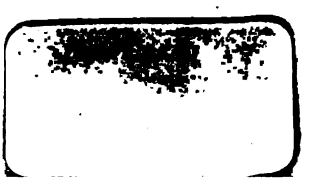

A

# TREATISE

ON THE

# ELECTION LAWS IN SCOTLAND:

TO WHICH IS ADDED

AN HISTORICAL INQUIRY CONCERNING THE MUNICIPAL CONSTITUTION OF TOWNS AND BOROUGHS.

WITH AN APPENDIX, CONTAINING THE ELECTION STATUTES, AND VARIOUS ILLUSTRATIVE DOCUMENTS.

By ARTHUR CONNELL, Esq.
ADVOCATE.

WILLIAM BLACKWOOD, EDINBURGH: AND
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TO THE RIGHT HONOURABLE

# CHARLES HOPE,

LORD PRESIDENT OF THE COLLEGE OF JUSTICE.

MY LORD,

WHATEVER fears I may entertain, that the style and conduct of this work may not be worthy of your Lordship's name, which I have been so kindly permitted to use, I can have no anxiety that the lustre of that name will be impaired by an association with the subject itself. The importance of our Election Law, as being connected with the preservation of our civil rights, and its difficulty, as involving many of the most intricate principles of our feudal polity, are sufficient to secure for it no ordinary degree of attention; and when we remember the remote periods to which many of its doctrines may be traced, and its connection with the history of the Scottish Parliament, it becomes associated in our minds with the high antiquity of this nation as an independent kingdom.

I have the honour to be, with much respect,

MY LORD,

Your LORDSHIP'S

Most obedient and faithful servant,

ARTHUR CONNELL.

EDINBURGH,
*Sept.* 20. 1827.

# PREFACE.

THE progressive nature which the science of Law possesses in common with the other branches of liberal knowledge, might perhaps alone constitute a sufficient apology for another attempt to illustrate a branch of our jurisprudence, which has been treated of by preceding writers. But it is upon the difference of the Author's plan from that of the works which have been already published on the Election Law of Scotland, that he wishes to rest his defence in his present undertaking. His general object has been to give a more condensed view of the Election Law than is to be found in the treatises already before the public. He has usually avoided entering into any lengthened detail of the circumstances of cases, which are to be found reported at length in the original repositories of the collected decisions, or in the works of those authors who first made them public; and he has, in general, confined himself to such a concise statement of the different cases as has appeared to be sufficient to communicate the legal points which were decided. The facilities for immediate reference which such a plan must possess, need not be pointed out.

Where, however, he has given cases which have not before been reported, he has of course entered more fully into their circumstances, and has usually added in notes, reports of them more or less extended.

The Author has fortunately been enabled to publish Notes of the Opinions of the Judges in a variety of important election questions. The sources from which he has principally derived these notes have been twofold. In the first place, he has had unlimited access to the valuable collection of Session Papers of the late Lord President CAMPBELL; and from these he has been enabled to give both the Notes of that eminent lawyer of his own opinions, in a variety of cases decided during his presidency, and also those which he took on the Bench of what fell from the other Judges. With respect to these Notes, it is proper to observe that they ought to be taken in connection with the full reports of the cases to which they relate, which are given in the Collection of Decisions published by the Faculty of Advocates; because it has not been consistent with the Author's plan to give so ample a report of those cases as might be necessary to the full understanding of these notes. At the same time, it is believed, that, in general, even the short account which the Author has given of the different cases, will be sufficient to enable the reader to comprehend the general import of these opinions. The other source

from which he has derived the Opinions of the Court, is the Collection of Notes of the late Lord HAILES. From this collection, it is well known that the opinions, in a variety of cases, have been already published, under the direction of a gentleman of the Bar of well known industry and ability. The opinions, however, in a considerable number of cases, were not included in this publication, principally because the cases were unreported, and the Session Papers could not be found; and many of these cases were election questions. These circumstances were kindly communicated to the Author, and as he was enabled to discover the Session Papers for some of those cases in the collection of Sir ILAY CAMPBELL, he was with great liberality permitted to avail himself of the Notes of Lord HAILES; and has accordingly from that source printed the previously unpublished opinions of the Court, in several questions.

The Historical Inquiry regarding the Constitution of Towns, which has been appended to the legal part of this publication, was originally intended to have related merely to the Boroughs of Scotland, and to have been of such an extent as might, without inconvenience, have been prefixed to that portion of the work which treats of the law of Borough Elections. But, in prosecuting this subject, the Author was struck with the similarity of the borough constitutions of different countries,

and was induced to extend his inquiry, so as to include a few of the principal countries of modern Europe, and also to enter rather more fully into the history of the Scottish Borough constitutions than he had originally intended. The result has been, that, although the historical view which he has drawn up, can only be considered as a general outline of the subject, it became too extended to be inserted as an introduction to that part of the work relating to the Law of Borough Elections; and it was judged better to annex it as a separate Essay, appended to the whole subject. In the portion of this inquiry relating to the Scottish Boroughs, the Author has necessarily trenched on some of those historical points which were the subjects of keen political controversy, during the pendence of certain questions in Parliament and before the Privy Council. His object, however, has been to abstain from all expression of party sentiment, and to state the facts in regard to the history of our Borough Constitutions, precisely as they have appeared to him to be established by authentic historical evidence.

In concluding these observations, he begs leave to return his warmest acknowledgments to those of his brethren at the Bar, who have kindly assisted him with opinions on points of difficulty as they happened to occur, and who have permitted him the use of writings and documents of various descriptions.

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## ERRATA.

Page 140, 15 lines from top, *insert* of *before* Session,
—— 326, 2d line of note, *for* he *read* are here
—— 339, 3 lines from bottom of text, *for* are *read* have been
—— 430, 11 lines from top, *for* in firm *read* in farm
—— —— 13 — — *for* in fee-firm *read* in fee-farm
—— 465, 3 lines from bottom of notes, *insert* et cæteris *after* 'Prepositis
—— 487, 2 lines from top of notes, *for* feodissimam *read* feodifirmam
—— 488, — — — *for* Lynlithee, *read* Linlithgw,

# INTRODUCTION.

By the original constitution of the Scottish Parliament, those who held their lands immediately of the king were bound to give attendance in that assembly as the feudal court of their superior. This duty applied equally to the great nobles of the land, and to the smaller proprietors. The obligation appears, however, to have been so far relaxed, that, instead of constantly attending in person, those who owed suit were often in the habit of sending procurators or substitutes to supply their places,—a practice which was checked by the act 1425, c. 52, which ordained all the king's freeholders to attend in person, unless the procurators could prove a lawful cause of their absence.

It will be observed, however, that this system of sending substitutes did not afford an example of *representation*, according to our present ideas of that term, because each procurator merely appeared for the particular individual who sent him, and not for any greater number. The first approach to a system of proper *representation*, was in the case of the boroughs of the kingdom; some of which came to enjoy the right, or to suffer the burden, of sending individuals to the Parliament or Convention, as the representatives of the communities by whom they were deputed. The precise period at which this event first happened, has been the subject of much controversy, and is not yet determined. To one author, it has appeared that the boroughs must have been originally one of the estates of Parliament, because they must have been bound, as the king's immediate vassals, to give suit and presence in the king's court, for the subjects held by them of the

crown[1]. Another writer[2], with the view of shewing that, at least as early as the year 1210, during the reign of William the Lion, they attended in Parliament, has referred to the following passage in Fordun[3]:—'Hoc anno (1210) rex 'Scotiæ Willielmus magnum tenuit concilium apud Strivelyn, 'ubi interfuit frater ejus comes David de Huntyndon, paulo 'post festum Sancti Michaelis, ubi petito ab optimatibus auxi-'lio pro pecunia regi Angliae solvenda promiserunt se daturos 'decem mille marcas, præter burgenses regni qui sex millia 'marcarum promiserunt, praeter ecclesias, super quas nihil 'imponere praesumpserunt.' A third author has conjectured, that the first time the boroughs were represented was in the year 1304, when Edward I. ordered a general council of the Scottish nation to be held at Perth[4].

From an indenture, in the year 1326, betwixt Robert Bruce and the nobles, freeholders, and boroughs of the kingdom, which document has been preserved[5], it is certain, that in that year representatives from the boroughs attended a Parliament held at Cambuskeneth, which granted the king the tenth penny of all the revenues from land. It is, however, not improbable, that, even at this period, the representatives of the boroughs may not have uniformly, and, on all occasions, constituted a part of the Parliament[6].

After the admission of the burgesses to Parliament, that assembly consisted of the three estates,—of the clergy, the

[1] Lord Kames, Essays on British Antiquities, p. 31.

[2] Lord Hailes, Annals, i. p. 165. 3d edit.

[3] Lib. 8. c. 73.

[4] Wight, p. 44.

[5] See a copy of it in Wight's Appendix. No. 1.

[6] See Wight, p. 29.—In the Parliament held at Edinburgh in the year 1357, which agreed to the ransom of David Bruce, representatives were present from the following boroughs:—Edinburgh, Perth, Aberdeen, Dundee, Inverkethyn, Carale, Cupar, St Andrews, Monros, Stryvelin, Linlithgow, Haddington, Dumbretane, Rotherglan, Lanark, Dumfries, Peblis. The representatives are designated 'Aldermanni, Mercatores, et 'Burgenses' of the different towns. Rymer's Federa, vol. vi. p. 44.

barons, and the representatives of the burghs, who met together in one house.

The first attempt which was made to introduce a system of *representation* amongst the barons who owed suit in Parliament, was in the year 1427, a few years after James I. returned from his captivity in England, where he had probably imbibed the English ideas on the constitution of Parliament. By the act 1427, c. 101, it was provided, that the small barons and free tenants should not be under the necessity of coming to Parliament, provided each sheriffdom should send there two or more wise men, according to the size of the county, chosen at the head court of the shire. But this provision did not take effect. The small barons neglected to elect representatives; and, therefore, continued bound to give personal attendance. One or two acts were, however, subsequently passed, to remove or alleviate the weight of this duty, with respect to the smaller freeholders[1].

At length, in the reign of James VI., the measure which had been attempted in that of James I. was carried into effect, by the establishment of a system of representation among the king's freeholders, below the degree of prelates and lords of Parliament. By the act 1587, c. 114, it was provided, that in each shire, commissioners, according to the number mentioned in the act of James I., should be chosen at the Michaelmas head court yearly; and that the qualifications of those entitled to vote in their election, should be a forty shilling land held of the king, and actual residence within the shire.

The qualification was farther extended by the act 1661, c. 35, which declared, 'That beside all heritors who hold a 'fourty shillings land of the king's majesty *in capite*, that 'also all heritors, liferenters, and wadsetters, holding of the 'king, and others who held their lands formerly of the bishops 'or abbots, and now hold of the king, and whose yearly 'rent doth amount to ten chalders of victual, or one thousand

[1] 1457, c. 75; 1503, c. 78.

'pounds (all feu-duties being deducted), shall be and are 'capable to vote in the election of commissioners of Parlia-'ments, and to be elected commissioners to Parliaments, ex-'cepting alwayes from this act all noblemen and their vas-'sals.'

By the subsequent statute, 1681, c. 21, the qualification was put on the footing on which it still rests at the present day. By that act it was provided, 'That none shall have 'vote in the election of commissioners for shires or stew-'artries, which have been in use to be represented in Par-'liament and conventions, but those who at that time shall 'be publickly infeft in property or superiority, and in pos-'session of a forty shilling land of old extent, holden of the 'king or prince, distinct from the feu-duties in feu-lands; or, 'where the said old extent appears not, shall be infeft in 'lands lyable in public burden for his majesty's supplies, for 'four hundred pounds of valued rent, whether kirk-lands now 'holden off the king, or other lands holding feu, waird, or 'blench off his majesty, as king or prince of Scotland.'

By this act also, permission to vote was given to apprizers or adjudgers, after expiry of the legal, to proper wadsetters, to apparent heirs in possession, by their predecessors' infeftment of the holding extent and valuation foresaid, to liferenters, and to husbands in right of their wives. The statute farther ordered the freeholders of each shire to make up a roll of the fiars, liferenters, and husbands having right to vote, and to revise it annually.

The dignified clergy, who, even after the Reformation, had continued to sit in the Scottish Parliament for a considerable period, were finally deprived of that right about the time of the Revolution, when Episcopacy was finally abolished[1].

By the Treaty of Union between England and Scotland it was provided, that the kingdom of Great Britain should be represented by one Parliament, to be called the Parliament of

[1] Wight, p. 75.

Great Britain. By the twenty-second article of that treaty, it was provided, That of the Scots Peers at the time of the Union, sixteen should be the number to sit and vote in the House of Lords; and that forty-five representatives should be sent from Scotland to the House of Commons. It was subsequently declared, by the act 1707, c. 8, of the Scots Parliament, which is held as equally valid as if it constituted a part of the Articles of Union, that the sixteen peers should be chosen by the peers of Scotland, out of their own number, by plurality of voices; and that of the forty-five commoners, thirty should be sent by the shires, and fifteen by the royal boroughs; of which boroughs Edinburgh should send one member, and the remainder should be divided into fourteen districts, each of which districts should also send one member. It was also provided, that none should be capable to elect, or be elected, to represent a shire or borough in the Parliament of Great Britain, but such as might elect, or be elected, to represent a shire or borough in the Parliament of Scotland.

It being thus established by the Treaty of Union, that representatives should be sent to the British Parliament from the peerage, the counties, and the boroughs of Scotland, the subject of the following pages naturally divides itself into three parts: the first relating to the election of the representatives from the Peers: the second to that of the representatives from the Shires; and the third to that of the representatives from the Boroughs.

# PART I.

## OF THE ELECTION OF THE REPRESENTATIVE PEERS OF SCOTLAND.

In considering the subject of the election of the representative peers of Scotland, there are two points which merit separate attention; 1*st*, The qualifications necessary to vote in this election, and to be elected; and, 2*dly*, The mode of proceeding at the election. These subjects shall be considered in their order.

## CHAPTER I.

### OF THE QUALIFICATIONS NECESSARY TO VOTE IN THE ELECTION OF THE SIXTEEN PEERS OF SCOTLAND, OR TO BE ELECTED.

Immediately after the Treaty of Union, a roll of the whole peers of Scotland was returned to the House of Peers, by the Lord Clerk-Register, by order of that House[1]. This list has experienced some alterations and additions, but still forms the basis of the roll which is called at the election of peers at the present day[2].

Those who claim a right to vote, in virtue of a title not on the roll, may vote at the election under protest; and it will rest with the House of Lords to determine the weight due to their votes when challenged[3].

[1] A copy of this roll will be found in the Appendix, No. 7.
[2] Wight, p. 125, Note.
[3] Ibid.

By the Scottish act 1707, c. 8, passed after the conclusion of the Treaty of Union, but before it took effect, it is declared, that the sixteen peers of Scotland shall be elected by the 'peers of Scotland, whom they represent, their heirs and 'successors, to their dignities and honours, out of their own 'number, and that by open election and plurality of voices 'of the peers present, and of the proxies.'

It was resolved by the House of Lords, in the month of January 1708, 'That a peer of Scotland claiming to sit in 'the House of Peers, by virtue of a patent passed under 'the Great Seal of Great Britain, after the Union, and who 'now sits in the Parliament of Great Britain, had no right 'to vote in the election of the sixteen peers, who are to re-'present the peers of Scotland in Parliament[1].'

English peers, however, having also Scottish peerage, were allowed to vote.

The grounds on which the elective privilege was denied to Scottish peers created British peers, are stated by Bishop Burnet[2] to have been, that it would create an inequality among peers, if some had a vote by representation, as well as in person; that, by creating some of the chief families in Scotland British peers, they would be able to carry the whole election of the sixteen as they pleased; that the case of a Scottish and an English peer having a British peerage, was distinguished in this respect, that a Scottish and an English peerage are held under two different crowns, and by two different great seals; but that Great Britain including Scotland as well as England, the Scottish peerage sunk in that of Great Britain; and that there having been only five peers of both kingdoms before the Union, it was of no great consequence giving them a double vote[3], whilst, in the case

[1] Robertson's Proceedings relative to the Scotch Peerage, p. 42.

[2] History of his Times. Oxford ed. 1823, vol. v. p. 386.

[3] It is stated in a note by the Earl of Dartmouth, printed in the above edition, that the English peers got this privilege through the influence of

of Scottish Peers, the precedent might be carried a great length.

A year or two afterwards, a decision of the House of Lords, in relation to the right of Scottish peers who had been created British Peers, to sit in Parliament, was passed, which in reality rendered this resolution, to a great extent, nugatory, although it would still appear to have been generally acted upon. In the year 1711, in the case of the Duke of Hamilton, who had been created Duke of Brandon after the Union, the question having been put in the House of Lords, whether Scottish peers created peers of Great Britain since the Union, have a right to sit in that House, it was carried in the negative, by 57 votes to 52. Hence, as the resolution of 1708 applied only to those Scottish peers created British peers, and 'now sitting' in Parliament, its effect was in reality destroyed by the decision in the year 1711, with respect to those Scottish peers now disqualified from sitting. It would appear, however, that the Scottish peers created British peers, refrained from claiming a vote in the election of Scottish peers, from the fear that they would be held as acquiescing in the justice of the decision of 1711. But, in the year 1784, at the general election of Scottish peers, the Dukes of Hamilton and Queensbery, who also had been created British peers, voted under protest that their doing so should not be held to infer any renunciation of their right to sit in the House of Lords, as British peers[1]. After this period, however, the Scottish peers created British peers, appear to have still refrained from voting at elections. In the year 1782, a new decision was pronounced as to the rights of Scottish peers created British peers, to sit in the House of Lords. In that year, this point was, on the claim of the then Duke of Hamilton, referred by the House of Lords to the Judges; and an unani-

the Duke of Marlborough, who was Baron Aymouth in Scotland.—P. 387.

[1] Robertson's Proceedings, p. 154. *et seq.*

mous opinion of those present was delivered, that 'the peers 'of Scotland are not disabled from receiving, subsequently 'to the Union, a patent of peerage of Great Britain, with all 'the privileges usually incident thereto.' Upon this opinion the House came to the conclusion, that the Duke of Hamilton and Brandon was entitled to be summoned to Parliament, and the question is now at rest.

The effect of this decision certainly was to revive the resolution 1708, because Scottish peers, who had been created British peers, were now entitled to sit in the House of Lords; and this resolution was accordingly again recognised by the House of Lords, in the year 1787, when they ordered a copy of the resolution to be transmitted to the Lord Clerk-Register, with an injunction to him to conform to it[1].

In the year 1793, however, the House of Lords came to an opposite determination on the subject. At the general election, in the year 1790, the Duke of Queensbery and the Earl of Abercorn, who had been created British peers, gave in signed lists, for certain of the candidates for the representation of the Scottish peerage. These lists it would appear that the clerks of Session refused to reckon. When the proceedings came under the review of the House of Lords, it was reported, on the 23d May 1793, as the opinion of the Committee of Privileges, that the Judges ought to be consulted on the point, whether a Scottish peer, sitting, or entitled to sit, in Parliament, as a British peer, is disabled from voting in elections of Scottish peers. It was carried in the House not to agree to this proposition of the Committee. It was afterwards, however, moved in the House, on the same day, 'That the votes of the Duke of Queensbery and the 'Earl of Abercorn, if duly tendered at the last election 'for electing sixteen peers of Scotland, ought to be counted,' which motion was carried in the affirmative. And, on the 6th

[1] Robertson's Proceedings, p. 441.

June 1793, a resolution of the Committee of Privileges having been reported, that the Duke of Queensbery and the Earl of Abercorn had sufficiently tendered their votes, by sending to the Clerk-Register, or his deputies, signed lists, with proper documents that they had qualified according to law, it was resolved in the House to agree to that resolution of the Committee. From this decision the Duke of Leeds, and the Earls of Kinnoul and Lauderdale, dissented[1]. The votes of Scottish peers who have been created British peers, are now received at the election of the sixteen Peers of Scotland, without objection.

No peer can vote, or be elected, who is under twenty-one years of age[2].

The act 1707, c. 8, excludes all papists, or such as refuse when required to swear and subscribe the formula in the 3d act of the 8th and 9th session of King William's parliament[3].

[1] Journals of the House of Lords, vol. xxxix. p. 693 and 726-7-8.

[2] *1707, c. 8.*

[3] The formula is of the following tenor:—'I do sincerely, from my 'heart, profess and declare, before God, who searcheth the heart, that I 'do deny, disown, and abhor, these tenets and doctrines of the Papal Ro-'mish Church, viz. the supremacy of the Pope and Bishop of Rome, over '*all pastors of the Catholic* Church; his power and authority over kings, '*princes, and states*, and the infallibility that he pretends to, either with-'out or with a general council; his power of dispensing and pardoning; 'the doctrine of transubstantiation, and the corporal presence, with the 'communion without the cup in the Sacrament of the Lord's Supper; the 'adoration and sacrifice professed and practised by the Popish Church in 'the mass; the invocation of angels and saints; the worshipping of 'images, crosses, and relics; the doctrine of supererogation, indulgencies, 'and purgatory; and the service and worship in an unknown tongue: 'All which tenets and doctrines of the said church I believe to be con-'trary to, and inconsistent with, the written word of God. And I do 'from my heart deny, disown, and disclaim, the said doctrines and tenets 'of the Church of Rome, as in the presence of God, without any equivo-'cation or mental reservation, but according to the known and plain 'meaning of the words, as to me offered and proposed. So help me 'God.'

The act 6th Ann, c. 23, requires that peers shall take the oath of supremacy[1], and the declaration, or test[2].

The latter act also requires, that they shall take and subscribe the oaths of allegiance[3] and abjuration[4].

[1] 'I ——, do swear, that I do, from my heart, abhor, detest, and abjure, as impious and heretical, that damnable doctrine and position, that princes, excommunicated or deprived by the Pope, or any authority of the see of Rome, may be deposed or murdered by their subjects, or any other whatsoever; and I do declare, that no foreign prince, person, prelate, state, or potentate, hath, or ought to have, any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm. So help me God.'

[2] 'I ——, do solemnly and sincerely, in the presence of God, profess, testify, and declare, that I do believe, that, in the sacrament of the Lord's Supper, there is not any transubstantiation of the elements of bread and wine into the body and blood of Christ, at or after the consecration thereof, by any person whatsoever; and that the invocation or adoration of the Virgin Mary, or any other saint, and the sacrifice of the mass, as they are now used in the Church of Rome, are superstitious and idolatrous: And I do solemnly, in the presence of God, profess, testify, and declare, that I do make this declaration, and every part thereof, in the plain and ordinary sense of the words read unto me, as they are commonly understood by English Protestants, without any evasion, equivocation, or mental reservation whatsoever, and without any dispensation already granted me for this purpose by the Pope, or any other authority or person whatsoever, or without any hope of any such dispensation from any person or authority whatsoever, or without thinking that I am or can be acquitted before God or man, or absolved of this declaration, or any part thereof; although the Pope, or any other person or persons, or power whatsoever, should dispense with, or annul the same, or declare that it was null and void from the beginning.'

[3] 'I ——, do sincerely promise and swear, that I will be faithful, and bear all true allegiance to his Majesty, &c. So help me God.'

[4] 'I ——, do truly and sincerely acknowledge, profess, testify, and declare, in my conscience, before God and the world, that our sovereign lord King George, &c., is lawful and rightful king of this realm, and all other his Majesty's dominions and countries thereunto belonging: And I do solemnly and sincerely declare, that I do believe, in my conscience, that not any of the descendants of the person who pretended to be Prince of Wales, during the life of the late King James the Second, and since his death, pretended to be, and took upon himself the stile and title of

By the act 19th Geo. II. c. 38, it is provided, that no Scottish peer shall be capable of voting or of being elected, who shall have been twice present, within a year of such election, at divine service in any episcopal meeting in Scotland, not held and allowed in pursuance of the act 10th Anne, c. 6[1]; or not registered as directed by the act (19th Geo. II.); or where the minister did not in express words pray for the King by name, and all the royal family; and it is declared that this objection may be stated by any peer present at the election, and proved by one or more witnessess on oath, or by the oath of the peer objected to; which oath the Lord Clerk-Register, or Clerk of Session, may administer.

'King of England, by the name of James the Third, or of Scotland, by 'the name of James the VIIIth, or the stile and title of King of Great 'Britain, hath any right or title whatsoever to the crown of this realm, 'or any other the dominions thereto belonging; and I do renounce, re- 'fuse, and abjure any allegiance or obedience to any of them; and I do 'swear, that I will bear faith and true allegiance to his majesty King 'George, and him will defend, to the utmost of my power, against all 'traitorous conspiracies and attempts whatsoever, which shall be made 'against his person, crown, or dignity; and I will do my utmost endea- 'vour to disclose and make known to his majesty, and his successors, all 'treasons and traitorous conspiracies, which I shall know to be against 'him, *or any of them*; and I do faithfully promise, to the utmost of my 'power, to support, maintain, and defend the succession of the crown 'against the descendants of the said James, and against all other persons 'whatsoever; which succession, by an act, entitled '*An act for the further li- 'mitation of the crown, and better securing the rights and liberties of the subject*,' 'is and stands limited to the Princess Sophia, Electress and Duchess Dow- 'ager of Hanover, and the heirs of her body, being Protestants: And all 'these things I do plainly and sincerely acknowledge and swear, according to 'these express words by me spoken, and according to the plain and com- 'mon sense and understanding of the same words, without any equivoca- 'tion, mental evasion, or secret reservation whatsoever; and I do make 'this recognition, acknowledgment, abjuration, renunciation, and promise 'heartily, willingly, and truly, upon the true faith of a Christian. So 'help me God.'—As corrected by 6th Geo. III. c. 53.

[1] By this act, it is *inter alia* provided that the pastor must be ordained by a protestant bishop, and take certain oaths to government, and pray for the Queen; and that the meeting shall be with open doors.

With respect to the objection of insanity, although there is no statutory provision on the subject, there can be little doubt that, where a peer has been cognosced by the verdict of a jury, and put under legal curatory, and where proper evidence is produced of that verdict at an election of peers, that the vote of the peer cannot be received in any shape [1], much less can he be elected himself. Where no legal steps have been taken to ascertain his state of mind, and the individual does not appear at the election in person, but tenders a vote by proxy, or by a signed list, it would appear not to be competent to reject such vote, either on mere allegation of derangement, or on any offer of proof, which there can be little doubt would be quite incompetent. The case of greatest difficulty and delicacy would occur, should the individual appear himself at the election and tender his vote; in which case there is strong ground for holding, that, if the insanity is quite manifest to all present, the vote ought not to be received [2]; but as to all inferior degrees of derangement, and especially as to any disease of mind not appearing at the time, it would appear that the vote, if tendered, must be received. All such cases are of course open to be afterwards fully canvassed in the House of Lords.

Besides the right of voting in person, peers have the power of appointing a proxy to vote for them, and of voting by signed lists.

The privilege of appointing a proxy is bestowed by the act 1707, c. 8, under this provision,—the 'said proxies be-'ing peers, and producing a mandate in writing duly signed 'before witnesses, and both the constituent and proxy being 'qualified according to law.' Those acting as proxies for absent peeers must therefore be peers, and qualified in the same manner as is necessary to entitle themselves to vote. The mandate must be signed by the witnesses; but it is not necessary that the witnesses or writer of the mandate should

[1] Wight, p. 122. [2] Ibid.

be designed in the writing; neither does the mandate require to be sealed, or written on stamped parchment [1].

With respect to the right of voting by signed lists, the same act 1707 declares, that absent peers, who are qualified, may send 'lists of the peers whom they judge fittest, validly 'signed by the said absent peers.'

Witnesses also must subscribe the lists; but it is not necessary that the name of the writer should be mentioned in them [2].

Peers who are English as well as Scottish peers must sign their proxies and lists by their Scottish titles [3].

Peers who appoint proxies, or vote by signed lists, must, by act 6th Anne, c. 23, take and subscribe the same oaths and declaration which have been already stated, as prescribed by that act 6th Anne, c. 23, to be taken by those peers who are present at an election [4]. Those who live in Scotland may qualify themselves in this manner in any sheriff court in Scotland [5]; and, in practice, the sheriff-depute, or his substitute, holds a court for that purpose at any place within his county [6]. The original subscription by the peer must be returned to the meeting by the sheriff, who must also return a certificate under his hand and seal that the peer has duly qualified himself [7].

Peers residing in England may take and subscribe the oaths and declaration in the Courts of Chancery, King's Bench, Common Pleas, or Exchequer; and a writ under

[1] Resolutions of the House of Lords 1708; Robertson's Proceedings, p. 43; See also p. 48.

[2] Ibid. [3] 6th Anne, c. 23.

[4] This act of 6th Anne does not mention the formula of 3d act of 8th and 9th session of William amongst those to be taken by absent peers; and declares that peers taking the oaths contained in itself shall be qualified to vote by proxy or signed list.

[5] 6th Anne, c. 23. [6] Wight, p. 121; Bell, p. 15.

[7] 6th Anne, c. 23; Resolution of the House of Lords, 26th January 1708.

the seal of court must be produced in evidence at the election [1].

Peers abroad on his Majesty's service, who have formerly qualified as above in England or Scotland, may appoint a proxy, or send a signed list, providing the evidence already mentioned of their having so qualified is produced [2]. Such peers are also admitted to those privileges, if they have taken the oaths in Parliament, provided the fact is certified under the great seal of Great Britain [3].

No peer can hold more than two proxies at one time [4].

[1] 6th Anne, c. 23. [2] Ibid. [3] Ibid. [4] Ibid.

## CHAPTER II.

### OF THE PROCEEDINGS AT THE MEETING FOR ELECTION OF PEERS.

THE proclamation calling the peers to assemble for electing representatives, must be published at Edinburgh and the other county towns of Scotland, at least twenty-five days before the meeting for election[1].

The proceedings at the election take place in the following order.

After prayers by one of his Majesty's chaplains, the proclamation and execution or attestation of the publication at Edinburgh of that proclamation, are read by one of the principal clerks of Session, two of whom attend the meeting. No evidence is required of the execution at the other county towns.

The great roll of the peerage is then called; and the names of those peers who are present, or who vote by proxy or signed lists, are marked in the minutes. Protests as to precedency must be made during this calling.

The oaths are then administered to those present; and the evidence that those who are absent and vote by proxy or list have duly qualified, is examined.

The votes are then collected, *1st*, Of the present peers, who read and deliver in signed notes of the peer or peers for whom they vote; *2d*, Of those peers holding proxies, who, in like manner, read and deliver in signed notes of the peers for whom they vote in their capacities of proxies; and, lastly, of those absent peers who vote by signed lists.

Protests against particular votes, founded either on want of right to the title of honour, or on informalities in the

[1] 6th Anne, c. 23.

proxies or lists, must be made during the collecting of the votes.

The titles of the peer or peers elected are then inserted in two separate returns on parchment, which are signed and sealed by the principal clerks of Session; and one of which is returned to the clerk of the crown at London, and the other deposited with the other documents of election in the Register House.

The proceedings are closed with prayer.

It is declared by the 6th Anne, c. 23, to be illegal for the peers to take any other subject under their consideration except the election of representatives; and that any peer who shall act contrary to this provision, shall incur the penalty of premunire expressed in the statute 16th Rich. II[1].

The duties of the meeting of peers are in no respect judicial. Their business is merely to give their votes, and not to determine, as is done in a court of freeholders, on the title on which a vote is claimed. All that a peer has it in his power to do in support of any objection as to title, or as to proxies or other documents produced, is to take a protest on the subject, and bring the objection under the review of the House of Lords by petition. Where, however, the House of Lords has come to any actual resolution with respect either to a title of peerage, or to any form to be observed in relation to the documents produced, the clerks of Session are bound to give effect to such resolution, at least when a copy of the resolution has been transmitted to the Lord Clerk-Register. On the 21st April 1788, it was moved in the House of Lords, 'That it is the opinion of the house that the 'Lord Clerk-Register, and his deputies acting at the election 'of the Scotch peers, ought to conform to the resolutions of 'this House, of which they have had notice by order of the 'House;' and this motion was resolved in the affirmative [1].

[1] As to the penalty of premunire, see Blackstone, vol. iv. p. 112, 9th and Wight, p. 124.

In case of equality of votes, there is no casting vote given to any particular person; the return must bear the true state of the fact.

By 8th Geo. II. c. 30, all soldiers quartered in any town or place where an election of peers or commoners is to take place, must be removed two miles from it, one day at least before the election takes place, and shall not return till the day after it. This rule does not apply to a castle or fortified place, where a garrison is usually kept.

[1] Journals of House of Lords, vol. xxxviii. p. 150.

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[1] Journals of House of Lords, vol. xxxviii. p. 150.

# PART II.

## OF THE ELECTION OF THE REPRESENTATIVES OF SHIRES.

The several subjects occurring under this head shall be considered in different chapters.

## CHAPTER I.

### PROCEEDINGS AT THE MICHAELMAS MEETING.

By the statute 1681, c. 21, the freeholders of each county were ordered to make up a roll of the freeholders in May then next, and to meet at the Michaelmas head court yearly thereafter, for the purpose of revising the said roll.

The statute has provided no remedy if the freeholders shall neglect to assemble, as here ordered; and, in a case where a complaint, on the ground that no meeting had taken place, was presented by a gentleman who had lodged a claim to be added to the roll of the county of Cromarty, and where it was strongly urged that no wrong should be without a remedy, the Court dismissed the complaint as incompetent [1].

By the statute 16th Geo. II. c. 11, which is now, to a great extent, the regulating act both as to Michaelmas and election meetings, it is provided [2], That, at each Michaelmas meeting, the original members shall be such persons only as

[1] Mackenzie v. Freeholders of Cromarty, 20th December 1753; Wight, p. 187.

[2] Sect. 11.

stand upon the roll which shall have been made up at the last Michaelmas or election meeting.

A copy of this roll, together with the minutes of proceedings, is ordered to be delivered to the sheriff or steward clerk, to be inserted in books to be kept for that purpose; which books are ordered to be produced at every Michaelmas or election meeting, under a penalty of L. 100 Sterling[1]. This penalty is also incurred if he shall neglect to make the entry in the books, or shall refuse an extract to any freeholder who asks it. If the books are not produced, it is declared that a copy of the roll and minutes, extracted and signed by the sheriff or steward's clerk, shall be sufficient. If he shall give out a false extract, he incurs a penalty of L. 100 Sterling, and is incapable of ever after holding his office.

There is no quorum of freeholders fixed by law to constitute a regular meeting. One freeholder may hold either a Michaelmas or election meeting[2]. In a case where various claimants were enrolled at a Michaelmas court, held by one freeholder only, and complaints were lodged against their enrolment by another freeholder, as well as complaints at the instance of those enrolled against the sheriff-clerk, for refusing, at a subsequent election meeting, to call the roll made up by the single freeholder, the Court of Session dismissed the first set of complaints; and, on advising the second, found the statutory penalties incurred by the sheriff-clerk[3].

For the purpose of choosing a preses and clerk of the meeting, the roll is called by the commissioner last elected representative of the county, and, in his absence, by the sheriff-clerk[4].

In case of an equality of votes for preses and clerk, the casting vote belongs to the following persons in order; first,

[1] Sect. 11. [2] Wight, p. 156.

[3] Mackay and others v. Reddoch and others, 1762; Wight, p. 156.

[4] If both are absent, Mr Wight thinks that the same order should be followed as is observed with respect to the casting vote.

to the commissioner last elected; secondly, in absence of the preceding, to any former representative; thirdly, to the freeholder present, who last presided at any meeting for election; fourthly, to the freeholder who last presided at any Michaelmas meeting; and, lastly, to the freeholder present who stands first on the roll. His casting vote is in addition to the ordinary vote of these individuals.

The minutes of the election of preses and clerk are signed by the person who called the roll at their election, and delivered to the person who has been elected clerk.

The freeholders then proceed to take and subscribe the oaths of allegiance and abjuration, and to sign the assurance [1].

It is not absolutely necessary to take the oath of abjuration, unless it be expressly required to be put by one of the freeholders present [2].

If the expressions of the acts 6th Anne, c. 23 [3], and 1st Geo. *III.* c. 13 [4], are taken literally, it may be supposed that

[1] Wight, p. 150. The form of the assurance is as follows: 'I ——, 'do, in the sincerity of my heart, assert, acknowledge, and declare, that 'his Majesty King George is the only lawful and undoubted sovereign of 'this realm, as well *de jure*, that is, of right, king, as *de facto*, that is, in 'the possession and exercise of the government; and, therefore, I do pro-'mise and swear, that I will, with heart and hand, life and goods, main-'tain and defend his right, title, and government, against the descendants 'of the person who pretended to be Prince of Wales during the life of the 'late King James, and since his decease pretended to be, and took upon 'himself the stile and title of King of England, by the name of James the 'Third, or of Scotland, by the name of James the Eighth, or the stile and 'title of King of Great Britain, and their adherents, and all other enemies, 'who, either by open or secret attempts, shall disturb or disquiet his Ma-'jesty in the possession and exercise thereof.' For the oaths of allegiance and abjuration, see p. 12. The oaths to Government may, by 7th Geo. II. c. 16. § 10, be administered before choosing preses and clerk, if required by any freeholder present.

[2] Wight, p. 150. See the acts 7th Geo. II. c. 16 § 10; 6th Anne, c. 23, and 1st Geo. II. c. 13.

[3] In fine. [4] Sect. 4.

the only consequence of a refusal to take the oath of abjuration is to be disqualified from voting for the preses, or member, or in making up the rolls, and this, accordingly, is Mr Wight's opinion [1]; but the act 1707, c. 8, is expressed in terms somewhat similar with respect to the formula as to popery; and yet it was decided, that the consequence of a refusal to subscribe that formula was to be struck off the roll, even after the lapse of four months [2]; and it may also be observed, that, from the terms of the 10th section of the 7th Geo. II. c. 16, the oath of abjuration may be put *before* enrolment. It is therefore doubtful, whether the consequence of refusing that oath, even after having been on the roll four months, would not be to be struck off the roll.

The clause above alluded to, of the act 7th Geo. II. is not held to include the trust-oath [3]. By a subsequent act, 37th Geo. III. c. 138, it was provided that this oath might be put before choosing the preses and clerk at election meetings; but as nothing is said of Michaelmas meetings, it cannot be put at such meetings, before choosing the preses and clerk.

The meeting of freeholders having been thus constituted, and the members having thus duly qualified, the court proceeds to its proper business, viz. the regulation of the roll of freeholders. This duty consists in striking off the names of those persons who have died since last meeting; in considering the objections made to those upon the roll, and in determining on the merits of the claims for enrolment. In all such questions the president has the casting vote.

Every one who intends to object to any freeholder already on the roll, or to claim enrolment for himself, must lodge his objections, or a copy of his claim, at least two months before the meeting, with the sheriff-clerk, who must indorse on

[1] Wight, p. 269, Note.

[2] Ferguson v. Glendonwyne, 17th February 1803; Fac.

[3] See infra, under the subject of the Trust-Oath.

these documents the day he received them, and give a copy of them to any person who shall demand them [1].

These regulations, however, apply to Michaelmas meetings only. At election meetings freeholders may be struck off, or enrolled, without the previous lodging of objections or claims.

With respect to objections thus lodged, it is not essential that they should be signed by any one, or should bear in whose name they have been given in [2]; but some person must insist on their being taken under consideration [3].

It was held to have been a sufficient compliance with the *rule* that a claim must be lodged two months before the meeting; that the claim had been lodged at 4 P. M. of 6th August, although the freeholders met before two o'clock of 6th October, because it is sufficient that either the day of presentment, or the day to which notice is given, be free; and if either the 6th August or 6th October were computed, the *two months* were complete [4].

The rule as to the necessity of two months having expired, applies equally to the case of an apparent heir as to any other [5].

The claim must set forth the name, old extent or valuation, and titles of the lands referred to, and the dates of the titles [6].

It is not necessary that the claim should be signed by the party claiming [7], but it must bear in whose name it is presented, because the freeholders must know who it is that asks enrolment; and if any misnomer occurs in the claim, it will be

[1] 16th Geo. II. c. 11. sect. 7.

[2] Rankine and Irvine v. Ramsay and Colvil, 1767; Wight, p. 153.

[3] Wight, p. 154.

[4] Elliot v. Ferguson, 15th January 1762; Fol. Dict. iii. 429; Fac. Col.

[5] Mackenzie v. Munro, 25th January 1783; Fac. Col.

[6] 16th Geo. II. c. 11. sect. 7.

[7] Wight, p. 154.

fatal to the enrolment. Thus, where a claim was presented in the name of Lieutenant John Cameron of the West Fencible Regiment, and it afterwards turned out that his true christian name was Duncan or Duncan John, his enrolment as Lieutenant John Cameron was found to be null [1].

The claimant does not require to appear in person at the meeting; and any one producing his titles is presumed to have authority to appear for him [2]. In one case where a claim had been duly lodged, two freeholders only attended the Michaelmas meeting, and when the claim was moved by the sheriff-clerk, who was also clerk of the meeting, they evaded taking cognisance of it, and afterwards refused to comply with the request of the brother-in-law of the claimant to take up the claim, on the ground that the business was concluded when this request was made, as the preses was then signing the minutes. These minutes also bore that intimation had been made at the door for some one to appear for the claimant, but that no appearance had been made. The Court of Session, in the whole circumstances, ordered the claimant to be enrolled [3]. When, however, a claimant is out of the kingdom, a mandate must be produced to some person to appear for him, whether at a Michaelmas [4] or election [5] meeting

It is sufficient that the claim bears, that the valuation of the lands exceeds L. 400 Scots, although it does not specify the exact amount [6]. But if a claim should bear, that the lands are of a particular extent, and enrolment should take

[1] Dalrymple *v.* Cameron, 8th February 1781; Sup. to Wight, p. 18.

[2] Wight, p. 154.

[3] Campbell *v.* Macneill and Macconochie, 24th June 1773; Fac.

[4] Dundas *v.* Ferguson, 20th July 1780; Fac.

[5] Davidson *v.* Elphinstone, 6th July 1802; Fac. The following note is from the Session Papers of Lord President Campbell. 'In this Court the 'appearance of an advocate presumes a mandate, if his client be within the 'kingdom, but not, if without it. The whole of this business conducted 'by a *negotiorum gestor* without authority. Petitioner ought to be struck 'off roll, and a new claim may be entered for him if properly authorised.'

[6] Grant *v.* Leith, 16th January 1764; Fac.

place accordingly, it is not competent for the claimant, in the Court of Session, if he fails in shewing that the retours prove that extent, to support his title by maintaining that they establish the legal amount, although a less extent than that mentioned in his claim [1].

The statute does not require that the register in which the sasine has been recorded shall be mentioned in the claim; and accordingly the Court repelled an objection to a claim that the register had not been stated [2]. In a prior case, however, where the claim bore that the sasine was recorded in one register, when in fact it was recorded in another, that circumstance was held to constitute a fatal objection [3]. It will reconcile these two decisions to hold, that, although it is not necessary to mention the register, yet if this is done it must be done accurately.

The statute requires, that the claimant shall set forth 'the 'names of his lands and titles thereto, and dates thereof, with 'the old extent or valuation.' It does not, however, appear to be held necessary in all cases, that he shall specify the precise character in which he claims, or the exact nature of the interest he has in the lands; but still it seems proper that he *should give such a description of his titles*, as that the freeholders may be enabled to discover the nature of his right with reasonable certainty. If his right is merely one of liferent, he cannot lodge a claim in which all his titles are so described as to lead to the conclusion that he has the full fee of the subject. In a case where a claim bore that the claimant was 'publicly infeft in all and whole the half of' certain lands, 'conform to a charter under the Great Seal in favour of 'Francis Lord Napier, dated,' &c.; 'disposition of the said 'lands and assignation to the said charter, and precept of

[1] Montgomerie v. Ainslie, 15th June 1813; Fac.

[2] Lindsay Carnegie v. Gardyne, 26th February 1796; Sup. to Wight, p. 16.

[3] Wight, p. 152.

'sasine therein contained, in favour of the said Lieutenant-'Colonel Alexander Murray,' (the claimant), &c. 'instrument 'of sasine taken on the said charter;' and it turned out that his right was one of liferent only, the freeholders were found to have done right in refusing enrolment [1]. In a later case, however, a claim by a wadsetter was sustained, although it did not set forth that he claimed in that character, but merely described his titles as a charter of certain lands contained in two contracts of wadset, and a sasine in those lands [2]. In another case also, older than either of the preceding, where a claim had been made as liferenter of certain lands, without stating that the right was limited to the liferenter of the superiority; and at the meeting a sasine in the property in favour of another had been produced, from which it appeared that the claimant was liferenter of the superiority only, the Court repelled the objection to the claim stated on that ground [3].

If a claim is made by a liferenter, it is not necessary that he should state who the fiar is, the only concern of the freeholders being with the claimant's proper title. This was held in a case where the claimant set forth as one of his titles a disposition and assignation of a charter to him in liferent, but

[1] Murray v. Muir Mackenzie, 16th May 1790; Sup. to Wight, p. 20; Fac. The following notes relating to this case, are from the Session Papers of Lord President Campbell. 'Interlocutor right. Nature of the title 'ought to appear, otherwise the freeholders, instead of being informed, are 'deceived. *Property* or *superiority* stands on different footing. Superior 'is proprietor in the eye of the law; but nature of the *title* ought to be set 'forth. Whether courtesy, apparency, liferent, &c.—universal practice.— '*Monboddo?* for adhering; has not given a sufficient state of his titles. '*Dunsinnan*, for altering. *Hailes*, suppose the brother had lodged in same 'terms. *Justice-Clerk*, Law meant something when it required titles to 'be set forth; has set forth a title which he has not. *Swinton*, same; his 'estate is a liferent, but claim does not say so. *Rockville*, same.—Ad-'here.'

[2] Mackay v. Houston, 9th March 1796; Session Papers.

[3] Forbes of New, 22d February 1774; Bell, p. 36.

did not state that the disposition, as was the fact, was to himself in liferent, and to another in fee [1].

It would appear, that it is not essential to condescend in the claim, upon the retour which is to be adduced in evidence of the old extent, if the qualification is rested on that kind of valuation [2]. A retour is not, in relation to this question, one of the titles of the lands, as it is merely adduced in evidence of the extent. Accordingly, in one instance a retour not mentioned in the claim, was admitted in support of another retour which had been mentioned [3].

The statute expresly requires that the dates of the titles *shall* be set forth in the claim. In one instance, however, the Court repelled an objection, founded on the omission of the date of one charter, and the erroneous statement of that of another [4]. In another instance, the objection was repelled, that the date of the claimant's retour had not been given [5]; but as it does not appear to be necessary to particularize the retour, this case is not a precedent as to the necessity of setting forth the dates of titles. In a later case, where the claim bore, that the sasine was dated 3d May 1810, and recorded on 23d June of the 'year foresaid,' whereas the true date was 1809; and where it appeared, that if the date mentioned in the claim had been the true one, a year had not elapsed from the infeftment, the error was found to be fatal to the claim; and Lord President Blair, in delivering his opinion on this case, appears to have rested his opinion not merely on the principle, that, if the date is given, it must be given accurately; but upon the general ground that the setting forth the dates of the titles in the claim is a statutory requisite [6].

[1] Buchanan v. Fisher, 7th July 1824; Fac. and Shaw.

[2] See Bell, p. 35.

[3] Scot and Tod v. Millar, 20th February 1787; Sup. to Wight, p. 15, and Fac.

[4] Skene v. Graham 1787; Wight, p. 151, Note.

[5] Ogilvy v. Coutts, 1768, Wight, *ib.*

[6] Monro v. Monro, 9th March 1811; Fac.

It is equally incumbent upon an heir-apparent as upon any other claimant, to comply with the statutory requisites regarding a claim. In one case a person claimed as heir-apparent to his father, in virtue of his father's 'charter and infeftment in the lands of Mayen and others *therein* specified, 'lying within the parish of Rothemay, and county of Banff; 'which charter and infeftment are herewith produced;' and the objection was sustained, that the claim did not specify the dates of the predecessor's titles, the particular lands, or their extent or valuation [1].

It appears also to be essential for a person asking to restrict his qualification to a part of the lands on which he was originally enrolled, to lodge a previous claim [2]; and this is done in practice.

In a case which recently occurred, a freeholder had been enrolled on certain lands, the liferent of which he afterwards disposed of to a third party, retaining the fee. He then presented to a meeting of freeholders, a petition, praying that certain other lands should be added to the lands on which he was already enrolled,—that his qualification should then be restricted to those lands thus added,—and that he should be allowed to retain his place on the roll. It was objected that this was not truly a case of restriction; but an entire new qualification, which, therefore, did not entitle the freeholder to retain his place on the roll. It was answered, that any freeholder may add to his qualification and then restrict it,—that this operation cannot affect his place on the roll,—and that, as this operation could undoubtedly have been effected at two meetings, there was no reason why it should not be done at one. The Court affirmed the judgment of the freeholders, which had granted the prayer of the petition [3].

The next point of inquiry regards the titles which must be produced in evidence of the qualification of a claimant, and

[1] Gordon *v.* Abernethy, 3d March 1773; Fac.

[2] Stewarts *v.* Campbell, 9th August 1774; Fac.

[3] Morison *v.* Earl of Fife, 28th February 1826; Fac. and Shaw.

the objections to those titles which it is competent for a court of freeholders to make.

The general rule is, that the only titles which freeholders are entitled to investigate, are the charter and sasine of the claimant; and that if these are *ex facie* formal, he has a right to be enrolled [1]. It must, however, be considered as comprehended in this rule, that the claimant must produce all titles which are requisite to connect his infeftment with the charter on which it proceeds; and that it is competent, within certain limits, to the freeholders to state objections to the manner in which he connects himself with his character. When a charter is not directly in favour of the claimant but of his author, and the latter has granted in favour of the former a disposition to the lands, containing an assignation to the charter, upon the precept of which the claimant is infeft; or where the charter is in favour of one whom the claimant represents, and who was not infeft, and the claimant has acquired right to the precept in the charter by a general service, in such cases the disposition and assignation, or the retour of service, forms part of the titles which the claimant must produce to the freeholders. The rule as to the necessity of producing the disposition and assignation, was enforced in the case of a claim of enrolment by a fiar, although it had formerly been produced when the liferenter was enrolled, as appeared from the minutes, since which time it had been lost or mislaid [2]. In a previous instance, a relaxation of the general rule was admitted to a certain extent, by a judgment of the House of Lords, in a case where a retour of general service, by which the immediate author of the claimant took up the unexecuted precept of sasine, had not been produced to the meeting of freeholders; but the sheriff-clerk, who was also clerk of the meeting, acknowledged to the meeting that it had been delivered to him, and that he had it that morning, although he

[1] Wight, p. 222.

[2] Edmonstone, 29th February 1780; Fol. Dict. iii. 434.

could not then find it. The Court of Session, even in these circumstances, enforced the general rule, and found that the claimant was not entitled to be enrolled [1]; but the House of Peers, on the ground that the retour was in the hands of the clerk on the morning of the meeting, and was then accidentally lost, so that an extract could not be got during the sitting of the meeting, but which extract was produced to the Court of Session, reversed the judgment [2]. In a subsequent case also, one of the titles was allowed, under particular circumstances, to be supplied in the Court of Session. In this instance, no objection, founded on the want of the disposition carrying the charter, had been made at the meeting of freeholders; and the claimant had consequently been deprived of the opportunity of remedying the defect, by actually producing the disposition which was then in his possession. In these circumstances, the claimant was allowed to produce it in the Court of Session, in a complaint against his enrolment, which complaint was dismissed [3]; and the judgment was approved of by the Committee of the House of Commons.

It has been mentioned, that it is competent for the freeholders to consider objections stated to the manner in which the claimant connects himself with his crown-charter. In one case an objection of this nature was urged, which, in reality, resolved itself into an allegation that the claimant was not properly infeft, in so far as respected the titles on which he founded. The claimant asked enrolment, in right of his wife, and it having been objected, at the meeting of freeholders, to her infeftment, that the precept of the charter on which it proceeded was exhausted by a previous sasine which had been taken on it, the Court found that the claimant was not entitled to be enrolled [4]. This power, however, of objecting to

[1] Douglas v. Reid, 2d January 1768; Fac. [2] Fol. Dict. iii. 436.

[3] Hamilton v. Cathcart, March 6. 1780; Fac.

[4] Lindsay Carnegie v. Robertson Scott, 26th February 1796; Fac. It appears from the Session Papers in this case, that an *extract* of the prior

the mode of connecting the charter and infeftment, must be understood within certain limits. With respect to the titles produced, in evidence of the steps by which a claimant's infeftment is connected with his charter, such as dispositions and retours, it will in general be equally incompetent to state any objections but those appearing *ex facie*, as with respect to the charter and sasine themselves. Freeholders, for example, could not listen to an allegation that the retour of service had proceeded on insufficient evidence.

Besides the *titles*, properly so called, which a claimant is bound to exhibit to the freeholders, he must also bring forward proper evidence of the valuation of the lands on which he claims; and such evidence cannot be afterwards supplied in the Court of Session. In the case of the valuation being

sasine was produced to the freeholders, in evidence of the exhaustion of the precept. Afterwards, in the Court of Session, the *original* sasine seems to have been produced, which shewed, that the notary had signed each *leaf* only, and not each *page*, a circumstance which could not appear from the extract, as the pages of the original sasine are necessarily confounded in the record. It appears from the Faculty Report, and from the following notes, that the Court thought the objection to the sasine, grounded on the omission of the notary, not to be well founded; and hence the precept was held to be exhausted, and the enrolment on the second sasine to be bad.

*Note, from the Session Papers of Lord President Campbell, of his opinion.*

'Objection to Sasine.—Precept exhausted by former sasine.—Evidence 'produced to freeholders. But supposing it had not, it was competent to 'produce and found on it here as an objection to the last sasine.—See 'Wight, p. 120, &c. Case of Gordon of Whitly, &c. An objection of 'this kind is not *jus tertii*. It does not merely resolve into a ground of 'challenge competent to a third party. It is a radical defect in the in-'vestiture, and amounts to a nullity of the title;—*e. g.* in the case of a 'charter proceeding upon a wadset, the wadset right itself may be reco-'vered and produced, to shew that it is an improper wadset. The first 'sasine here was liable to no good objection. The act of sederunt 1756 'seems to proceed on a mistake.—*Justice-Clerk.* No doubt as to compe-'tency, if the objections be good. Freeholders must be satisfied that 'claimant is infeft. No good objection to first sasine. Act 1696 does not 'apply to instruments;—*e. g.* witnesses must subscribe every page of a sasine. Construction of act 1681 (1686)—enough to sign every leaf.'

the old extent, a retour prior to 1681 must be adduced; and where it is valued rent, a certificate, under the hands of two commissioners and of the clerk of supply, is the proper evidence. In a case where a claimant neglected to produce a retour in evidence of the old extent, and afterwards brought it forward in the Court of Session, his claim was rejected both in that Court and in the House of Peers [1]. In another instance, the decree of the Commissioners of Supply, by which the claimant's valuation had been separated from that of other lands, was liable to certain irregularities; and, when the case came into the Court of Session, he stated, that, since the complaint was given in, a new and regular division had been made by the commissioners, from which it appeared, that the valuation of his lands exceeded L. 400 Scots; but the Court refused to pay any attention to this new division, and found he had no right to stand on the roll [2].

Until about twenty years ago, charters were recorded before the Great Seal was appended, so that an extract afforded no evidence of that important step, which is equivalent to signing in private writings. Hence, a claimant who produced an extract of a charter in favour of his wife, with an instrument of sasine, which bore that a charter under the Great Seal had been produced at the time of taking infeftment, was nevertheless rejected by the Court [3]. But, by statute 49th Geo. III. c. 42, following out an act of sederunt on the subject, of 11th July 1808, it was provided, that the Keeper of the Great Seal, instead of delivering the charter to the party expeding it, should deliver it to the Director of Chancery or his deputy, who, *after making the proper entry of the sealing in the record*, should deliver the charter to the party expeding it; and it was farther enacted, 'that 'extracts of writs from the register of the great seal, of which

[1] Gordon v. Fraser, 17th February 1767; Wight, p. 140.

[2] Callender v. Bruce, 17th January 1755; Fac.

[3] Nisbet v. Hope, 23d February 1790; Fac.

'the fact and date of sealing shall have been duly recorded, '(such extracts being certified in due form by the keepers of 'the said records), *shall make entire faith in all cases*, ex-'cepting in case of improbation.' In virtue of this enactment, therefore, it would be competent now to claim on such an extract of a charter as is mentioned in this clause; but, with respect to all extracts under the old law, which do not bear the fact of sealing, the former rule will still be enforced, that a claim of enrolment cannot be made upon them [1].

There is one exception from the rule, that a claimant must produce his charter as well as his sasine, to entitle him to be enrolled. The statute 1594, c. 214, which was passed at the time when precepts of sasine were separate from the charters to which they refer, provides, that, after forty years, the want of procuratories of resignation and precepts of sasine shall be no ground of reduction, or of any quarrel whatsoever, where the charters and sasines are extant, the charter being held as evidence of the procuratory and the sasine of the precept. On the ground of this statute, an heir-apparent who produced two retours of his ancestor, with the sasines following thereon, of more than forty years' standing, but did not exhibit the precepts from Chancery, was found *entitled to* be enrolled [2]. The same rule would apply to a claimant producing a sasine in his own person, taken forty years ago, and proceeding on a retour [3]; and it seems of no consequence whether the retour be produced or not, for the precept is the immediate warrant of the sasine. One, however, who should merely produce a sasine proceeding on the precept in a charter, although of forty years standing, would not be entitled to enrolment [4], for now the precept is part of the charter; and if the one is not produced the other is not

[1] Nicholson *v.* Chancellor, 15th May 1819, Fac. where the question related to the extract of a charter in 1731.

[2] Haldane *v.* Tridl, 10th February 1781; Fac.

[3] See Wight, p. 248-9.

[4] See what is afterwards said as to the titles an apparent heir must produce, and the case of Nicholson *v.* Chancellor, *infra*.

produced either; and when they were separate, it would have been necessary, under the act 1594, to produce the charter and the sasine, although not the procuratory or precept. By the prescription act 1617, c. 12, also, it is necessary that the charter should be produced.

The general rule, that freeholders are not entitled to go beyond the claimant's charter and sasine, has been enforced under a variety of circumstances. It has been held to be incompetent to go into any inquiry respecting the rights to the lands prior to the claimant's charter, with the view of shewing either that his author had no power to convey the subject from being previously divested, or that his author's titles laboured under any defect, or that his own charter was irregularly obtained; and this has been held even where the evidence of the objection appeared from the minutes of the freeholders themselves, or from the documents laid before them. In one case, it was objected to the titles founded on, that it appeared from the minutes of the freeholders that a former claim had been presented by the same person, in virtue of a charter and infeftment in the same lands, which charter proceeded on a disposition by the same individual who had granted the disposition on which the charter now founded on proceeded, and that, consequently, the granter of the disposition had been divested by the first investiture, and the second was inept. The Court, however, held that it was incompetent to go into this previous inquiry; and that, as the charter and sasine produced were *ex facie* unexceptionable, the claimant was entitled to be enrolled[1]. In another case, where a claimant produced to the freeholders a disposition to his father, and sasine thereon, a disposition by his father to himself, and sasine thereon, and a charter confirming both sasines, it was objected, that his father's sasine did not engross the whole precept contained in the disposition, but that part only which related to the lands in which infeftment was taken; and it was

[1] Adam v. Farquhar, 4th July 1809; Fac.

maintained, that this objection might be competently considered, because the charter confirmed both sasines, which were therefore inseparable, and both formed part of the claimant's title. The Court of Session, however, held, that the freeholders had no right to go back to the author's titles; and that, even if they had, the objection was ill founded [1]. In a third case, a title had been made up, by taking infeftment on the precept contained in a disposition, and expeding a charter of confirmation; and a claim of enrolment on that title had been rejected, on the ground of the claimant's name being erroneously stated in the record of the sasine. Thereafter, a charter of resignation was expede upon the procuratory of the same disposition; and the precept of that charter having been conveyed to another person, he took infeftment, and claimed enrolment on the title so made up. To this title it was objected, that the precept in the original disposition was exhausted by the infeftment in favour of the original disponee, that the fee was filled up in his person, and that the subsequent resignation was incompetent. It was answered, *first*, That the titles produced being *ex facie* complete, the freeholders had no right to look farther; *secondly*, That the sasine in favour of the original disponee having been improperly recorded, it must be held to be null and void, and consequently, that the titles subsequently made up by resignation were quite regular. Both answers were held to be conclusive by majorities of the Court, although the majorities did not in both instances consist of the same judges; and the claimant was found entitled to be enrolled [2]. In like manner, it has been decided, that it is not competent to allege that the charter is disconform to the signature on which it proceeds [3]. Neither can the freeholders refuse enrolment, because the commission under which a person has

[1] Don *v.* Waldie, 4th February 1814; Fac.

[2] Kibble *v.* Shaw Stewart and Spiers, 16th June 1814; Fac.

[3] Burn *v.* Adam, 17th February 1779; Fac.

granted a charter or disposition for another, has not been produced to them, along with the deed itself. This was decided in relation to a factor *loco tutoris*, who had been appointed by the Court, and had granted a charter for his ward in the county of Sutherland, where votes are allowed on rights held of subject-superiors [1]; and also in relation to commissioners who had granted for another a disposition, assigning the unexecuted precept of a charter [2]. In this latter case, however, an extract of the commission was produced in the Court of Session. The commission, it was observed on the Bench, forms no part of the titles of a claimant, although, in order to support them, he is no doubt bound to produce it if required; but as he may not have it in his power instantly to exhibit collateral evidence of this sort, he is entitled to produce it in the Court of Session, should he be rejected by the freeholders for not making such production before them.

In several instances the general rule has been applied, where it has been alleged, contrary to the *ex facie* nature of the freeholder's right, that the subject on which he has claimed his vote did not truly hold of the crown, or, at least, that he was not truly the immediate crown-vassal. Thus, it was objected to the rights of certain persons infeft on a crown holding, that the lands were given by act of Parliament to the King's second son, and that, consequently, they were not held of the King; but, on the ground, partly, that the act did not *eo ipso* vest the lands in the King's second son, and partly, that all which the statute 1681 required, was an infeftment on a crown holding, the objection was repelled [3]. On the latter ground, also, the objection was in the same case repelled, that some of the voters held formerly of the family of Seaforth, and that they had not bought the superiority.

[1] Mackay v. Houston, 24th February 1706; Fol. Dict. iii. 417; Bell, p. 252.

[2] Proctor v. Carnegie, 14th May 1796; Fac.; Bell, p. 250.

[3] Munro v. Mackenzie, 30th July 1745; Elch; Falc. i. 126.

In like manner, in another case, a qualification was founded in part, on certain lands which had been held of an hospital, and to which lands the claimant had obtained right, on the resignation into the hands of the crown of the superiority of those lands by the patron of the hospital, who conceived he had right to that superiority, in virtue of the act 1661, c. 54, which enacts that the vassals of certain clerical establishments shall hold of the patrons as superiors. It was objected, that this act did not apply to hospitals; and the Court, although they had considerable doubt as to the right, yet gave effect to the freeholder's title, as being founded on an infeftment under the Great Seal [1]. In a later case, where lands had been bought at a judicial sale, and described as holding of the crown, it was objected to a claim of enrolment on a crown-charter of these lands, that they truly held of the family of Lothian; and two freeholders present, substitutes of entail of that family, declared their intention of bringing a reduction of the charter. The freeholders gave effect to the objection; but the Court of Session altered their judgment, with costs, although the summons of reduction had been actually executed before the complaint was advised [2].

A like rule was enforced in a late case, where it was objected to a claim, that the lands, although, by the charter produced, they were held blench of the crown, truly formed part of the burgage property of the city of Edinburgh; and, in evidence of this, reference was made to some ancient charters in favour of the city, in addition to certain expressions in the crown charter itself, on which the claim was founded. The Court refused to go beyond the claimant's titles, and dismissed a complaint against his enrolment [3].

In a case, however, where several qualifications had been created by the Earl of Fife on fishings, they were rejected,

[1] Dunbar v. Budge, 26th February 1745; Elch; Falc.

[2] Sibbald v. Douglas and Kerr, 18th December 1790; Sup. to Wight, p. 62.

[3] Gibson v. Forbes, 16th Dec. 1817; Fac. Affirmed on appeal, 23d May 1821; Shaw's Appeal Cases.

because it appeared from a deed under the late Earl's hand, that these fishings were held of the borough of Banff, and not of the crown [1]. Accordingly, Mr Wight has laid it down as a general principle, that where an objection is palpable, and can be established under the hand of the claimant or of his author, without any farther investigation, the Court will depart from the rule which limits them to an examination of the claimant's charter and sasine; and, in support of this opinion, he refers to the case which has just been quoted [2].

There are other exceptions to this rule. Thus it has been settled by a variety of cases, that it is competent for a claimant to adduce extraneous evidence in the Court of Session, in order to remove objections, stated before the freeholders, against the *identity* of the lands contained in his titles, with those referred to in the entries in the cess books on which he founds in proof of his valuation [3]; and it appears that it would be also competent for the freeholders to consider such extraneous evidence, if the claimant should be provided with it in their court; unless, perhaps, the complicated nature of such an investigation in any particular case, should render it inconvenient for the consideration of such a meeting.

It has been already mentioned, that it is competent for freeholders to object to the manner in which a claimant connects himself with his charter; as, for instance, to maintain that the precept of the charter has been exhausted by a previous sasine; which allegation truly amounts to this, that the

[1] Abercromby *v.* Alewood, 17th June 1777; Wight, p. 223.—From the Faculty Report of this case, it appears that there was also an objection to the valuation of the fishings in this case, as a junto of freeholders had taken upon themselves to divide a cumulo, as if it had stood in the county books; whereas, the subjects were not valued in the county books, but had always paid cess in the town. Mr Wight, however, who was counsel in the case, gives the other ground as the foundation of the judgment.

[2] Abercromby, *sup.* He also refers to the case of Pierce against Hay. See this case, Fac. Col. July 1771.

[3] See *infra.* Proceedings in Court of Session on Complaint.

claimant is not infeft, in so far as regards the titles on which he founds [1].

It is also settled, that, where a freeholder has been already enrolled on certain lands, and another claimant comes forward with *ex facie* unexceptionable titles to the same lands, derived from the same author from whom the right of the person already enrolled was obtained, it is competent for the freeholders to go to their own record for evidence in support of the objection to the new claimant, and to reject him on the fact of the previous enrolment being established [2].

It cannot, however, be laid down as a general rule, that in all cases an objection to a qualification may competently be entertained by freeholders, because it is established by evidence derived from their own records. This will appear from some cases already mentioned, in which it was held not to be competent to consider certain objections, although the evidence in support of them appeared from the minutes of the freeholders [3].

With respect to the titles which heirs apparent must produce when they claim enrolment, the statute 16th Geo. II. c. 11. § 10, provides, 'that no heir apparent shall be enrolled until his predecessor's titles are produced and allowed by the freeholders as a sufficient qualification for his voting for a member of parliament.' The titles here alluded to are the same which would have entitled the ancestor himself to be enrolled; and their production is equally required, although the ancestor himself may have stood on the roll [4]. A claim made by a person as heir apparent to his father, who

[1] *See p.* 33.

[2] Stirling *v.* Hamilton, 26th Jan. 1819; Fac.

[3] See the cases of Adam *v.* Farquhar, 4th July 1809, Fac.; and Kibble *v.* Shaw Stewart and Speirs, 16th June 1814, Fac.; mentioned, p. 36 and 37. See the subject, in what circumstances new evidence may be received in the Court of Session, afterwards treated of.

[4] Wight, p. 247. See more particularly *infra*, under Votes on Apparency, how far the titles of the apparent must always be such as would have entitled the ancestor to enrolment.

had stood many years on the roll, was rejected, because he had neglected to produce his father's charter, although he afterwards exhibited the charter in the Court of Session [1]. It is of course equally necessary to produce evidence of the valuation, as it is to exhibit the titles of the lands, and this is requisite whether the ancestor has been enrolled or not [2].

A case has been already noticed, in which it was decided that an heir apparent who produced the retour, and sasine following thereon, of his ancestor, bearing date more than forty years before, was entitled, in virtue of the act 1594, c. 214, to be enrolled, although he did not exhibit the precept from Chancery, which was the immediate warrant of the sasine [3]. If the sasine, however, has not proceeded on a service, but on a charter of resignation, such sasine will not be of itself a sufficient warrant of enrolment, although of more than forty years' standing. The act 1594 was passed at a time when precepts of sasine were distinct from the charter; and dispenses, after forty years, with the production of procuratories and precepts, if the charters and sasines be extant,—holding the charter to be evidence of the procuratory, and the sasine of the precept. But where the precept is contained in the charter itself, if the one is lost the other of course is lost also. And the act 1617, c. 12, relating to the long prescription, requires a charter and sasine even after forty years, unless where the sasine proceeds on retours or precepts of *clare constat*. In a case where the heir apparent produced only an extract of a charter of resignation, and an extract of the sasine thereupon, in favour of his ancestor, of more than forty years' standing, along with his own retour of service and precept thereupon, he was found not to be entitled to enrolment, although the extract of the charter shewed that it proceeded on the resignation of the ancestor himself, and so was not acquired in the character of a singular successor, who is less

[1] Moodie v. Balkie, 10th Feb. 1781; Wight, p. 248, and Fac.
[2] Haldane v. Trail, 10th Feb. 1781; Wight, p. 248, and Fac.
[3] Haldane, *sup.* See p. 36.

favoured in such questions than an heir; and although the claimant's retour of service bore that the ancestor's charter had proceeded under the great seal [1].

When a claim of restriction is made, it is not necessary to lodge the titles on which the claimant was originally enrolled [2]. Restriction is not a new enrolment, but merely a limitation of the qualification to a part of the original subject. The freeholders, therefore, can have no right to canvass the merits of the freehold a second time, which is the only purpose for which the titles, that is the charter, sasine, and connecting deeds, can be demanded. But the claimant ought to produce evidence that the portion of his qualification which he proposes to retain is of the requisite valuation; unless where the part alienated bears a very trifling proportion to that retained.

Having considered the nature of the titles which must be laid before the freeholders, and the objections which may be competently urged before them to a qualification, we now proceed to the farther consideration of the proceedings at the Michaelmas meeting.

Freeholders are not entitled to refuse, or even to delay, enrolment, on the ground that the claimant's valuation is the subject of a process of reduction in the Court of Session. Thus, where the freeholders had delayed judging of the validity of certain qualifications, till the issue of a process of reduction of the valuation, reserving all objections till then, the Court of Session ordered the claimants to be enrolled, and refused to go into an examination of the merits of the objections to the claimants' titles [3]. This judgment, in so far as the claimants were admitted to the roll, without any examination of such objections as might competently have been

[1] 15th May 1819, Stewart Nicholson v. Chancellor; Fac.

[2] Gordon v. Fairlie, 16th Jan. 1819; Fac.

[3] Rose v. Gordon, Jan. 1766; Wight, p. 134.

urged before the freeholders, is certainly liable to objection; because a claimant might thus be admitted who truly had no legal qualification [1]; but if the Court had taken upon themselves the determination of the merits of such objections, the decision, in other respects, appears well-founded [2]. It cannot be taken for granted, that the issue of the process of reduction will be unfavourable to the claimants; and if the mere dependence of such a process were to constitute a good objection to enrolment, an action of that nature would be constantly resorted to, upon frivolous pretences, to defeat claims of enrolment. Should a decree of reduction be obtained subsequently to the enrolment, this will constitute such an alteration of circumstances as will authorise the striking the freeholder off the roll [3].

In a subsequent case, also, where the objection of multiplication of superiors was urged by the vassal, who was also a freeholder, and who produced to the meeting a summons of reduction of the qualification of a claimant, on the ground of the multiplication of superiors, the Court of Session held that it was *jus tertii* to the freeholders as a body to entertain that objection, and ordered the claimant to be enrolled [4]. In this judgment, it was necessarily implied that the existence of the action of reduction of the qualification was no bar to enrolment in the mean time.

In a case, however, where recently after the passing of the act 16th Geo. II. an application had been made to the Court of Session to have certain freeholders expunged from the

[1] See Wight, p. 135, Note.

[2] It is stated by Mr Wight in the above note, that, in the subsequent case of Campbell *v.* Macneill and Macconochie, 24th June 1773, Fac., the Court, in somewhat similar circumstances, seemed inclined to listen to any objections which the freeholders might state, but none were offered.

[3] Wight, Note, *supra*.

[4] Sloan Lawrie *v.* Hamilton and Campbell, 1st Feb. 1781, Wight, p. 231.

roll, in terms of that act, and during the pendence of that process, those freeholders had been turned off the roll by certain others of the freeholders, the Court of Session, on a complaint against this latter proceeding, found it to be a contempt of their authority, and ordered the freeholders who had been expunged to remain on the roll till the issue of the former process[1].

Where a person on the roll has conveyed his qualification to another, it is not incumbent on the latter to lodge objections to the continuance of his author on the roll, but the disponee is entitled to enrolment on production of his titles, although his author has not yet been struck off the roll[2]. The duty of keeping the roll free from persons who have no right to be upon it, rests with the freeholders themselves; and if they have neglected to lodge objections to the continuance on the roll of one who is denuded, the new claimant ought not to suffer from such neglect. A case occurred involving a somewhat similar principle, although under different circumstances. A person had been admitted on the roll, partly on certain church lands, although he appears to have had right merely to the feu-duties of those church lands, as assignee of the lord of erection; whilst a second claimant, who asked enrolment partly on those lands, derived his right from the family who had been the church vassals in those lands, and had had them for a century contained in their crown charters[3]. This second claimant was refused enrolment at a Michaelmas Meeting, on the ground that the other stood already on the roll on these lands. At a subsequent election meeting the new claimant again applied for enrolment, and the person already on the roll declined to take the oath of

[1] Munro v. Mackenzie, 6th Feb. 1745; Fol. Dict. iii. 430; Falc.

[2] Skene v. Adam, 15th December 1775, Fac; Wight, p. 207.

[3] In 1628, the Lords of Erection resigned into the hands of Charles I. their superiorities of lands, &c. reserving right to the feu-duties, until a compensation should be made for these feu-duties.—*See the Deed of Resignation, Mr Thomson's Acts*, vol. v. p. 189.

possession; but the freeholders refused either to strike off the latter, or to admit the former. Before the Court pronounced judgment on the complaint of the rejected claimant, the individual on the roll had been ordered to be struck off for refusing to take the oath of possession; but the Court found, that the former ought to have been admitted, when he first made his application at the Michaelmas meeting, that is before the latter had been struck off[1]. It may therefore be held, that the Court proceeded on the principle, that, as the one had no valid qualification, the circumstance of his being on the roll was no bar to the claim of the other, who had the true right. But where a person has been already enrolled on certain lands, and there is no evidence either of original want of right to those lands, or of being subsequently denuded; a new claimant bringing forward a title to the same lands, although *ex facie* unexceptionable, has no right to be enrolled on that title. This was held in a case where a claimant had acquired right to certain lands from the same author, who had previously conveyed them to another person already enrolled on those lands; and in support of the objection to the new claim, reference was made to the charter of the former claimant. It was answered, that it was not competent to look at any part of the anterior progress. The Court, in deciding that the second claimant had no right to be added to the roll, held it to be clearly competent for the freeholders to go to their own record for evidence of the fact, that another was already enrolled on the same lands; and as he had not denuded, they were of opinion, that another had no right to come forward with a claim on the same lands[2].

Freeholders cannot alter the proceedings of one meeting at any subsequent meeting. In one instance, only two freeholders had been present at a Michaelmas court; and one of them, the president, alleging that the name of an absent free-

[1] Boyes v. Hamilton, 21st December 1780; Wight, p. 206.

[2] Stirling v. Hamilton, 26th January 1819.—Fac.

holder had been improperly, at a former meeting, placed after that of the other freeholder present, had ordered the clerk to reverse this order. The other freeholder, who had declined voting, complained to the Court of Session; but objections having been made to the competency of the complaint, he raised a declaratory action, to have it found that he was entitled to his former place on the roll; and this action having been taken up along with the complaint, the Court ordered the complainer 'to be restored to his former 'place on the roll[1]."

It is competent, however, for freeholders to judge of a new claim of enrolment on titles which have been rejected at a previous meeting[2]; and this has even been held to be the rule, where the freeholder had been previously on the roll, and did not come forward with his new claim for twenty years after having been struck off[3].

Freeholders have no power to cite witnesses or to administer oaths. Hence a parole proof, in a court of freeholders, even with respect to a point of which they may competently take cognisance, would be necessarily imperfect and inefficient; and it is rather believed would be held altogether incompetent. In one instance, a meeting of freeholders went so far out of the proper line of their duty, as to administer oaths to certain members of their own body, and to take their evidence in support of an objection, that certain sasines on which claims were made had not been entered in the record

[1] Rankine and Irvine v. Ramsay and Colvil, 23d January 1767; Fac. Mr Wight, who was counsel in this case, observes, in a note, at p. 155, that no order was specially directed to the sheriff-clerk by the Court, and that it was left to the freeholders themselves to give obedience to the order, the sheriff-clerk being only bound to act in those cases where he is specially required by statute.

[2] Wight, p. 156.

[3] Montgomerie v. Cathcart and Oswald, 2d March 1813; Fac. See also Dunbar v. Urquhart, 23d February 1774; Fac.

of the date borne by the attestation of the keeper of the register. When the case came into Court, the judges not only reprobated the course which had been taken in this instance, but expressed a general opinion as to the unfitness of parole proof in a meeting of freeholders [1]. As freeholders, however, may determine certain facts, such as the character of apparency of a claimant, on their own knowledge of their truth or falsehood, so it appears to be competent, for any individual members of the meeting who have had better opportunities of information on the subject than the others, to give their deliberate assurances as to the truth or falsehood of such facts, for the guidance of their brethren. It is also quite competent to examine a claimant by interrogatories with respect to his *possession* of the estate on which he asks enrolment, and as to any circumstances from which the quality of nominality may be inferred [2].

[1] See the Opinions in case of Mackenzie v. Macleod, 9th February 1768, afterwards quoted under Registration of Sasine.

[2] See this last subject more fully treated afterwards under the Truist Oath.

## CHAPTER II.

### OF THE FREEHOLDER'S QUALIFICATION IN RESPECT OF ESTATE.

By the act 1681 it is declared, that none shall have vote in the election of commissioners for shires 'but those who at 'that time shall be publicly infeft in property or superiority, 'and in possession of a forty shilling land of old extent, 'holden of the king or prince, distinct from the feu-duties in 'feu lands; or, where the said old extent appears not, shall 'be infeft in lands lyable in publick burden for his Majesty's 'supplies, for four hundred pounds of valued rent, whether 'kirk lands, now holden off the king, or other lands holding 'feu, waird or blench, off his Majesty, as King or Prince of 'Scotland.' This clause, as well as some of the subsequent provisions of the act, suggest the different matters to be treated of in considering the feudal qualification of the freeholder, and these shall form the subjects of the following sections.

#### SECTION 1.

*Of the Holding of the Freeholder's Estate, and the Constitution of Qualifications.*

According to the genius of the feudal system, land is the subject of the double right of superior and vassal. By the theory of that system, the king was originally the feudal proprietor of all the lands in his dominions, and conveyed portions of them to different individuals, to be held under him, on the condition of military service. In process of time, these crown vassals came to have the right of conveying their

estates to others, to be held under themselves, on various conditions; and thus to have the double character of superior, in relation to those holding under them, and of vassal, in relation to their sovereign. By this system, however, the superior under the crown is by no means divested of the lands, and, even at the present day, continues to retain, in the eye of the law, a right of a very high description in them. He enjoys what is termed the *dominium directum*, which is a right of proprietorship, limited only by the *dominium utile*, which is vested in the vassal. According to strict feudal notions indeed, the *dominium directum* or superiority is the more important estate of the two; the vassal's right being more properly that of a mere usufructuary, making an annual prestation to his superior, for the liberty of enjoying his land.

In the feudal series, therefore, land is a subject affording an estate of its own proper nature to each individual, from the superior under the crown, to him who actually enjoys the fruits of the ground; and each of those individuals requires a feudal title to the subject perfected by sasine.

It is upon these principles that the nature of the right which is requisite to constitute a freehold qualification is founded. The statute 1681 requires that the lands which shall afford the privilege of voting, shall be holden of the king or prince, in property or superiority. The estate in the crown vassal may either be an absolute right of property, unlimited by any subvassal, or it may be that kind of estate in the land, which is the *dominium directum* only, and which is limited by the property of the subvassal. Both these kinds of right in the crown vassal are, in the eye of law, real estates, and are held of the crown. In both the estate is feudally vested in the superior. In the case where he is not possessed of the *dominium utile* or property, there is a vassal who holds that right under him, and who is equally with himself feudally vested with the estate.

This latter circumstance, that there shall be a vassal, is

essential, whenever a freehold qualification is rested on a right of superiority alone. It in truth becomes the test that there is a proper feudal estate in the superior held of the crown. For, if he does not possess the property himself, and if no vassal holds it under him, then it is plain, that any right which is supposed to be in him, must either be a mere nonentity, or an anomalous excrescence on the proper feudal series. Any claimant, therefore, on a right of superiority, must be able to shew, on the one hand, that he holds the lands immediately of the crown; and, on the other, that a vassal has a proper feudal title to the property under him as superior.

Hence arises the well established rule, that a person who has the full and undivided right of superiority and property in lands, cannot create a freehold in another by any conveyance to him, under reservation of the property[1]. There is here no feudal separation of the superiority and property. There is no creation of a subright; and the whole proceeding is anomalous and unavailing.

When such a proprietor wishes to constitute a valid freehold in the person of another, and to retain the property for himself, some mode must be adopted which shall create a valid feudal subright. This may be accomplished either by means of a third person, or without such aid.

In the former case, the crown vassal conveys to a trustee the lands to be held base under himself. The property and superiority are thus feudally separated, and a subright created. The crown vassal then conveys to the person who is to have the freehold, the lands, excepting from the warrandice the feu-right already constituted, and granting procuratory of resignation. The trustee then reconveys the property to the truster. The disponee of the superiority, when infeft on a crown charter, obtained in virtue of the procuratory, is feu-

[1] Elliot v. Shaw and Oliver, 1759, Wight, p. 252; Baron Norton v. Anderson, 6th July 1813, Fac. Col. See this case mentioned, p. 53.

dally vested in a proper freehold qualification; or, after having granted the feu-right, the granter may resign into the hands of the crown, and obtain a new charter, the precept of which may be assigned, in the disposition, to the intended freeholder who completes his title by infeftment.

Where a proprietor wishes to create more than one qualification, retaining the property, it is advisable that, in constituting the subright, the lands and feu-duties should be so divided, that it may be ascertained what portion is payable to each superior. This may be accomplished either by separate conveyances of the several parcels of lands to the trustee, or if one conveyance is used, by regularly dividing the lands into those parcels, and determining the feu-duties payable for each parcel [1].

It is a fixed principle in the feudal law, that one who is not infeft in lands, but has merely a personal right to them, cannot effectually grant warrant for infefting his disponee. He may, indeed, convey his personal right, and assign the unexecuted precept of sasine, which will substitute the disponee in his right, and enable the latter to obtain infeftment; but he cannot grant a warrant, flowing from himself, for completing the investiture by sasine. Another doctrine, however, is recognised, which, in general, obviates the inconvenience attending the former. When the author of a disponee acquires a right appertaining to that which he has conveyed, it is held to be immediately transferred to the disponee, or, in law phrase, to *accresce* to the previous right. If, therefore, in the case under consideration, the author, after granting precept of sasine, and after his disponee is infeft, takes sasine himself, that infeftment accresces to the disponee's right, and validates the precept and investiture following on it.

From these principles it follows, that where an uninfeft proprietor, in constituting a feu-right, has granted warrant for sasine, and where any thing has occurred to prevent the

[1] See Wight, p. 252, note; and Bell, p. 74.

*accretion* of the author's infeftment, the feu-right becomes incapable of being perfected by sasine; and all attempts to convey the superiority to any other become unavailing, because there will be no vassal in the lands, contrary to the fundamental rule which has been already explained. If an uninfeft proprietor dispones to be held base, and grants precept of sasine, and the disponee is infeft; and if the author then conveys the *dominium directum* to a third person, who is infeft on the assigned crown precept, he can no longer take sasine himself, because he has denuded of his whole right; and the infeftment of the disponee of the superiority cannot accresce to the disponee of the property, *first*, because that infeftment is not in the person of the author of the latter, and, *secondly*, because it is only in the *superiority*; whereas it is essential that the author should have been infeft in the *property* also, to enable him to grant warrant for sasine in the property [1].

Where the interest in land is divided between a liferenter and a fiar, and attempts are made to constitute freeholds, questions of difficulty may arise.

In a case which occurred a few years ago, certain trustees, who had got a disposition to the superiority of some lands, expede a crown charter of that superiority, but took no infeftment upon it. They then disponed the liferent of the superiority to another person, with power to enter vassals, and receive resignations *ad remanentiam*, and assigned to him the precept in the charter on which he took infeftment. The *dominium utile* or property was then resigned *ad remanentiam*, into the hands of the liferenter and fiars of the superiority; and the liferenter, with the consent of the fiars, granted a new feu-right to another. It was held, that the resignation was effectual, although the fiars were not infeft; that the new subright, constituted by the liferenter, was not valid for a period longer than his life; and that, consequently, a claim

[1] Baron Norton *v.* Anderson, 6th July 1813; Fac.

for enrolment on the superiority, which was made by a subsequent disponee of the superiority, was inept, as no subfeu had been duly constituted [1].

A few years ago a question of much difficulty occurred, in consequence of an attempt to constitute a liferent vote by an entailed proprietor, relative to the effect of resignation *ad remanentiam* by a trust-vassal, where the interest in the superiority had been divided between a fiar and liferenter. In terms of the special powers and provisions of an entail, a feuright had been granted to a trustee, under condition, that, when required, he should reconvey with procuratory of resignation *ad remanentiam*; and a liferent had then been granted of the superiority to a third party. It was objected to the qualification of the liferenter, that it was in the power of the granter and of the trustee at any time to destroy it; because the effect of resignation *ad remanentiam* would be to annihilate the base right, and so destroy the superiority both fee and liferent, as estates distinct from the property; or, if the liferenter, as well as the fiar of the superiority, should be held to acquire the property after the resignation of it, he could only hold it as trustee, and so could not take the trust-oath. The question was ultimately decided by the narrowest majority,—the minority conceiving the objection to be well founded, but the majority holding that the liferent of superiority being a distinct estate, constituted by infeftment, could not be affected by the resignation *ad remanentiam*, and that, during the existence of the liferent, the effect of the resignation was suspended [2].

A proprietor may create a freehold, without the aid of a trustee, by conveying his land to the intended freeholder, who reconveys the property to be held of himself [3]. Care, however, must be taken, that the obligation to reconvey the

[1] Redfearn *v.* Maxwell, 7th March 1816; Fac. In this case the liferenter was dead before the superiority was conveyed to the claimant.

[2] Dundas *v.* Campbell and Alexander, 26th May 1812; Fac.

[3] Forrester *v.* Fletcher and Others, 9th January 1755; Fac.

property appears on the face of the titles, because, as will afterwards appear, the voter is bound to swear that he has not made any disposition, or promised to make any, other than appears from the titles; and if the obligation do not appear in the deeds, the freehold will not be sustained [1].

When a person has obtained a disposition of lands, containing procuratory and precept, and after taking infeftment on the precept, has then expede a crown charter on the procuratory, which charter has contained a confirmation of the base infeftment; it has been objected to claims of enrolment on the crown charter, and sasine following on the precept contained in it, that, as confirmation operates *retro*, and makes the previous infeftment a public one, the title made up by resignation becomes inept; but this objection has, in more than one instance, been repelled [2]. In a case, however, where a charter of confirmation of the base sasine, taken on the precept in a disposition, had first been obtained, and then, as a subsequent step, a title was made up by a new charter of resignation obtained on the procuratory of that disposition, the Court, on the special ground that the first sasine was null, from having been unduly recorded, sustained the title by resignation,—a judgment directly implying, that, had the first sasine been good, the title by resignation would have been inept [3].

Not only does a bare right of superiority give the privilege of voting, but it was even decided in one case, although under special circumstances, that a superior who had granted a perpetual discharge of the feu-duties, was still possessed of such an estate as afforded a qualification. The feu-duties had, so far back as the year 1627, been discharged for ever, but the superior still had right to the casualties; the Court

[1] Freeholders of Kincardineshire v. Burnet, 30th July 1745, and 19th June 1746; Falconer.

[2] Cunningham, 3d January 1754, Elch. vol. i. and 2; Stewart v. Earl of Fife, 20th February 1827, Shaw and Fac.

[3] Kibble v. Stewart, 16th June 1814; Fac.

being of opinion that the discharge of feu-duties had merely been resorted to as a mode of evading the legal necessity of feuing out the lands, which were held ward, at a competent avail, and that the right could not have been created fictitiously for the purpose of making a vote [1].

The lands upon which a vote is claimed must constitute a separate and distinct estate [2]. A *pro indiviso* right will not afford a qualification [3]. Neither will a separation of the valuation by the commissioners be of any avail, if the lands have not been previously divided in such a way as to make it certain to what particular subject the divided valuation applies [4].

The Court, in two instances, so far extended this principle, as to decide that all blench holdings were indivisible, where the *reddendo* was incapable of being apportioned, either from the smallness of its amount, as a penny, or from its nature, as a rose, or peacock's feather; and where, consequently, distinct possession could not follow on the separate conveyances [5]. The latter of these cases was reversed on appeal [6]; and although no appearance was made in the House of Lords for the respondent, yet it is stated by Mr Wight that the

[1] Freeholders of Dumfriesshire v. Ferguson, 30th July 1746; Falc.

[2] In the contested election for the county of Dumbarton in 1724, the Committee of Privileges and Elections came to the following resolution, which was approved of by the House: 'That it is the opinion of this committee, that any conveyance of undivided shares of the superiority of 'any lands in the shire of Dumbarton, in order to multiply votes, or split 'an interest in such superiority amongst several persons, with a view to 'enable them to vote, is contrary to the act of Parliament made in Scotland in 1681, intituled, 'Act concerning the Election of Commissioners 'for shires." Wight. p. 236.

[3] Stewart v. Pollok, 6th March 1760, Fac.; Seton v. Shairp, 24th November 1808, Fac.

[4] Gibson v. Anderson, 29th June 1819. See this subject farther discussed below, under Valued Rent.

[5] Ferguson v. Montgomery, March 1780, Wight, p. 234; Ferrier v. Erskine, 23d January 1781, Fac.

[6] 17th April 1782.

pleadings before the Court were maturely considered by the Noble Lord who moved for the reversal[1].

Where the valuation of lands is the old extent, and these lands are not already separately valued in the retour, which is the evidence of their extent, they cannot now be divided by new retours or otherwise, to the effect of affording more than one freehold qualification on that kind of valuation; because a retour, *previous to the year* 1681, as will be afterwards seen, must be produced in evidence; and because the statute 16th Geo. II, c. 11, sect. 8, farther enacts, that 'no divi-'sion of the old extent, made since the aforesaid 16th day of 'September 1681, or to be made in time coming, by retour, 'or any other way, is or shall be sustained as sufficient evi-'dence of the old extent.' If the same lands are, however, valued in the cess-books also, then of course this species of valuation may be divided, and as many freeholds created as the amount admits of[2].

The act 1681 bestows the right of voting on those infeft in lands rated at L. 400 of valued rent, 'whether kirk-'lands now holden of the King, or other lands, holding feu, 'ward or blench of his Majesty.' The meaning of this clause became the subject of discussion under the following circumstances. Certain chaplanries had been granted by James VI. to the College of Aberdeen, to be held as mortified subjects, for the reddendo to the King of prayers and supplications, and had been purchased by certain persons from the college, and were now held by them, in virtue of a crown charter, for the same reddendo of prayers and supplications, after an unsuccessful attempt to obtain an alteration of the tenure to a blench holding. These purchasers presented claims of enrolment, when it was objected that no lands afforded a qualification, unless they were held feu, ward or

[1] Wight, p. 236.

[2] See the whole subject of the division of valuations farther discussed *infra*, under Valued Rent.

blench; and that this was the meaning of the above clause of the act 1681. It was answered, that, by the clause of the act quoted, it was not required that church lands should be held either feu, blench or ward, and that mortified lands were in the same situation; and farther, that the act 16th Geo. II. c. 11. sect. 9, provided in general terms, that 'lands holden 'of the King or Prince, liable in public burdens for L. 400 'Scots of valued rent, shall, in all cases, be a sufficient quali-'fication, whatever be the old extent of the said lands, any 'law or practice to the contrary notwithstanding.' The Court repelled the objections to the qualification [1].

Every one in the feudal series who holds of another, and has a vassal under him, is to a greater or less extent controlled by his overlord and his vassal, in the exercise of his right of property; and the question arises, How far this controul extends in regard to the power of alienation? This point may be considered, *first*, in relation to him of whom the feu is held, who, in so far as regards the present object of our inquiry, is the sovereign; and, *secondly*, in respect to the vassal.

By the original principles of the feudal system, no vassal could alienate his feu, without the consent of his superior. In regard to rights held of subject-superiors, the power of refusing an entry to singular successors continued so late as the middle of the last century; although, by certain indirect methods, the object was accomplished. Our sovereigns, however, early waved their privilege of refusing an entry; and every crown-vassal has long been at liberty to dispose of his estate, either in whole or in part, without objection on the part of the sovereign. The disponee, on applying for an entry, will obtain it on payment of the usual composition. There is, however, another shape in which this point was once disputed by a court of freeholders. The charters of the crown are granted to heirs and assignees; and the practice

[1] Dalrymple and others v. Reid, 4th March 1755; Fac. and Sess. Pap.

is perfectly common for the crown vassal to assign the precept of this charter to various purchasers, either in fee or liferent, who pay no additional composition. This power was once called in question, on the ground that the charter contained one joint reddendo for the whole lands which had been separated, and that no splitting of the right could take place, without the consent of the crown. It was answered, that where the superior grants a precept to assignees, it is implied that the grantee may dispose of the lands in whole or in part; and the superior suffers no prejudice, for the whole lands, and every part of the lands continue liable for the whole reddendo, however split. The objection was accordingly repelled [1].

The other question, respecting the right of the vassal to object to alienations of the superiority, has given rise to more discussion.

The general rule of the feudal law is, that a superior may alienate his right, provided the condition of the vassal be not thus rendered worse [2]. Hence he may dispose of his whole *dominium directum* to one person, who shall thus come precisely into his situation, and shall have the same rights over the vassal which his author enjoyed; for the vassal is not conceived to be placed in a worse condition by merely exchanging one superior for another. But where the alienation is attended with an increase of the number of superiors, the rule will be different. Thus, if the superior should dispose of his *jus dominii* to be held under himself, he interposes another person between himself and his vassal, and the latter suffers prejudice in this respect, that he sinks lower in the scale of feudal servitude, and his lands become liable for prestations to an additional superior. If the superiority is disponed to more than one, although these are not made to hold base of their author, inconvenience still results to the

[1] Campbell and Graham v. Muir, 5th February 1760; Fac. Col.

[2] Craig, b. ii. d. 12. sect. 35.

vassal, from this mode of multiplying overlords; because the feudal services become exigible by many instead of one. Before the ward-holding act, which abolished many of the feudal services, it was accordingly decided that such a multiplication of superiors was illegal [1]. After the passing of that act, the question was again stirred, when it was argued that the rights of the overlord had been very much curtailed, and that the inconvenience resulting to the vassal from alienation was rather imaginary than real. The Court, however, still thought that the genuine principles of the feudal law were at variance with such a multiplication, and that enough of real prejudice still resulted to the vassal to justify the prohibition. He would still be liable to claims for feu and non-entry duties from a number of superiors, instead of one; and when he required an entry, he would be obliged to seek it from all of those from whom he held, in order to prevent the disagreeable consequences resulting from not having obtained a charter from any one of them. Decisions according to these principles have been given in cases where the multiplication was merely of the liferents of the superiority, the fee remaining with the granter, and where it was argued that an entry from the fiar would supersede the necessity of going to any of the liferenters [2].

It is of no consequence that lands have been once held by separate rights from the same or different superiors, if they have come afterwards to be included in the same charter. They will then be regarded as one feu; and even separate descriptions and reddendos in the charter will not alter the case. The charter will have the effect of consolidating the rights of superiority, so as to prevent a subsequent separation without consent of the vassal; and this effect can only be

[1] Sir John Maxwell v. Macmillan, 9th June 1741; Kilkerran, p. 529; C. Home, p. 284.

[2] Sir John Anstruther v. Earl of Eglinton, July 1780, Wight, p. 229; Duke of Montrose v. Colquhoun, 31st January 1781; Fac.

avoided, by inserting a special clause of reservation of the superior's power to separate the superiorities [1].

The cases relating to the multiplication of superiors which have been alluded to, were instances of regular actions of reduction or declarator at the instance of the vassal, for having the rights of superiority set aside or declared to be illegal; and it is thus perfectly settled that such remedies are competent to the vassal. But it is also settled that an objection of this nature cannot be pleaded in a court of freeholders, unless it can be shewn that decree of reduction has already been obtained at the instance of the vassal; in which case the right of the superior is of course at an end. Where the vassal is not one of the objecting freeholders, and where no action of reduction has ever been raised, then it is clearly *jus tertii* to them to state such an objection, and they will not be listened to [2]. This principle has, however, been carried so far, as to prevent the vassal himself from founding in the court of freeholders upon an action of reduction of the superiority, which he has already raised, but in which he has not obtained decree [3]. In support of this view of the law, it may be argued, that the objector, *qua* vassal, suffers no inconveniency from the enrolment of the superior in the mean time; that such enrolment is not one of the evils which it is the object of the law to avert from him; and that his action of reduction will sufficiently obviate any prejudice to which he may be exposed in the character of vassal. When decree of reduction, however, shall have been obtained, that circumstance will constitute such an alteration of circumstances, as will authorise the striking the freeholder off the roll.

There are various ways in which a superior may forfeit

[1] Colquhoun v. Duke of Montrose above, p. 60, note; Lammont v. Duke of Argyle and Others, 23d June 1813.

[2] Stewart v. Dalrymple, 28th July 1761.

[3] Sloan Lawrie v. Hamilton and Campbell, 1st and 17th February 1781. Wight, vol. i. p. 231; Fac. App.

his right, either entirely or partially; and the question arises, Whether the vassal, who formerly held of a subject-superior, and now, through the forfeiture, holds of the crown, is entitled to the elective privileges of a crown vassal? This point seems to depend upon the extent of the loss of right which the superior has suffered. When the forfeiture is total, so that he is completely divested, the vassal, upon entering with the crown, is entitled to the elective franchise, so long as he continues to hold of the king; whilst, on the other hand, if the loss is only partial, and the superior still retains some of his rights, the vassal is not held to acquire the right of voting, by obtaining a charter from the crown. A total forfeiture of the feu formerly took place under several circumstances, but now occurs more rarely. The case of high treason is still an example; and where the vassal who formerly held of the forfeiting person enters with the crown, he immediately acquires the elective privilege [1]. It forms no objection to this result, that his Majesty retains the power of selling the superiority to another, because, so long as this is not done, the holder of the subfeu is to all intents and purposes a crown vassal [2].

The act 1474, c. 58, introduced a forfeiture of the right of a superior, when he lay out unentered for forty days, after being required by his vassal to complete his titles; and authorised the latter to go to the next overlord, and procure an entry from him *supplendo vices*. This forfeiture has been interpreted as only partial, and as not extending to the fixed

[1] In the case of Ballenden v. Duke of Argyle, July 6. 1792, the statute 1597, c. 246, which enacts, that, upon the non-payment of feu-duty for two years, the feu is forfeited, was held to be still in force; and the superior was found to have recovered the feu. If a case occurred where the crown obtained a right in this way, the vassal of the forfeiting superior would have the right of voting.

[2] Carnegie v. Stewart, 13th February 1741; Elchies v. Mem. Parl. No. 5.

yearly duties payable by the vassal[1]. The result of this mode of interpretation has been, that the forfeiting superior, when a crown vassal, is held not to lose his elective privileges, and, consequently, the vassal entering with the king does not gain any such franchise[2].

We have seen that superiority is, as well as property, a direct right in lands, and that, in strict principle, the superior is as much, or even more, entitled to be considered as a proprietor of the estate than the vassal. Hence it is that the usual mode in which superiority is conveyed, is to transfer the lands themselves *nominatim*, and merely to except in the clause of warrandice, the feu-right which has been granted to the vassal. Sasine is then taken in the lands themselves. But, although this is the usual, and certainly the more correct, method of constituting a right of superiority, it has been doubted whether a conveyance of the *dominium directum*, or right of superiority *nominatim* of the lands, and not of the lands themselves, and an infeftment in the same terms, by delivery of earth and stone of the lands, will not also form a legal investiture in the right. This question has of late been much agitated, and cannot yet be considered as finally set at rest.

On the *one* side, we certainly have various decisions which tend to support the legality of the less correct mode of investiture. There is an old case reported by Dury, in which the report bears, that an infeftment '*per expressum* only of the 'superiority,' was held sufficient as a title to remove tenants, who could show no right to maintain themselves in the lands[3]; and, upon reference to the late abridgment of retours, published by Mr Thomson, we find, that Grierson of Lag, the

[1] Erskine, b. iii. tit. 8. sect. 80.

[2] Earl Fife and Duff *v.* Sinclair 1780, Wight, p. 205.

[3] Laird of Lagg *v.* his Tenants, 19th November 1624. Durie, p. 149.

party infeft in that case, was infeft '*in superioritate*' of certain lands [1].

In a late case, which occurred in the First Division, the question was very maturely considered; and the Court, although not unanimous, decided in favour of this mode of conveyance and infeftment, and sustained a qualification, all the titles of which exhibited to the freeholders, were constituted in this form [2].

A still more recent case supports, to a certain extent, the same doctrine [3]. In this case, the crown charter and sasine were in the common form; but the disposition which assigned the crown precept, on which the sasine followed, conveyed only 'the superiority' of the lands. The infeftment, however, was here expressly 'in the lands;' and the titles were held sufficient, by the Second Division of the Court, to pursue a declarator of non-entry; and, if such titles are good for that purpose, they are of course quite sufficient to afford a freehold qualification.

It deserves also to be noticed, that this method has been very extensively followed in practice, in the constitution of freehold qualifications; and there can be no doubt that great confusion and inconvenience would result from its illegality being established.

On the other hand, this mode of conveyance and investiture, by a conveyance of, and infeftment in, the superiority merely, is expressly reprobated by our institutional writers. Thus, Lord Stair [4] says, 'The superior must be infeft, as well 'as vassal, and that in the lands or tenement itself, *simply*, 'without mention of the superiority, which followeth upon 'the concession of the fee in tenantry, though sometimes, 'through the ignorance of writers, infeftments bear expressly 'to be 'of the superiority only;" and Mr Erskine [5] expresses

[1] Dumfries, No. 133.

[2] Lord A. Hamilton v. Bogle, 23d February 1819; Fac.

[3] Mackenzie v. Mackenzie, 14th December 1822.

[4] B. ii. tit. 4. sect. 1. [5] B. ii. t. 3. sect. 10.

precisely the same opinion. Such a title was, in a case of recent date, found insufficient, by the Second Division of the Court, to be the foundation of a declarator of non-entry [1]. In the latest case on the subject, the whole question underwent a very full discussion in the Second Division; but another point in the case superseded the necessity of determining the validity of the conveyance and infeftment in the superiority; and the Court declared, that, had it been necessary to decide this latter question, they would have taken the opinion of the Judges of the First Division before coming to a final determination [2].

Under all these circumstances, it certainly cannot be said that the point is yet set at rest. Whatever the result may be, it seems plain that it will be expedient to establish one uniform rule, which will validate or annul a right of this kind *for all purposes*. It would lead to great confusion, if such a right might be good to one effect, and bad to another.

## SECTION 2.

### *Of the Infeftment of the Claimant.*

ALTHOUGH the act 1681 requires that the claimant shall be infeft, it does not point out any time which must elapse between the infeftment and the enrolment, or the exercise of the right of voting. The statute 12th Anne, c. 6. sect. 1, on the narrative, that conveyances in trust had been made for the creating of votes, contrary to the true intent of the laws, enacts, that no conveyance, whereon infeftment is not taken, and sasine registered, one year before the teste of the writs for calling a new parliament, or before the date of the writ

[1] Park v. Robertson, 16th May 1816; Fac.

[2] Macqueen v. Nairne, 23d January 1824.

for an election, if that election shall occur during the continuance of Parliament, shall entitle the person 'to vote or to 'be elected at that election.' And the act 16th Geo. II. c. 11. sect. 10, provides, 'that no purchaser or singular succes-'sor shall be enrolled till he be publickly infeoft, and his 'sasine registered, or charter of confirmation be expede, 'where confirmation is necessary, one year before the enrol-'ment.' It will be observed, that there is a difference in the phraseology of the clauses of these two acts, the former providing, that, unless the year be elapsed before the writ for the new Parliament, the person shall not be entitled to *vote, or be elected*; and the latter, that unless a year shall have expired before enrolment, he shall not be entitled *to be enrolled*. This difference gave rise to a question in a case, where a claim to be enrolled was made at an election meeting, by a person who had been more than a year infeft, but whose infeftment was not a year previous to the writ for calling Parliament. The freeholders having kept him off the roll, he pleaded, in a complaint, that, as *posteriora derogant prioribus*, he was entitled, under the act 16th Geo. II., both to be enrolled, and to exercise the privilege of voting, which is conferred by enrolment. The objecting freeholders maintained, that, by the act of Anne, he could have no right to vote, although he might have a right to be enrolled, which they were willing to have allowed after the election was over, and that there was nothing incompatible in the two clauses. The Court repelled the objection to the enrolment [1]. The same objection was again repelled in a subsequent case [2]; and, in a Committee of the House of Commons on this case, the right both to vote, and to be elected, was sustained [3].

It is therefore considered as settled, that the only li-

[1] Buchanan v. Cunninghame, 17th January 1755; Fac; Wight, p. 213.
[2] Gordon v. Dalziel, December 1780; Wight, p. 213.
[3] Wight, p. 214.

mitation in point of time is, that the claimant must have been infeft, and his sasine registered, a year before the enrolment; and that, if then enrolled, and not otherwise disqualified, he is entitled to the privileges of voting, and of being elected.

Both the acts which have been quoted require that the sasine shall have been registered; and it is settled, as will be immediately seen, that the year is reckoned from the date of registration, *i. e.* from the date when the sasine, on being presented for registration, is marked in the minute-book which is kept for the purpose of marking the time of the presentment of sasines for registration [1].

The year must have expired at the time when the claim is presented to the meeting of freeholders. In one case, the sasine had been recorded at 6 o'clock of the afternoon of September 15. 1779; a meeting of freeholders had been held on 14th September 1780, and continued past midnight, and the claim had been presented at 3 o'clock of the morning of the 15th. In these circumstances, the Court held that the year had expired according to the maxim, *Dies inceptus pro completo habetur* [2].

The preceding rules are applicable to the case of the titles of the claimant having been made up by infeftment, on a charter of resignation. When titles have been made up by confirmation, the statute of Geo. II.[3] enacts, that the charter of confirmation must have been expede one year before enrolment. The reason of this provision is, that, in this mode of investiture, the sasine, which is taken on the disposition from the last proprietor, does not become a crown-holding, until it is confirmed by the crown charter. The charter is not considered complete until it is sealed, and the year is therefore to be counted from that date [4].

[1] See the Subject of Registration *infra*.

[2] Telfers *v.* Ferrier, January 1781; Wight, p. 220; Fol. Dict. iii. 423.

[3] 16th Geo. II. c. ii. sect. 10. [4] Wight, p. 222.

As the statutes require that the claimant shall be infeft, it is of course necessary that the ceremony of infeftment shall have been carried on, according to the forms prescribed by law, and that the instrument of sasine produced in evidence of the infeftment shall possess all the legal solemnities. It will, therefore, be proper to enter into a short explanation of the rules regulating the taking of infeftments, and the drawing out instruments of sasine.

As sasine proceeds on a warrant or precept, contained in the charter or disposition conveying the lands, it will prove a fatal objection to the infeftment, if it shall appear that the precept had been exhausted before the date of the sasine on which the claim is made. This is the case when a previous valid infeftment has been taken, for a precept authorises only one act of delivery of heritable possession, provided that act of delivery has been executed according to law, and is evidenced by a valid instrument of sasine. Hence, if a sasine, liable to no legal objection, and duly registered, and prior in date to that on which the claim is made, or if an extract of such sasine is produced, the second infeftment must be held to be null and void, as having been taken without a warrant; and the qualification, as set forth in the claim, cannot be sustained [1]. If the first sasine labours under any essential nullity, it follows that the precept is not exhausted, and that the second infeftment will be good. Questions, however, of much nicety may occur as to the extent to which a sasine is vitiated by errors, either in the instrument itself, or in the registration, and as to the effect which such vitiation will have in saving the precept from exhaustion. The act 1617, c. 16, provides, that if sasines are not *duly* registered within sixty days from their date, they shall bear no faith in judgment against third parties, who have acquired perfect rights to the subjects, without prejudice to using them against the grant-

[1] Carnegie *v.* Robertson Scott, 26th February 1796; Fac. *supra*, p. 34.

ers and their heirs; and the act 1696, c. 18, declares, that no sasine shall 'be of any force or effect against any but the 'granters and their heirs, unless it be duly booked and insert 'in the register.' Founding on the terms of the act 1617, lawyers of high authority have given it as their opinion, that if sasines are not thus registered, they are not null and void, although they cannot be used against third parties[1]. On the other hand, it has been laid down from the bench, that the true view of the subject is, that a sasine not recorded is null and void, although certain parties are not entitled to plead that nullity[2]. In one case, the party in whose favour a sasine had been taken on the precept in a disposition, had been called in the record of the sasine Alexander Johnstone, instead of Alexander Houston, and a charter of confirmation had been expede; but the error having been discovered, the procuratory of resignation in the disposition was executed, a charter of resignation expede, and new infeftment taken in the person of an assignee to the precept in that charter, who claimed enrolment on the title thus made up by resignation. The Court held, that the charter of confirmation, as confirming a null sasine, had no effect in divesting the disponer; that, consequently, it was competent to execute the procuratory; and that the title made up by resignation was perfectly regular[3]. The import of this case therefore is, that a precept is not exhausted by a sasine not recorded or unduly registered; and that it is competent to take infeftment again

[1] Erskine, b. ii. tit. 3. sect. 40. and others.

[2] See Lord Meadowbank's Speech in Kibble *v.* Shaw Stewart and Speirs, 16th June 1814; Fac. See also Stewart's Answers to Dirleton, p. 275.

[3] Kibble *sup.* Lord Meadowbank stated, as mentioned above, that he thought the proper view of the case was, that an unregistered sasine is null and void, although certain parties are not entitled to plead the nullity; and that, at all events, it constituted no real right in a question with the claimant. Two of the other judges said they acquiesced in Lord Meadowbank's opinion on the merits; and the Lord Justice Clerk said, 'I am 'of opinion with all your Lordships, that the precept was not exhausted 'by what took place in this case.' See the Faculty Report.

upon it. The question was again agitated in a subsequent case, in which the sasine had not been recorded till the 67th day. Lord Gillies decided, that a new infeftment might be taken on the precept; and the Inner-House, by one judgment, adhered to this interlocutor. On a reclaiming petition, in consequence of some doubts thrown out by Lord Balgray, a hearing in presence was ordered, and the case was afterwards compromised [1]. In these circumstances, it cannot be said that the question is finally at rest.

The general rule is, that an instrument of sasine must give a full account of the circumstances which passed at the taking of infeftment; because, by that means only can it be known whether every thing was done according to law. The lands on which the sasine was taken ought to be specially mentioned; and, in considering this part of the instrument, it is to be remembered, that, where there is more than one parcel of lands, and these lie separate from one another, infeftment should be given on the lands of each parcel. In a case where a sasine bore delivery of infeftment of two only of three parcels of lands set forth in a claim of enrolment, although, in the last part of the sasine, it was stated generally, in common form, that *these things were done* on all the three subjects, an objection, founded on the omission, was sustained by the Court [2]. In this case, two of the parcels had been mentioned, and the third had been omitted; but, in another case, where there were several parcels, and it was stated generally, that sasine had been given of 'all and each of the before mentioned lands,' it was presumed, that this had been done on each of the lands separately; and the sasine was sustained [3].

[1] Baxter v. Watson, 15th May 1818. Noticed by Mr Bell, (Commentaries, last edition, vol. i. p. 697.), who expresses an opinion, that a sasine not registered does not exhaust the precept.

[2] Macleod v. Ross and Others, 18th February 1768; Wight, p. 223.; Fol. Dict. iii. 424.

[3] Brodie v. Gordon, August 1773; Bell, p. 254.

Where a precept of sasine contains warrant for infefting various disponees in different parcels of lands, it is sufficient that the instrument of sasine of each disponee shall contain as much of the precept engrossed in it as relates to the lands in which that particular disponee is infeft [1].

An instrument of sasine mentions the precise hour at which infeftment has been taken; because, in a competition of rights, questions may occur as to priority of infeftment. In election questions, however, some latitude has been allowed in this particular. In a case where the instrument of sasine bore infeftment to have taken place between five and six o'clock of the 21st June, without specifying whether this was on the morning or evening, the Court repelled an objection stated to enrolment, founded on that omission, holding, that, except in the case of a competition, it was unnecessary to be more particular, unless to shew that sasine had not been given under cloud of night, which could not have been the case in this instance, whether the infeftment had been taken in the morning or evening [2]. It does not, however, appear necessarily to import a nullity in a sasine, that it has been taken under cloud of night. In an old case, a sasine taken in the dark was sustained, 'nothing of latency or fraud being qualified [3];' and, in a later case, where a sasine was taken between seven and eight on 21st August, and the parties were at issue as to the degree of light, the Court sustained the sasine [4]. In practice, however, sasines are taken before sunset.

Where a person is infeft on the precept in a crown-charter, to which he has right by assignation, the instrument of sasine, in the ordinary case, bears, that the deed of disposition and assignation was exhibited and delivered, along with the charter, by the procurator to the person officiating as bailie for

[1] Don v. Waldie, 4th February 1814; Fac.

[2] Denniston v. Spiers, 16th November 1824; Shaw.

[3] Arnot v. Turner, 19th November 1679; Stair.

[4] Douglas, &c. v. Elphinstone, 1768; Bell, p. 258.

the crown, and by the latter to the notary, who then read over and explained to the witnesses the said charter and disposition. In a case where it appears that the instrument of sasine bore merely, that the disposition and assignation had been exhibited, but did not state that it had been delivered and read over, an objection founded on that omission was repelled [1].

An instrument of sasine, according to its ordinary style, bears, that heritable state and sasine is given to the *party infeft nominatim*, by delivery of the symbol to his *procurator*. In some instances, a less correct style has been followed, where the sasine has borne, that heritable possession was given to the procurator instead of the party himself. Such sasines have, however, been held valid. In one case, the precept of sasine directed infeftment to be given to Adam Toshack and William Ireland, the principal parties, by delivery of earth and stone to the said parties, or their procurator. The instrument bore, that Robert Glass compeared as procurator, and that the bailie 'gave and delivered to the '*said Robert Glass* heritable state,' &c. 'and that by deliver-'ing to the said Robert Glass, as procurator aforesaid, of 'earth and stone,' &c.; and an objection, that sasine had been given neither to the parties nor to their procurator, but to Robert Glass simply, was repelled [2]. In another instance, the precept ordered sasine to be given 'Gulielmo Macgilli-'vray in vitali-redditu, et Simoni Macgillivray in feodo, vel 'eorum actornato.' The instrument stated, that Hugo Macdougal appeared 'tanquam actornatus,' and that the sheriff gave '*præfato Hugoni Macdougal* statum et sasinam,' &c. 'per 'traditionem terræ,' &c. 'in manibus dict. actornati, pro et in 'manibus dict. Gulielmi Macgillivray,' &c.; and an objection, that the sasine was disconform to the precept, was repelled [3].

[1] Scot and Kerr *v.* Dalrymple, 17th January 1781; Fac.

[2] Kirkham *v.* Campbell, 21st May 1822; Shaw.

[3] Macgillivray *v.* Campbell, 9th December 1824; Shaw.

Errors in instruments of sasine have occurred under a variety of other forms; and the general tendency of the Court has certainly been to sustain the sasines, notwithstanding such errors, where they have been of such a nature that they could be corrected from other parts of the writing, and from the general import of the whole. Thus, in an old case, the same person appeared, from the clause of tradition, to have acted both as bailie and attorney; but, from the first part of the sasine, it was clear that there was a distinct attorney; and the Court inclined to sustain the sasine, and ordered parties to be heard on a farther point in the case [1].

In a later case, the instrument shewed, that Alexander Livingston appeared as bailie, and John Bryce as procurator; but, in the clause of delivery, infeftment was given, not to John Bryce, but to John Burn. To this objection it was answered, that it arose from a mistake, and was corrected in other parts of the sasine. The Court accordingly sustained the sasine [2], and the judgment was affirmed on appeal.

In another case, two persons were mentioned in the beginning of the sasine, the one as attorney, the other as sheriff; but, in the clause of delivery, the names of those persons were reversed, so that it appeared as if the attorney had given delivery to the sheriff. The Court, however, sustained the sasine; the majority holding this to be a mere blunder, but a considerable minority regarding it as a nullity [3]. In a still later case, a claim for enrolment was made on a charter, sealed 24th July 1822, a disposition, bearing date 19th August 1822, and sasine, bearing date 7th September 1822. The instrument of sasine, after the usual words of style, and narrating the crown-charter, proceeded thus: 'Ac etiam præ-

[1] Hilton v. Cheynes, 24th February 1676; Dirleton.

[2] Livingston v. Lord Napier, 3d March 1762; Sup. to Mor. vol. v. p. 587.

[3] Henderson v. Dalrymple, 1776; Sup. to Morison, vol. v. p. 586, and Hailes' Notes.

'dictus attornatus habens, et in suis manibus tenens, disposi-
'tionem de data *decimo nono* die mensis Augusti,' &c. but omitting the *year* in which the disposition was dated. It was objected that the sasine was null by analogy, from the act 1696, c. 35, which requires, that, in instruments of sasine taken after the death of the granter or grantee of the precept, the titles of the party to whom infeftment is granted shall be deduced, which could not be said to be done if the date of the disposition was not set forth; and that there was no evidence that the disposition mentioned in the claim was the same with that mentioned in the sasine. The Court, however, held them to be sufficiently identified, and sustained the title of the claimant[1]. In a very recent instance, the effect of certain errors in an instrument of sasine, underwent a very full discussion before both Divisions of the Court, met together. A claim of admission to the roll of Banffshire was made at the election meeting in the year 1826, founded, 1st, on a charter of resignation in favour of Theodore Morison, Esq.; 2d, disposition of part of the lands in the crown-charter to Alexander Gordon, Esq. (the claimant) in liferent, and to Theodore Morison, and his heirs and assignees, in fee; and, 3d, on an instrument of sasine in the claimant's favour. The instrument commenced in usual form, bearing date 7th May 1825, 'regnique serenissimi domini nostri *Georgii Quarti*,' &c. 'anno sexto;' and stated, that the attorney appeared 'habens, 'et in manibus suis tenens, quandam cartam resignationis 'sub sigillo per Unionis tractatum custodiend. et in Scotia 'vice et loco magni sigilli ejusdem utend. ordinat., *de data ut* '*infra script.*, et præceptum sasinæ subinsertum in se con-'tinen.; per quam cartam DICT. S. D. N. REX, cum consensu 'Baronum sui Scaccarii in Scotia, dedit, concessit, et dispo-'suit,' &c. As the only king mentioned before the expressions *dict. S. D. N. Rex*, was George IV., it was stated in objection to this sasine, that it proceeded on a charter of George

[1] Hamilton v. Hamilton, 24th January 1824; Fac. and Shaw.

IV., whereas the charter produced was one of George III. The instrument also bore, that the attorney held in his hand a disposition in favour 'dicti Alexandri Gordon, in vitali-re-'ditu, pro vitali-reditu suo solummodo, *et hæredum assig-'natorumque quorumcunque dicti Theodori Morison*, sui ip-'sius, in feodo,' &c. It farther bore, that an assignation had been granted of the unexecuted precept in the charter, that, by virtue 'dict. præcepti sasinæ, dict. Alexander Gordon in 'vitali-reditu, et dict. Theodorus Morison, ejusque prædict. 'in feodo, promptius infeodarentur,' &c. The description of the disposition, as contained in the instrument, gave rise to the farther objection, that whilst, by the disposition produced, the lands were conveyed to Mr Gordon in liferent, and to *Theodore Morison, and his heirs and assignees*, in fee; those lands were, by the disposition, as recited in the instrument of sasine, conveyed to Mr Gordon in liferent, and to *the heirs and assignees of Mr Morison in fee*. These objections were, however, repelled by a majority of seven judges to five. The grounds of that judgment, as expressed by the Lord Justice-Clerk, with respect to the first objection, were, that the charter mentioned in the instrument was sufficiently identified with that produced, by its date, sealing, and general nature; and that, in the decisions founded on [1],—all of which, however, his Lordship did not approve of,—a relaxation from strict accuracy had been admitted. With respect to the second objection, his Lordship held, that, as the question related only to the claim of the liferenter, and as, in the subsequent part of the instrument, the title, even with respect to the fiar, was correctly given, the objection ought to be repelled [2].

In a very late case, a question occurred as to the effect of an erasure, in an instrument of sasine, in the name of one of

[1] Amongst the cases founded on in support of the sasine, besides those of Hilton, of Henderson, and of Hamilton, mentioned above, were those of Buchanan v. Fisher, 7th July 1824; Adam, 12th June 1810; Duncan, 16th February 1706; Scott, 17th January 1781; Boyd, 23d February 1622.

[2] Gordon v. Lord Fife, 9th March 1827; Shaw and Fac.

the subjects on which enrolment was claimed. In the charter produced, the lands claimed on were described as being lot first of certain subjects, and as consisting of various lands, and, amongst others, of those of *Coblehouse*. In the instrument of sasine infeftment was said to be given of this lot; and various lands constituting it were enumerated, and, amongst others, those of *Coblehouse;* but, in all the material parts of the instrument, the word 'house,' forming part of the compound 'Coblehouse,' was written on an erasure. These erasures the Court held to vitiate the sasine, and to render it null and void [1].

To obviate the necessity of taking infeftment on every separate parcel of lands, or other subject contained in a charter, a clause of union is often introduced, by which it is declared that sasine taken at one place, and by delivery of one symbol, shall be sufficient for the whole. The place pointed out is generally the manor-house, but if no spot be specified in the clause of union, the sasine may be taken any where on the lands [2].

Various questions have occurred as to the effect produced on such a clause of union, by an alienation of a part of the subject. In a case where a person claimed on several discontiguous parcels of lands conveyed to him, constituting a part of the lands contained in a charter from the crown, in favour of the Earl of Panmure, with a clause of union, declaring sasine taken 'on any part of the said lands' to be sufficient 'for the whole lands,' or 'any part of the same,' and where the claimant had not taken sasine on the several parcels, composing the qualification, but at one part only for the whole, the Court of Session held, that the effect of the clause of dispen-

[1] Erskine, b. ii. tit. 3. sect. 45.

[2] Rose Innes *v.* Lord Fife, 10th March 1827; Shaw and Fac. The Committee on the Banff election, however, after this judgment, sustained the vote on this sasine, having, it is understood, led evidence as to the fact that sasine was given of the lands of Coblehouse.

sation was destroyed by the alienation [1]; but their judgment was reversed in the House of Lords [2]. In another case, where infeftment had been taken, in virtue of a clause of union, on lands which were not conveyed to the person infeft, but to another individual, the House of Lords [3] again reversed a decision of the Court of Session [4], which had found the infeftment invalid. In a subsequent instance, where a clause of dispensation provided, 'quod unica sasina per præfatum 'G. Home, ejusque præd., nunc et in omni tempore,' on any part of the grounds, should be sufficient 'pro integris præ-'dictis terris aliisque;' and where several parcels of these lands had been conveyed to a disponee, who had taken infeftment on one of these parcels for the whole, it was objected to the qualification of this disponee, that the clause might allow one total infeftment for the whole lands in the charter, in favour of George Home himself, or of any one to whom he might convey the lands, but could not authorise twenty different infeftments on as many parts of the lands. The infeftment, however, was sustained, and a claimant upon it was ordered to be enrolled [5].

In terms of this last mentioned case, it may be laid down, that, after the alienation of certain parcels of the lands contained in a charter, with a clause impowering sasine to be taken on any part of the lands for the whole, the disponee of those parcels is entitled, under that clause, notwithstanding the alienation, to take infeftment on any one of these parcels for the whole of them; and this rule will hold, although the clause should authorise the infeftment to be taken simply *for the whole lands*, and not specifically for the whole lands, and *every part of them*.

[1] Skene and Hunter v. Ogilvy, 19th January 1768; Wight, p. 224; Fol. Dict. iii. 424.

[2] 4th March 1768.

[3] 5th March 1770, Dundas v. Freeholders of Linlithgow.

[4] 19th December 1767; Wight, p. 225; Fol. Dict. iii. 424.

[5] Heron v. Syme, 14th February 1771; Fac.

In like manner, where the clause appoints sasine to be taken at the manor-place, or at a fortalice, its effect is not destroyed, by the alienation of a part of the lands, with respect to that part. Clauses of that description have given rise to some questions relative to the effect of inconsistencies between different parts of the instrument of sasine, or between the instrument and the precept of sasine. Thus, where the instrument bore that sasine was given, 'by delivery of earth and 'stone of the ground of the said lands;' and that 'these 'things were done on the ground of the said lands' at the manor-place, in virtue of a clause of dispensation, it was objected, that the manor-house was not situated on the lands disponed, and that infeftment could not therefore have been given on the ground of the said lands; and that earth and stone of the ground at the manor-house should have been used; but the Court held that the infeftment was quite in accordance with the ordinary clauses of dispensation in barony charters [1]. In another case, in which the precept of sasine ordered infeftment to be taken on the lands disponed, without mentioning the fortalice, at which a clause of union in the charter directed sasine to be taken, an objection, that the instrument of sasine, which stated infeftment to have been delivered at the fortalice, was disconform to the precept, was repelled [2].

With respect to the solemnities which are requisite to render an instrument of sasine a probative document, the law has varied considerably at different times; and cannot be said to be even now in all respects completely fixed; although certain rules as to the authentication of sasines are well known in practice. By the ancient custom instruments of sasine were extended on one sheet of parchment; but by act 1686, c. 17, permission was given to write them bookwise, on condition of 'the attestation of the nottar condescending upon

[1] Denniston v. Campbell, 7th July 1824; Shaw and Fac.

[2] Dunbar v. Urquhart, 23d February 1774; Bell, p. 256.

'the number of the leafes of the book, and each leaf being 'signed by the nottar and witnesses to the giving of the sa- 'sine.' A subsequent statute 1696, c. 15, authorises 'con- 'tracts, decreets, dispositions, extracts, transumpts, and 'other securities;' which it had been the custom to write on sheets pasted together, to be henceforth written bookwise, 'providing that if they be written bookways, every 'page be marked by the number, 1st, 2d, &c. and signed, 'as the margines were before, and that the end of the 'last page make mention how many pages are therein con- 'tained, in which page only witnesses are to sign, in writs 'and securities, where witnesses are required by law.' There is little doubt, that this last mentioned act never was intended to have any reference to sasines. It does not allude to the preceding statute 1686, and never mentions sasines; and that species of instrument never had been written on sheets pasted together, at least when flowing from the Crown [1]. The Court of Session, however, appear to have taken up the idea, that the act 1696 was applicable to sasines as well as other deeds; and, accordingly, an act of sederunt was passed on the 17th January 1756, proceeding on the narrative, that some of the regulations of the act 1696 had been neglected in regard to sasines, and ordaining that for the future all instruments of sasine written bookwise, shall 'have every page 'marked by the number 1st, 2d, 3d; and that the notary's 'doquet subjoined to the sasine shall mention the number of 'pages of which the sasine consists;' with certification that all sasines taken 'contrary to the directions of the foresaid act '1696, and of this act, shall be void and null.' Yet, in subsequent cases, the Court has held that the act 1696 has no relation to sasines [2]; and the consequence of this variation of opinion, and of the practice differing at different times, has been, that the law, as to the requisite solemnities, has been unsettled,

[1] Erskine b. iii. tit. 2. sect. 16.

[2] Carnegie v. Robertson Scott, 26th February 1796; Fac.

and still in some measure remains so. We shall endeavour to give such rules in regard to these solemnities as appear to be best recognised.

The statute 1686, which expressly relates to sasines, requires that the notary shall mention in his doquet the number of leaves of the instrument. The object of this rule is of course to prevent the subsequent interpolation of leaves. This regulation, however, was neglected in practice [1]; and the Court, influenced by that consideration, repelled an objection founded on this omission in several instances, prior to the act of sederunt 1756 [2]; although in one of these cases [3], they had sustained the objection, until a proof of the practice was taken. The act of sederunt 1756 provided that the notary should mention the number of pages; and although it proceeds on an erroneous narrative, as already noticed, yet, in effect the provision is nearly the same with that of the act 1686; and the practice is now universally conformable to that provision. There can be no doubt, that, to mention the number of leaves or pages, would now be regarded as an essential requisite, under the act 1686, the act of sederunt 1756, and the existing practice. There is, however, an exception to this rule in the case of an instrument of sasine, written on a single sheet of parchment, although folded so as to comprehend four pages. Such a document is understood to be in the same situation with the sasine of old, written on a single sheet; there being no risk of interpolation of leaves; and, accordingly, in a recent case, the objection was repelled, that the notary had not mentioned in his doquet the number of pages

[1] Bell, p. 259.

[2] Duke of Roxburgh *v.* Hall, 4th June, and 17th July 1741; Kilk.—Maxwell, 5th January 1745; Elch.—Clark and Waddell, 7th February 1742; Kilk. There is also a similar decision, after the act of sederunt 1756; Maclean *v.* Duke of Argyle, 2d July 1777, Sup. to Mor. vol. v. p. 590; but it related to a sasine taken in 1702.

[3] Duke of Roxburgh *supra*.

of a sasine, written on three pages of a single sheet of parchment [1]. The same rule was applied, even where the doquet stated, contrary to the fact, that the sasine was written on 'this and the two preceding pages,' when in truth the sasine was extended on the face of a single page [2].

The statute 1686 requires that the notary shall sign each *leaf* of the instrument of sasine; and this solemnity is indispensable. In practice the notary signs each *page* of the instrument, but this is not the provision of the statute 1686; neither does the act 1696 nor the act of sederunt 1756 say any thing as to the signature of a notary. Accordingly, in a case where the notary had signed each leaf only, the sasine was held to be effectual [3].

A farther provision of the act 1686 is, that the witnesses shall sign each leaf of the sasine. When the idea, however, had been taken up, that the statute 1696, which directs witnesses to sign the last page only of deeds, applied to sasines, the Court in several instances repelled objections to sasines, that every page had not been signed by the witnesses [4]; and in the report of one of these cases decided in 1762, it is stated, that, on a search into the record, it had been found that, since 1696, the bulk of the sasines are only signed by the witnesses on the last page. The practice has now, however, completely changed, and has gone beyond the provision of the statute 1686, it being now universal for the witnesses to sign every *page* in conjunction with the notary; and even while

[1] Kirkham v. Campbell, 21st May 1822; Shaw.

[2] Morison v. Ramsay, 16th December 1826; Shaw, Fac.

[3] Carnegie v. Robertson Scott, *Sup.* See the notes on this case already quoted p. 33, from the Session Papers of Lord President Campbell.

[4] Findlater v. Boyne, June 1716, Fol. Dict. ii. 544; Buchan v. Duff, January 1725, *ib.*; Maxwell, 5th January 1745, Elch. M. P.; Duke of Hamilton v. Douglas, 9th December 1762; Maclean v. Duke of Argyle, 2d July 1777, Sup. to Mor. vol. v. p. 590, relating to a sasine taken in 1702.

the practice was different, one of the decisions just quoted was reversed in the House of Lords [1]; although there seems to be doubt as to the precise ground on which the judgment went [2]. In the whole circumstances, it is likely that the act 1686 will at present be considered as the regulating authority on this point, as on that regarding the signature of the notary; and that whilst it will not be held *essential* that the witnesses should sign every *page*, it will be reckoned indispensable that they should at least adhibit their signature to each *leaf*.

The act of sederunt 1756 directs that each page of the sasine shall be numbered, *first*, *second*, *third*, &c. There is, however, no such regulation in the act of Parliament 1686; and as the act of sederunt has now been held by the Court itself to have proceeded on erroneous grounds, it probably will not be considered as binding on this point. In one case, indeed, where the *first* page had not been marked, the Court repelled an objection founded on that circumstance [3]. It may be observed, that, where the doquet states the number of leaves or pages of the sasine, which it is now essential that it shall, the accidental omission to mark one, or even more, of the pages, cannot be of much consequence, as all idea of interpolation is excluded.

The act 1681, c. 5, requires, that, in all instruments of sasine, and in various other writings, the subscribing witnesses shall be designed in the body of the instrument or other writ, under the sanction of nullity, if this requisite is omitted. Hence, if there is a material discrepancy between the name of the witness, as written by himself, when he subscribes, and that inserted in the body of the deed; and if it can be said that the two names are truly different, and not merely different modes of spelling the same name, the writing becomes liable

[1] Buchan, *sup.* [2] Bell, p. 261.

[3] Copland v. Busby, 14th February 1771, mentioned in note to Heron v. Syme, *cod. die.* Fac.

to the objection, that the statutory requisite has not been complied with, because it will be argued that the subscribing witness has not been designed in the deed, but some different person. The difference between 'Thomas Hill,' and 'Thomas Hillock,' and that between 'Thomas Wars,' and 'Francis Wars,' were in two instances held sufficient to nullify deeds [1]. In another case, however, where the witnesses subscribed an instrument of sasine, as 'William Moir, wit-'ness,' and 'Alexander Garrock, witness,' and in the body of the instrument the witnesses designed were 'William Moor,' and 'Alexander Garvock,' an objection founded on the discrepancy was repelled, although not without difference of opinion on the bench [2].

The election statute 16th Geo. II. cap. 11 [3], requires, that a claimant's sasine shall be registered, before he can be admitted to the roll [4]. This provision was intended as following out the previous law, established by former statutes, that sasines are of no effect, if not registered, except in questions with the granters of the rights, or their heirs. By the Scottish act 1617, cap. 16, every sasine is appointed to be fully engrossed in the register, within sixty days of its date, under the sanction of nullity, in questions with third parties; and the instrument is required to be returned by the keeper of the register, to the party, with an attestation, expressing the day, month, and year of registration, and leaf of the record-book. It is also ordered, that the engrossing shall be executed within forty-eight hours of the presenting of the sasine. As the operation of booking a sasine is one which occupies some time, it was felt in practice, that, where many

[1] Archibalds v. Marshall, 17th November 1787; Fac. Douglas, Heron and Company v. Clerk, 28th November 1787; Fac.

[2] Stewart v. Stewart and Others, 2d March 1815; Fac.

[3] Sect. 10.

[4] As to the time which must elapse between registration and enrolment, see p. 66.

were presented at the register about the same period, they were afterwards occasionally inserted in an order different from that of their presentation, and sometimes omitted altogether. It was therefore provided, by subsequent acts[1], that minute-books should be kept, in which a note of the sasine presented should be entered, with the time of presentment, and that the record should afterwards be made up in the order shewn by these previous entries. In consequence of this provision, the date of entry in the minute-book is now held as the date of registration. It is, however, essential that the full registration in the record shall afterwards have taken place.

Even where the instrument has not been inserted in the register for some days after the entry in the minute-book, and where, if the date of actual registration were to be the rule, the claimant would not have been a year on record, the date of entry in the minute-book is held to be the date of registration[2].

[1] 1672, c. 16, and 1693, c. 14.

[2] Mackenzie *v.* Macleod, 9th February 1768; Bell, p. 264; Wight, p. 221. In this case a proof was led with respect to the mode in which the registers were kept in a variety of the counties in Scotland; and it appeared that practices of the loosest description had crept in. Sometimes a jotting was made on the sasine at presenting, and the minute-book made up afterwards. At other times, the full registration was made first, and the minute-book drawn up from the register, contrary to the intention and provision of the act 1693. In the General Register at Edinburgh, the method followed was regular; but even there it was often found impossible to insert all the sasines in the record within the sixty days. See Bell, p. 267, note. In this case also, the freeholders had taken the evidence of several of their own members on oath, in support of the fact, that the sasines had not been engrossed of the date mentioned in the attestation,—a course which met with the reprobation of the Court. The following are Lord Hailes' notes, not before published, of the opinion of the Court in this case:—

'*President.*—If there is an apparent nullity on the face of a sasine, the 'freeholders may judge upon it; but I doubt how far they could enter 'into expiscations of this nature. *Here* was a certificate of an officer of 'Court, *ex facie* good. Freeholders are bound to meet on a particular day,

The act 1698, cap. 14, requires that the entry in the minute-book shall be *immediately* signed by the presenter of the

'they cannot go into proofs, or adjourn. If they do not adjourn, the proof 'which they take will be *ex parte*, as happened in this case.

'*Gardenstoun.*—By the same rule which the freeholders took in this 'case, they may set every right aside upon proof.

'*Monboddo.*—I think the proof not competent. The objection resolved 'into an improbation and reduction. The freeholders might as well have 'alleged falsehood against the charter. Every objection that can be tried, 'without unravelling, as the English call it, falls within their competency, 'but nothing else.

'*Pitfour.*—Thought that the freeholders might take proofs, but waved 'giving any opinion on the preliminary point. Shewed at great length 'that inserting in the minute-book was considered in law, and from the 'necessity of the thing, as registration.

'*Kames.*—The preliminary point must proceed upon the supposition 'that a complete registration, and not only an insertion in the minute-'book, is required: if this was necessary, and if the want of it appeared '*ex facie*, the objection must be good. Were the freeholders to be allow-'ed to enter into inquiries such as that in the present case, matters would 'be inextricable; and, therefore, upon the footing of utility, I would 'hold that they could not; just as in the Court of Justiciary, diets are 'peremptory, and therefore trials for forgery cannot proceed there. I 'should not think that the objection as to a year's registration can be 'good, because the presenting or the inserting in the minute-book may 'serve the purposes of the statute as well as the more formal registration 'could do, for the purpose of the statute was to prevent surprise; besides, 'here there is a personal exception, for the parties who objected knew 'that the sasines had been presented in due time.

'*Auchinleck.*—As to competency, the freeholders hold a *meeting*, not a 'court. That is an abuse in language. The freeholders must judge of 'what is laid before them. They departed in this case from their duty, by 'taking proofs, and those proofs by parties and their agents, to whom no 'oaths ought to have been administered. Now, it is in proof that the re-'gisters, our supposed glory, have been most irregularly kept. It has 'been supposed in practice, that putting a paper into the register was re-'gistration,— the check of presentments had been laid aside. It is of 'great consequence to mark in the minute-book and in the record, because 'this marking and this registration may serve to check each other.

'*Coalstoun.*—As to competency, whether the disquisition competent 'before the freeholders. Nothing can come before them which does not 'either appear *ex facie* of the writings produced, or may be instantly ve-

sasine, and by the keeper of the register. But, in a case where the entry in the minute-book was not signed till a few

'rified; as, for example, if the minute-book itself had been produced, and 'from it, it had appeared that the infeftment was more recent than a 'year; but it is a separate question how the objection is competent be- 'fore this Court; the decisions under this head are not uniform. In the 'case of possession we may try it, although the freeholders could not. Be 'this as it will, I think that the minute-book must be the rule.

'*Monboddo.*—I put my judgment upon the act 16th Geo. II. In it, '*registered* means what is expressed in the act 1696, which is unambi- 'guous. The act 1693 determines that the entry in the minute-book 'shall be the rule as to the question of the term of days allowed for regis- 'tration. The act 1696 further requires that an entry be at some time or 'other made in the record. All that is proved from the practice is, that 'it has been the custom to register after the sixty days, but of this the 'act 1696 says nothing.

'*Kennet.*—The acts 1693 and 1696 are not inconsistent, and they are 'both in force. The act 1696 repealed the act 1686. The law does not 'require impossibilities; time must be given for writing into the record. 'The sasine must remain with the clerk, till he can have time to insert it 'in the record; for till he inserts it, he cannot mark upon the principal 'in what leaves of the record it is inserted.

'*President.*—I do not admire the proof taken before the freeholders, nor 'the methods taken by the freeholders previous to the proof; and there- 'fore I would incline to repel the defences, upon the footing of *personalis* '*exceptio*. As to the great question of registration, sasines must be regis- 'tered. Originally there was no minute-book. The act 1686 gave great 'authority to the minute-book. The act of sederunt 15th July 1692 puts 'the matter out of doubt; that act shews that the entry in the minute- 'book was the rule of preference. The very next session of Parliament, '1693, an act was passed upon the plan of that act of sederunt, and it 'gives, in effect, the authority of a law to that act of sederunt. The lieges 'seeing the minute-book to bear an entry in the record, must hold it to 'be so recorded; the keeper of the minute-book must instantly ingross, 'and if he neglect, is liable to deprivation. The presenting of itself is not 'sufficient; for, if I look into the minute-book, and see no sasine, I lend 'my money upon heritable security, and yet there may be a sasine at that 'time in the hands of the keeper, were presenting sufficient. I should be 'disappointed of my preference, by not seeing what by no search I could 'see. If the regulations 1692 were necessary at that time, they are 'more necessary *now*, when writings have become more numerous and 'longer. The act 1696 does, moreover, require actual registration in the

days after the entry was made, an objection made to the registration on that ground was repelled, and the sasine held as recorded of the date of the entry in the minute-book, in respect of the loose practice which had been proved, in a preceding case[1], to exist in the mode of keeping the registers, and of the mischief which might result from a rigid enforcement of the rule[2].

In another instance, a party had been enrolled, without any specific objections being entered in the minutes of the freeholders; but it was stated in a complaint against the enrolment, and admitted by the opposite party, that there was no entry of the claimant's sasine in the minute-book. There was, however, no minute-book kept in the county; and although a proof by witnesses was offered, that the actual entry in the register was several days subsequent to the date of the attestation on the back of the sasine, so that the sasine truly had not been a year on record, the Court repelled the objections to the enrolment[3].

Various other questions have occurred with respect to the effect of errors, in regard to the mode of carrying the statutory provisions into effect. Thus an objection to a claim of enrolment was made by the respondents in a complaint, un-

'record, but it does not say that such registration must be within sixty 'days.'

'On the 26th January 1768, the Lords repelled the objection; but ap-'pointed an act of sederunt to be made, in order to enforce the statutes 'concerning registration, which, both as to the form of marking presenters, 'and as to the keeping of the minute-book, had been greatly trans-'gressed.'

In notes by Sir Ilay Campbell on his session papers, Lord Pitfour's opinion on the competency of the proof is thus given: 'As to competency, 'difficult to ascertain precise boundary: may take nullities (*i. e.* into ac-'count) but not proofs.'—See these notes in Appendix, No. 17.

[1] Mackenzie, *sup.*

[2] Earl of Fife and Others *v.* Gordon and Others, 8th July 1774; Wight, p. 222; Bell, p. 264, and Fac.

[3] Dunbar *v.* Sutherland, 10th March 1790; Fac.

der the following circumstances:—The instrument of sasine was dated the 12th September 1806. It was presented to the keeper of the record on the 25th September, and immediately entered *ad longum* in the record. It was observed, on the 4th October, that it had not been entered in the minute-book, in terms of the act 1693. To obviate objections on that head, it was entered in the minute-book as presented of the last date. The attestation was altered, so as to make it correspond with the minute-book. A similar alteration was necessary in the principal record, and the 25th of September was therefore erased, and the 4th of October inserted in its place. This sasine now bore to be recorded the 4th October, and it thus came to stand in the register out of its place, and before several sasines that were recorded of earlier dates. It was argued, in support of the objections to the registration, that the sasine was not recorded in terms of the statutes, and that the erasure in the attestation constituted a vitiation *in substantialibus*. The majority of the Second Division of the Court were of opinion, that the provisions of the statutes must be understood as having been enacted under the sanction of nullity, if neglected; and sustained the objections to the registration of the sasine in question[1].

About a year afterwards a question came before the First Division of the Court, under circumstances similar to the preceding, the principal difference being, that there was no erasure in the attestation of registration on the sasine produced. According to the claimant's statement, in answer to a complaint brought against his enrolment, the facts were as follows:—The sasine, which bore date 12th September 1806, was sent to the record-office on the 25th September, and was copied *ad longum* into the record on that day. It was accidentally discovered that there was a marginal note on the instrument, which was not subscribed by the notary. The instrument was then taken away, and a new one written out,

[1] Drummond v. Ramsay, 24th June 1809; Fac.

duly subscribed and executed, and returned to the record on the 4th October, on which day it was entered in the minute-book; and the date of 25th September, which was prefixed to its insertion *ad longum* in the record, was erased, and the date of the 4th October superinduced, to correspond with the entry in the minute-book. The opposing party, on the other hand, offered to prove, by the evidence of the notary, of the keeper of the record, and of other witnesses, that the attestation on the original instrument of sasine had been truly vitiated, under circumstances very similar to those in the last mentioned case, and that the present instrument had been made out with its fair attestation, in order to avoid the objection. The majority of the Court held that the proof was incompetent; and that as, *ex facie*, the entry in the minute-book, and the attestation, were unimpeachable, whilst there was no necessity for any date prefixed to the entry in the principal record, the sasine ought to be sustained[1].

But although, in the ordinary case, the entry in the minute-book is held as the date of registration, such entry by no means supersedes the necessity of a subsequent recording of the sasine at full length, in the body of the register. The act 1617, cap. 16, requires the keeper 'to engrosse the whole 'body of the writ in the register,' under the pain of deprivation of office; and the act 1696, c. 18, declares, that no sasine shall be of any force against third parties, unless 'duly 'booked and insert in the register.' A practice having afterwards crept in, of not engrossing in the register the whole of the notary's doquet attached to sasines, it was provided, by act of sederunt, 17th January 1756, that the entire sasine, including the whole of the notary's doquet, should afterwards be inserted in the record, under the sanction of nullity.

The effect of these repeated enactments, is to render an omission in the register of any material part of the sasine, or an error in copying such part into the record, fatal to the re-

[1] Adam v. Duthie, 19th June 1810; Fac.

gistration. Thus the omission of certain lands, in the copying into the register, of that part of the sasine in which the notary attests that delivery was given, although they were included in the precept of sasine in the register, was held to be fatal to a claim of enrolment founded partly on these lands[1].

In a very recent case, the clause of delivery in the claimant's sasine bore, that sasine was given 'dict. villæ et terrarum 'de Eastertown de Lesmurdie (inibi comprehenden. tertiam 'partem terrarum de Invercharrachy, tertiam partem terra-'rum de Auchnastank, una cum tertia parte terrarum de 'Belchirrie, molendinum de Lesmurdie), terras molendinarias, 'multuras, sequelas, et lie knaveships ejusd:' &c. In the register the words within parentheses were omitted. In evidence of the extent, there was produced a retour, 'in omnibus et 'singulis villis et terris de Eistertown de Lesmurdie, tertiâ 'parte terrarum de Inverquherache, tertiâ parte terrarum de 'Auchnastank, et tertiâ parte terrarum de Belchirie, cum 'earundem pertinen.' The Court dismissed the claim, on the grounds that the recorded sasine did not correspond with the retour, and that the sasine could not be considered as duly recorded[2].

Errors in copying into the record the *year* in which the sasine, or precept of sasine, bears date, have also been found to void the registration; and this equally holds whether the error has been committed in the year of the Christian era, or in the year of the king's reign. Thus, in one case, an enrolment had been made on a sasine, which bore date, 'anno domini

[1] Grey *v.* Hope, 23d February 1790, Fac. Note from the Session Papers of Lord President Campbell, on reclaiming petition.—'Interlocu-'tor clearly right. Sasine taken out of the register. Any person, there-'fore, examining the register, would see nothing but the record copy.—'*Monboddo.* Minute-book only supplies the date.—*Justice-Clerk.* Clear 'that the interlocutor is right. Attestation on sasine affords only pre-'sumptive evidence. Minute-book is not registration, short description 'only. Evidence of date.'—'Adhere.'

[2] Stewart *v.* Lord Fife, 20th February 1827; Shaw, and Fac.

'millesimo octingentesimo vigesimo *primo*, mensis vero Aprilis 'die decimo, regnique S. D. N. Georgii Quarti, &c. anno se-'cundo;' but, in the register, the word *primo* was omitted, although, in other respects, the date was accurate. The dates of the charter and precept, as engrossed in the instrument of sasine, were also correctly given in the record. The error, however, was found fatal to the enrolment[1]. In another instance, the precept, as registered, bore date, 'anno millesimo 'octingentesimo et decimo tertio, regnique nostri anno *quadra-'gesimo* quarto,' instead of '*quinquagesimo* quarto,' the true date; which error was also found to be fatal to the enrolment[2].

SECTION 3.

## *Of the Claimant's Valuation.*

WITH respect to the valuation of the land which affords a freehold qualification, the statute of Charles II. 1681, c. 21, has declared that the claimant shall be infeft either in '*a* '*forty shilling land of old extent*, holden of the king or prince, '*distinct from the feu-duties*,' or 'where the said old extent 'appears not, that he shall be infeft in lands liable in public 'burden for his Majestie's supply *for four hundred pounds* '*of valued rent*.' There are thus two measures pointed out of the valuation of the qualification, the *old extent* and the *valued rent*; and it will be necessary to consider the nature and evidence of both in their order.

### 1. *Old Extent.*

The valuation by Old Extent is of great antiquity. In its origin and whole history, it is involved in much obscurity,

[1] Macqueen v. Nairne, 23d Jan. 1823; Fac., and Shaw, ii. 637.

[2] Denniston v. Speirs, 16th November 1824; Shaw, iii. 285.

and has exercised the research and ingenuity of lawyers and antiquarians for a long period. A few years ago, great additional light was thrown on the subject by an eminent lawyer, in the course of a question involving this subject, which depended before the Court; although, from the very imperfect state of our ancient records, much remains still very obscure, and probably will long continue so [1].

There were two objects which early called for a valuation of lands in this country. The one was the levying of taxes on those occasions admitted by the genius of feudal government; the other, the ascertainment of the amount of the feudal casualties due by the vassal to his superior.

In the course of the twelfth and thirteenth centuries we know that considerable contributions were levied by the sovereign on different occasions. It can hardly be doubted that these aids were collected according to some fixed rule or proportion; and although history affords no light on the subject, yet the expressions, *carracuta terræ*, *bovata terræ (plough-gate* and *ox-gate* of land) which occur in deeds so early as the eleventh century, may be regarded as indications of valuation. Lord Hailes first pointed out a document, in the Chartulary of Aberdeen, shewing, that, in the reign of Alexander III [2]. the expression *antiqua extenta* was used [3]; and it has been inferred that the valuation so denominated must have been older than the reign of that monarch; but whether this *antiqua extenta* was a general estimation of the whole lands of the kingdom, is a point at least not established by any certain evidence

[1] The following short account of the present state of our knowledge on this subject, is derived from the learned and able memorial written by Mr Thomson, in the case of Cranston, 16th May 1818.

[2] Alexander III. reigned from 1249 to 1285.

[3] In the Chartulary of Aberdeen (101) we have 'Rentale Regis Alexdri Tertii vicecomitat. de Aberdene et de Banff.' Among other articles this occurs, 'de Thanagio de Nathdole, *secundum antiquam extentam*, xlix. lib. et xvi. denar.'—*Hailes' Annals*, vol. i. p. 224. 3d edit.

The first proof which exists of a double valuation, or an *old* and *new extent* of lands, is afforded, not by any document relating to taxation, but by retours, framed in obedience to briefs issued by Edward I. after his successful inroad into Scotland. The first of these retours relates to the succession to the lands of Riccardiston, in the county of Edinburgh, and is dated 18th February 1304. The brief is not extant. The retour bears, that the estate is holden of the Lord John de Soules, who held it of the Steward of Scotland, and that, 'valuit *tempore pacis* in omnibus exitubus per annum x libras, 'et *nunc valet* xx solidos." Two other briefs were issued by Edward I. relative to the barony of Brade, also in the county of Edinburgh; the one directing the enquiry, *inter alia* 'ce que meismes les terres et tenementz valent per an en 'totes issues;' the other proceeding on an application for a grant of the ward, and ordering the inquest to say, 'quantum custodia illa valet per annum, in omnibus exitibus *juxta* '*verum valorem*.' A retour, dated 14th July 1305, 'super '*extentum* baroniæ de Brade,' appears to have been drawn up in answer to both briefs, and bears: 'Item dicunt, quod 'dicte terre tempore pacis, *quando fuerunt edificate et culte* 'per totum, cum molendino, et omnibus aliis commoditatibus, valebant xl marcas, sed NUNC, *propter destructionem* '*guerre* due partes de Brade et de Groutehill, de quibus 'dictus Henricus obiit vestitus et sasitus, valent hoc anno 'viii. marcas, *quia in nullo edificantur*: Item dicunt, quod se'cundo anno, si molendinum sit constructum, et *terra edifi'cata et de hominibus habitata*, valebit xii marcas; et tertio 'anno xiiii marcas; et quarto anno xvi marcas; et quinto et 'sexto anno, quolibet anno valebit xviii marcas,' &c.

These curious documents are very instructive. They show distinctly the precise meaning of the expression 'tempore pa'cis' in retours, about which lawyers were much divided. It plainly signifies the value of lands in a time of peace and

tranquillity, in opposition to its deteriorated condition after suffering from the ravages of war; and, considered as a phrase in general use, it probably did not refer, at first, to any definite period common to all retours, but generally to the condition of lands in tranquil times, although, in process of time, it certainly may have come to have had a more definite meaning. These retours also shew, that, previous to the reign of Robert Bruce, which, for a reason to be mentioned immediately, had been fixed upon by lawyers as the period when a double extent was first introduced in retours, this mode of valuation was practised. They farther demonstrate, that, originally, the old extent, or valuation '*tempore pacis*,' was higher than the new extent, or '*nunc valent*' of lands, which last was the estimation which resulted after the deterioration of war.

From the phraseology relative to the *new extent* of the last mentioned retour, it seems quite certain that it was a valuation made at the time; although it would be rash to say, that, in other and later instances, the 'nunc valent' may never have been derived from some general valuation for the purpose of taxation. It is also not improbable that the old extent of retours may have been derived from a similar source, although no evidence on that subject is to be found.

The first example which we find of any double valuation in regard to the levying of public aids, is afforded by an indenture entered into between Robert Bruce and the temporal members of a parliament held in the year 1326, by which a tenth of the rents of land was granted to that monarch, 'juxta *antiquam extentam* terrarum et redituum tempore bonæ memoriæ Domini Alexandri, Dei gratia, Regis Scotorum illustris ultimo defuncti, pro ministeriis ejus fideliter faciend. excepta tantummodo destructione guerræ, in quo casu fiet decidentia de decimo denario preconcesso, secundum quantitatem firmæ quæ occasione predicta, de terris et redi-

'tibus predictis levari non poterit, pro ut per inquisitionem 'per vicecomitem loci fideliter faciendam poterit reperiri[1].'

The new valuation here directed to be made, was thus precisely of the same nature as that in the retours quoted, and arose from the ravages of war. The old extent may have been a valuation, either made in the reign of Alexander III, or one known in his time, although framed at some preceding period.

To pay the ransom of David II. an aid was imposed in the year 1357, 'secundum *verum valorem*;' and it was ordered 'quod hujusmodi taxatio renovetur, quolibet anno statim 'post autumptnum.' To pay off the arrears of this imposition, the lands were again, in the year 1366, appointed to be taxed 'secundum *verum valorem et antiquum*.' The lands of the kingdom had suffered dreadfully from the wars in the reign of that monarch; so much indeed, that, from records of the several counties at this period, we learn that the total *old extent* of lands in the different counties amounted to L. 48,249 : 7 : 8, whilst the valuation 'per verum valorem' extended to L. 22,239, 10s. only.

In so far as retours between the years 1366 and 1424, have yet been made public, the new valuation seems generally less than the old, although sometimes of the same amount[2]. Mr Erskine, however, alludes[3] to some retours of the family of Stirling of Keir, in which the new extent is said to exceed the old. In the fifteenth century, the practice became not uncommon of retouring both extents as of the same amount; and as it is improbable that two valuations, made at a considerable distance of time from one another, should exactly coincide, it seems to follow, that the estimation of one, or perhaps both, extents was, in these instances, in a great measure arbitrary.

In the year 1424, a tax was imposed by act of Parliament

[1] This indenture will be found in Wight's App. No. I.

[2] See Mr Thomson's Paper, p. 119. [3] B. ii. t. 5. sect. 32.

for the payment of the expences incurred by James I., during his detention in England; and it was ordered, 'that all the 'lands of the kinrie be taxt efter as they are *of avail now*, 'and that but (without) fraud or gile.' There is no authority for the conjecture of Lord Kames, that the new extent in retours, subsequent to the year 1424, was derived from the valuation made in that year; nor is it true that in all retours of a posterior date the new extent is larger than the old. There are various instances between the years 1424 and 1474, in which both extents are returned as the same [1]. It deserves, also, to be mentioned, that, from the great depreciation in the value of money, an increase in the nominal estimation did not always shew that the real value of land had actually been augmented. The worth of the coin of James I. was nearly one-half less than that of Alexander III [2].

The new extent, or present value, continued to be the rule according to which several successive taxes were imposed, down to the reign of Mary, when the valuation by old extent was resumed, and continued on various occasions subsequently to her reign. In the year 1643, taxation according to valued rent was introduced; and continued always afterwards, with the single exception of the year 1665, when a tax was imposed according to old extent.

From the statute 1474, c. 10, it would appear, that the new extent, which was then inserted in retours, did not amount to the real value of lands; and it was therefore by that act provided, that, for the future, the 'avail of the auld,' and the 'very avail' at the time of serving the brief, should be retoured. It would appear that this statute was not long strictly adhered to in the practice of inquests; and many successful attempts to enforce it by the authority of a court of law, are to be found in the reports of the decisions of the Lords of Council between the date of the act and the commence-

[1] See Mr Thomson's Paper, p. 127.

[2] L.1 of Alexander III. was equal to L. 1 : 17 : 6 of James I.

ment of the sixteenth century [1]. Notwithstanding this legal interference, however, a practice became prevalent, in the course of the sixteenth century, of estimating the new extent, as bearing some certain proportion to the old, either by adding to the latter some aliquot part of it, or by making it some multiple of the new. On this principle, Skene [2] says, that the new extent was estimated at four times the old; and Balfour [3] states, that a merk of the latter was reckoned equal to a pound of the former. Neither, however, of these two rules was ever in general observance, so far as we know at present.

On a general view of the evidence on the subject of the old and new extent, derived from the documents recently brought to light, it appears that our eminent lawyers, who had written on this subject previous to our recent accession of knowledge, had been too hasty in forming decided theories as to the precise periods when these extents originated, and as to the derivation of the retoured valuations from the general tax-rolls of the kingdom. The progress of inquiry with respect to obscure subjects, besides explaining some parts of them, has often the effect of rendering more manifest the difficulties attending other parts of those subjects; and although we thus have a better chance of arriving at the ultimate discovery of truth, the effect, in the mean time, is to overturn many a speculation which had been previously thought to solve points of difficulty in a satisfactory manner.

With respect to church lands, a different rule appears to have been followed in the raising of aids, from what was observed in regard to temporal estates. This at least is true, since the period that we have any evidence on the subject. The first certain information relates to the imposition, in 1275, of a tax of one-tenth of ecclesiastical revenues, for six years, by Pope Gregory X., for the support of the wars in the Holy-

[1] See Mr Thomson's Paper, p. 132. *et seq.*

[2] De verb. signif. v. Extent. [3] Practicks, p. 430.

Land. A person, called Baiamundus, was dispatched into Scotland, as legate on this occasion, under whose direction a tax roll, since well known as Bagimont's roll, was drawn up, '*non secundum antiquam taxationem, sed secundum verum* '*valorem*[1].'

This valuation continued to be the rule according to which all impositions, both those of the church and of the government, were laid on ecclesiastical property. The prelates, and other beneficed persons, had relief from their vassals and tenants, according to the *free rents* of those possessors of the grounds[2]. There was thus no room, at least after 1275, for the estimation of church-lands by old extent, in the public rolls. Neither, in so far as regarded church-lands not subfeued, was it necessary to insert the extents in retours, because, in this description of lands, there was no room for feudal casualties, as the church never died. There are extant, however, some retours of church vassals of the end of the 14th, and beginning of the 15th century, in which both old and new extents are entered[3].

[1] J. de Fordun Scotichr. p. 780.

[2] James VI. 1597, c. 277.

[3] Mr Thomson's Paper, p. 119.

A manuscript, from the Auchinleck library, and bearing to have been dictated by the late Lord Auchinleck to his son Mr Boswell, has lately been printed under the directions of a gentleman, who has kindly allowed me to make some quotations from it. The following extract, relative to the valuation of church-lands, and to the authority due to retours of that kind of property, will be read with interest; although it is settled by a long series of decisions, that such retours must be received in evidence of the old extent. 'A question,' says his Lordship, 'may likewise be stirred, 'as to retours of church-lands, and of such as were the property of the 'crown; the doubt as to which arises from this consideration, that an- 'ciently, the property lands, as paying the rent to the king, were liable 'in no cess; and as to church-lands, though they paid cess, yet the rule 'of payment of the cess was different from what obtained in the temporal 'lands. For, first, there was laid upon the church a proportion of the 'cess corresponding not only to the lands, but to the teinds which belong- 'ed to the church; and in dividing the cess laid upon a particular religious 'house, the churchmen caused their vassals in the kirk-lands held of them,

Having given this short account of the history of this species of valuation, we now proceed to consider the evidence which must be adduced to a meeting of freeholders, that the lands on which a claim is made are of the requisite amount of old extent.

The statute 16th Geo. II. c. 11, on the narrative, that the practice had become frequent of unduly splitting the old extent of lands, with the view of making votes, enacts, sect. 8, that the old extent of lands on which a vote is claimed, must be proved 'by a retour of the lands, of a date prior to the

'relieve them of the cess, conform, indeed, to the extent of their lands, 'which was mentioned in their feu-charters; but this extent was not like 'the old extent of the temporal lands; but was taken from a valuation 'made by the authority of the Pope, and his legate, Cardinal Bagimont. 'So that neither in the property lands, nor in the kirk-lands, was there 'place for old extent.'—p. 24-5.

After stating that the king's property lands were retoured in virtue of special statute, his Lordship proceeds thus: 'So being the case as to the 'king's property lands, there can be no doubt that they may entitle to 'vote upon the footing of the old extent. But as to the kirk-lands, they 'rarely can; for, though there are numbers of services of heirs in kirk-'lands, and the retours mention the old extent of them; yet as commonly 'the old and new extent are the same, and both are the same with the 'feu-duty, which is conform to Bagimont's roll, it is obvious that this is 'not the extent which the act of Parliament 1681 fixed for the qualifica-'tions of voters. Yet cases may happen even in kirk-lands, where the 'retour appears in the form of a proper election retour, the old extent be-'ing different from the new, and both different from the feu-duty; in 'which case, although it is extremely possible that this has been owing 'to a blunder, in the jury supposing themselves entitled to take the de-'scription of the lands in the title-deeds, as proper evidence of the old 'extent, and making the new correspond to the rule in the county where 'the lands lie; yet, as this is but a possibility, and it is also possible that 'the lands were truly extended before they came into the hands of the 'church, the express authority of the retour in this case ought rather to 'preponderate.

'It will be observed, that here the case is stated where there is no re-'tour existing prior to the lands being in the church; for, if there were 'such retour, which may happen, as some lands were given to the church 'in very late times, there can be no doubt.'

'16th day of September 1681, and that no division of the 'old extent, made since the aforesaid 16th day of September '1681, or to be made in time coming, by retour, or any 'other way, is or shall be sustained as sufficient evidence of 'the old extent.' Previous to the date of this act of Geo. II, other modes of proof were admitted, as the statute 1681 made no limitation with respect to the kind of evidence. A retour, however, prior to 16th September 1681, is now the exclusive mode of proof. Thus, a retour in 1741, supported by the Respond Book in Chancery from 1591 to 1606, was held insufficient evidence [1]. The like judgment was pronounced in another case as to a sasine [2]; and in a third as to a charter [3]; in both instances supported in the same way as in the first mentioned case.

By the practice in services, the original service is lodged in Chancery, and it is also transcribed into the Books of Chancery. An extract is given out, when demanded, to the party retoured, which extract is received as legal evidence of old extent; and even where the original service is not extant, an extract from the record in the Chancery books is held sufficient [4]. The same rule is held to apply, although the testing clause of the retour is not completely filled up in the extract [5]. If, however, it can be shewn that the document lodged in Chancery as the original service is not genuine, an extract from the record will not be held as evidence [6]. Although it should appear, *ex facie* of a retour, that there have

[1] Hamilton, 19th January 1745; Elch. M. P. 23.

[2] Dundas, *eod. die*; Ib. 24.

[3] Stewart v. Crawford, 22d February 1745; Falc. vol. i. p. 84.

[4] Colquhoun v. Freeholders of Dumbartonshire, 5th February 1745; Falc. v. i. p. 61. Stewart v. Dalrymple, 28th July 1761; Fac. Mackie v. Maxwell, 29. July 1761; Fac.

[5] Chalmers v. Tytler, 19th November 1755; Fac. The extract concluded with the words, 'in cujus rei testimonium.' In the pleading it seems to be admitted, that even in the record it was in the same form.

[6] Cathcart v. Gordon, 9th March 1813; Fac.

been less than fifteen jurymen on the assize, this is not a good objection to it [1], as we learn from the record that the number has varied at different times from nineteen to ten.

The Chancery Register is not the only record from which a retour of service may be adduced as evidence of the old extent. In one case, a Sheriff court record, containing copied into it various retours, was held, along with certain *adminicles*, in the course of a process of sale of superiorities, at the instance of an heir of entail, to afford sufficient evidence of a freehold qualification. An extract of one of those retours was afterwards delivered, by authority of the Court, to the purchaser of some of those superiorities, and was deposited by him in Chancery, as in the case of an original retour [2].

Neither is it essential that the retour founded on shall be an inquest of *service*. If the assize has been held for the purpose of valuing lands, with a view to the imposition of public taxes, their verdict, if properly authenticated, will be held evidence of old extent, as the basis of a freehold qualification [3]. But a mere certificate of the keeper of a record of old extent, that certain lands are entered in that record, will not supply the place of a retour [4].

The retour must bear, in the *valent clause*, that the estate is worth the requisite old extent; because that is the clause in which the jury return upon oath the value of the lands; and it is not sufficient that they are mentioned in the *descrip-*

[1] Stewart *v.* Dalrymple, 28th July 1761, where twelve were held enough. Stewart *v.* Maxwell, 15th January 1762, where thirteen were held sufficient.

[2] Trustees of Fraser *v.* Fraser, 11th July 1800; Fac. The adminicles were certain relative titles of the estate, which showed, that, at the date of the retour founded on, the person retoured had right to the lands in question, and seemed to account for the loss of the principal retour.

[3] Chalmers *v.* Tytler *sup.* where an extract was produced from a record in Chancery, of a retour of all the lands in the county of Edinburgh. Moncrieff *v.* Erskine, 27th February 1761; Fac.

[4] Sir John Gordon, 17th February 1767; Fol. Dict. v. iii. p. 403.

*tive clause* in the beginning of the retour, as lands of a certain number of pounds or merks [1].

But, within certain limits, the descriptive clause is admitted in illustration of the valent. Thus, where different lands are, in the former clause, mentioned as being separately of a certain old extent, and the total amount stated in the latter clause agrees with the sum of the particulars in the descriptive, then the retour is admitted as evidence of the extent of the several lands mentioned [2]. And this illustration is allowed, although there should be a small difference between the total amounts in the two clauses, especially where that in the valent *exceeds* that in the descriptive. The difference will be presumed to proceed from a mere error in summation, which certainly appears the most legitimate principle on which the illustration can be permitted in the case of a discrepancy between them; or it may be argued, that, where the sum in the valent exceeds the total amount in the descriptive clause, that some of the lands have been underrated, but cannot have been overvalued. Accordingly, where the valent clause gave L. 517 : 3 : 4 as the value, and exceeded the total sum in the descriptive clause by L. 1 : 16 : 8 [3]; and, in another case, where the former clause gave L. 11 : 3 : 8, and exceeded the latter by only 4d.[4], the difference in both instances was held not to be fatal to the retour. The same decision was given where the valent was L. 16, 6s., and exceeded the descriptive by L. 1 : 2 : 8 [5], which was giving a much greater latitude than in either of the preceding instances, as the difference bore a much greater proportion to the sum-total.

[1] Stewart v. Campbell, 22d February 1745; Falc. vol. i. p. 83. Crawford *eod. die*; Elchies, M. P. No. 35.

[2] Case of Renfrewshire, 18th January 1745; Elchies, M. P. 22.

[3] Fletcher v. Ferrier, 23d January 1781; Fac. Colquhoun v. Freeholders of Dunbarton, 5th February 1745, both relating to the retour of the Dukedom of Lennox.

[4] Maxwell v. Bushby, 13th July 1775; Fac.

[5] Barns v. Hamilton, 5th December 1780; Fac.

Where, however, the cumulo extent in the valent clause was L. 7: 6: 8, and the excess over the total amount in the descriptive L. 2, the Court thought this too great a discrepancy to be attributed merely to an error in summation, and refused to sustain the retour [1]. Again, where the cumulo extent in the valent was stated at L. 11, 2s., and *fell short* of the joint amounts in the description by 6s. 8d., and where the descriptions of the different lands were repeated in the valent immediately before the cumulo extent, there could be little doubt that the difference arose merely from an error in calculation, and the Court sustained the retour [2]. Mr Wight is of opinion that, where the amount in the valent is *less* than that in the description, the difference will not be fatal, provided it may be subtracted from the extent of the lands on which the claim is made, without diminishing it below the requisite sum of 40s.; but that if it will have this effect, it constitutes a good objection to the retour [3].

The descriptive clause is also sometimes made use of in illustration, even where it does not bear a particular value attached to each subject mentioned in it. Thus, where the descriptive clause bore, that the deceased died seised, 'de terris de Gask, et de uno annuo-reditu 13 solidorum et 4 denariorum,' (one merk); and the valent bore, 'quod dictæ terræ et annuus-reditus valent nunc per annum 12 mercas et valuerunt 10 *tempore pacis*;' it was held that, as annualrents are always retoured *valere seipsum*, there was sufficient evidence of the extent of the lands [4]. Again, where lands are retoured with an office in the valent clause, as worth a particular amount; and, in the descriptive clause, the lands

[1] Scott v. Hamilton, 6th March 1781; Fac.

[2] Ferrier v. Graham, 7th March 1781; Fac. In the Faculty Report the discrepancy is erroneously stated at 7 merks 8d. In Morison's Dictionary there is a farther error in the descriptive, in stating the lands of Dreghorn at 20s. 8d. instead of 20s.

[3] Wight, p. 170.

[4] Fordyce v. Urquhart, 20th November 1767; F

are described as amounting to this same sum, and no value is put on the office at all, although it is mentioned, the retour will be sustained as evidence that the extent mentioned applies to the lands [1].

[1] Scot *v.* Tod and Millar, 20th February 1787; Fac. and Supplement to Wight, p. 25. Davidson *v.* Elphinstone, 9th March 1803; Fac. affirmed on appeal. By the descriptive in this latter case, the deceased died seised in 'quinq. merc. terrarum de Eister Glenboig, *alias*,' &c. 'una cum officio coronatoris,' &c.; and by the valent, 'terræ de Eister Glenboig,' &c. 'una cum officio coronatoris,' &c. 'valuerunt temp. pac. sum. quinq. merc.'

*Note of the Opinion of Lord President Campbell, in Davidson* v. *Elphinstone, from his Session Papers.*

'Respondent does not chuse to take the grounds suggested in my former 'notes, of objecting to the decision in the case of Mr A. Stewart, (Select 'Decisions, p. 156.), and perhaps he may be advised that it is better not to 'risk that ground; but, on the contrary, to maintain that the office was 'in fact not extended. But I cannot go along with him in this, being 'clear that it did make a part of the cumulo extent. Of this, the retour 'itself is decisive evidence. The valent clause is clear, and cannot be 'rendered otherwise by a reference to the descriptive clause, which is 'ambiguous, and still less by a reference to other retours. That offices were extended, appears from Mr A. Stewart's case and many 'others,—Case of Locharthur. But, perhaps the Court thought in Mr A. 'Stewart's case, that the petty office of coroner of the regality of Kilbride, created by the lord of regality, fell with the regality itself. Does 'it make any difference whether the office is put first or last in the retour?—*Hermand.* Good retour. Offices may sometimes have been extended, but oftener not, just like mills. When offices were retoured, it was '*debito exercendo sui officii.*—*Meadowbank.* Contrary. Offices extended. '—*Balmuto.* Lands alone extended.—*Craig.* For sustaining the objection. '—*Methven.* For repelling the objection; true it is extended, but it is to 'be presumed that it was *valere se ipsum*, where something else was added 'to the office besides the fees.—*Justice Clerk.* In cases upon Lennox retour, valent was explained by descriptive clause; valent did not mean 'to take from the lands and add to the office.—*Woodhouselee.* Descriptive 'clearly applies to the lands alone.'—'*9th March* 1803, Repel the objection.' The case was affirmed on appeal. In a late instance, a right of patronage was mentioned in the descriptive clause, along with various parcels of lands of different extents, but no extent was attached to the patronage. In the valent, the 'foresaid *lands*,' without any mention of the patronage,

In like manner, in the descriptive clause, certain different lands, parts of a barony, being specified as merk or shilling lands of a particular amount; and besides these a borough of barony, and also a town and fortalice, with gardens, mill, mill-lands, &c. being mentioned as parts of the barony, but not stated as of any particular amount; and, in the valent clause, 'eædem 'terræ *aliaque suprascripta*, cum pertinentiis,' being mentioned as worth a cumulo amount, which coincided within 4d. with the sum-total of the values of the shilling and merk lands, as specified in the descriptive clause; there was held to be sufficient evidence of the value attached to each of the shilling and merk lands [1]. In a case where, in the valent clause, a ten merk land was extended along with a pendicle of land, to ten merks; and, in the descriptive clause, the ten merk land was described as of that amount, and the pendicle, although mentioned, was not stated as of any particular amount; the Court, before answer, allowed a proof that the pendicle was comprehended in some lands named in the claimant's charter, and afterwards found it proved, that it formed part of the ten merk land, and sustained the qualification [2]. Where certain lands and an office were retoured *in cumulo* in the valent clause at eleven merks, and in the descriptive, the lands were described as worth five merks, and no value was put on the office, although it was mentioned, there was held to be no sufficient proof that the lands afforded a qualification [3].

If the valent clause bears, that the half of certain lands is worth a particular amount, that will not be held evidence that the *whole* is worth *twice* that amount, even although in the de-

were said to extend to twelve pounds, being the sum of the particulars mentioned in the descriptive. The Court held this retour good evidence of the particular extents of the lands in the descriptive; Montgomery v. Shaw, 1st June 1826; Shaw.

[1] Maxwell v. Bushby, 13th July 1775; Fac.

[2] Abercromby v. Baird, 28th February 1753; Elchies, M. P. 55.

[3] Murray v. Clerk, 1774; Wight, p. 170.

scriptive clause the *whole* is mentioned as being of this double value [1].

One retour may be explained by the valent clause, but not by the descriptive clause of another. In one case, the valent clause of a retour bore, 'that the ten pound land of Eding-'ham and Culloch' was 'worth, in time of peace, the sum of 'ten pounds.' The *descriptive* clauses of two other retours were referred to, mentioning the lands of Edingham and Culloch, as each being five pounds. It was held that there was no sufficient evidence of the separate extent of Edingham [2]. But where the *valent* clause of a retour specified the extent of one of two parcels of lands, which were valued *in cumulo* in the valent clause of a separate retour, the extent of the other parcel was held to be determined by subtracting the specified value from the cumulo amount [3].

Although one retour may thus, under certain circumstances, be *explained and illustrated* by another, yet, in no case can a retour *ex facie* regular, and admitted to be genuine, be *redargued* by other retours, or by any extraneous evidence, where the allegation is that there is an error in the amount of extent [4]. This was held even in a case where there was a strong presumption against the accuracy of the valent clause, from a very small estate being rated at so high an extent as L. 50, and from this same estate being mentioned in other retours, as a *part* of a barony extending to only L. 32 [5].

[1] Macdowal v. Buchanan, 20th February 1787; Fac., and Sup. to Wight, p. 26.

[2] Montgomery v. Ainslie, 15th June 1813; Fac.

[3] Davidson v. Hill, 22d June 1802; Fac.—The following is a note of Lord President Campbell on the Session Papers in this case: 'If the matter 'were entire, it would be better to adhere literally and strictly to the 'statute. But the former decisions have allowed a latitude of construc-'tion, particularly Belsches v. Buchanan, 25th June 1790.' The case of Belsches is reported by Mr Bell, Elec. Law, p. 178. See also Scott v. Tod, *sup.*

[4] Chalmers, 28th July 1745; Elchies, M. P. 41.

[5] Gibson v. Adinston, 13th June 1818; Fac.

But, in another instance, where two retours were adduced to prove that certain lands were of a particular extent, the one retour, as was alleged, proving the value of one parcel of those lands, and the other that of another, the Court held it competent to allege certain inaccuracies in the detail of those retours, with the view of shewing that they in reality referred to the *same* parcel of those lands, and so did not establish a sufficient extent [1].

Where it is objected that the retour produced does not apply to the lands claimed on, the claimant may adduce evidence to prove their identity [2]. But, in a case where a person claimed on certain lands, stated in his charter to be of a certain extent, conform to a certain retour there described, and this particular retour was adduced, valuing those lands at that extent, the Court refused to allow an investigation of titles, with the view of shewing that the lands in the charter and in the retour were really not the same, holding the identity to be sufficiently made out, and the proposed investigation of the progress incompetent [3].

A single retour may be received as evidence of as many qualifications as it contains distinct lands of the requisite extent separately valued, according to the rules already laid down; and, on the other hand, it is not requisite that a vote shall be rested on one subject alone, instructed by a single retour, but it will be equally afforded by two or more parcels of lands of the requisite valuation, instructed either by a retour for each parcel, or by one for the whole [4]. A single retour, however, will not prove the valuation of more than one parcel of lands, unless the extent of such lands is *separately* stated, either in the valent clause, or, at least, in the descriptive clause, and supported by a cumulo valuation in the valent. Even

[1] Montgomery v. Ainslie, 16th November 1816; Fac.

[2] Govan v. Douglas, 4th March; Sup. to Wight, p. 7. Abercromby v. Baird, 28th February 1753; Elchies, M. P. 55.

[3] Fulton and Kibble v. Crum, 12th June 1821; Shaw, and Sess. Papers.

[4] Malcolm v. Allan, 23d January 1767; Fac.

an infeftment *pro diviso*, in the *half* of certain lands, the extent of the *whole* of which is established by retour, and is more than twice the requisite amount, will not afford a qualification [1].

By the act 16th Geo. II. c. 11. sect. 8, it is provided, as already mentioned, that 'no division of the old extent, made 'after the year 1681, by retour or otherwise, shall be held as 'evidence of old extent.'

Where a person was infeft in the *half* of certain lands, without specifying in the titles any particular half, and the extent of the whole of these lands was proved to be 20 merks; a voluntary contract, dividing the lands and extent, although *before* 1681, and possession following thereon, were found not to be of any avail in determining the extent of the half [2].

Trifling dismemberments, however, for the purpose of straighting marches, have not been held to be fatal to the valuation of lands by old extent. Thus, in one instance, the Court of Session, and afterwards the Committee of the House of Commons, disregarded the argument, that such dismemberments ought not to be allowed, because, if the old extent was only 40 shillings, the smallest alienation would reduce it below the legal requisite; and if higher, any division of old extent was prohibited by the 16th Geo. II [3]. In like manner, where, for the purpose of straighting marches which had been disturbed by a public road, two acres of a ten pound land, constituting 'not $\frac{1}{40}$th part of it,' had been disponed to a neighbour, principally for a price in money, although a very small portion of ground was also given in exchange, it was held, that the extent was not affected [4], although an at-

[1] Dickson, 9th July 1747; Elch. M. P. 48.

[2] Freeholders of Lanarkshire *v.* Hamilton, 7th February 1745.; Falc. Elchies, M. P. 31. See particularly the report in Elchies, 2*d volume*.

[3] Hamilton *v.* Bogle, February 1781; Wight, p. 287.

[4] Stewart *v.* Gordon, 11th February 1803; Fac. Note from the Session-Papers of Lord President Campbell: 'This is clearly a straighting of marches, 'and nothing more. It might have been forced by a process before the 'sheriff. The public burdens and valued rent, &c. remain as before. The

tempt was made to rear up an argument on the clause of the act 16th Geo. II.

Lands are not the only subject which has been extended, and is capable of being made the basis of a freehold qualification, although the act 1681 mentions that kind of subject only as giving a title to vote. According to Mr Wight, *land* has been interpreted as synonimous with *estate* [1]; and various other heritable subjects, capable of being held of the crown, and of being extended or valued, are held to afford a qualification. Mills have been sometimes retoured [2]; and there can be no doubt that they would be admitted as the foundation of a claim to be enrolled.

Fishings have also been extended and sustained along with lands, as the foundation of a freehold qualification [3]. They are equally capable of being made the *sole* basis of a vote [4].

An obsolete heritable office, although retoured of the requisite extent, will not afford a qualification [5].

The general rule is, that lands, of every description, holden of the crown, when retoured of the requisite extent, give the right to vote. Attempts, however, have at different times been made to establish exceptions to this rule. Thus, in the case of lands which have formerly constituted a part of the patrimony of the church, it has repeatedly been argued, that the examples which occur of retours of such lands, do not afford evidence of that genuine extent which the Legislature had in view, in framing the statutes on the subject. The grounds of this argument will be found in the short account which has been already given of the mode of valuing church

' old extent, therefore, is not affected. See the words of the act 16th Geo. ' II. concerning dividing or splitting the old extent, in order to multiply- ' ing votes.'

[1] Wight, p. 203. [2] Wight, p. 172.

[3] Freeholders of Dunbarton *v.* Campbell, 10th July 1745; Fac.

[4] Gordon *v.* Duff, 7th August 1773, Fac. where the valuation was *valued rent*.

[5] Stewart *v. eund.*, 16th July 1756; Sel. Decis. See [the subject what subjects besides lands give a vote farther discussed below, under Valued Rent.

property [1]. The objection, however, has been repeatedly repelled; and it is now quite settled, that church-lands, of the requisite extent, afford an undoubted qualification [2], even where the old and new extent and the feu-duty are the same, the feu-duty being payable to a subject-superior [3].

Similar unsuccessful attempts have been frequently made to deprive retours of lands held of a subject-superior, of their authority as evidence of old extent. It has been maintained, that the ascertaining of the old extent of such lands was useless, as it was those persons only who held *in capite* of the Crown, that contributed to supplies, according to extent, whilst their vassals were liable to them in relief, according to their free rent. A brief directed from the king's Chancery to a vassal not holding of the crown, and service following thereon, it has been asserted, were anomalous proceedings, inasmuch as the Crown had no interest in the ascertaining of extent, when no tax could be raised according to it, and inasmuch as the subject superior of the vassal could not be bound with respect to any claim for his casualties, by measures to which he was in no shape made a party. The view which has guided the Court in such cases is, that the act 1474 directs all retours, without exception, to contain old and new extent, and that the statute 16th Geo. II. admits retours in general without distinction, as evidence of extent. Accordingly, in a variety of cases, the objection has been repelled [4].

There is a limitation, of the evidence of old extent afforded by retours, introduced by that part of the act 1681 which

[1] See p. 97. *et seq.*

[2] Kirkpatrick v. Irvine, 10th February 1747; Falc. Kilk. Retour 1. Moncrieff v. Erskine, 27th February 1761; Fac. Stewart v. Dalrymple, as decided in the House of Lords, 1st April 1762, where a contrary judgment of the Court of Session, 28th July 1761, Fac. Sel. Decis., was reversed. Cranston v. Gibson, 16th May 1818; Fac.

[3] Cranston *supra.*

[4] Abercromby v. Baird, 26th July 1753; Fac., and Kames Sel. Dec. Stewart v. Dalrymple, 28th July 1761; Fac.—Mackie v. Maxwell, 29th July 1761.; Fac. Cranston v. Gibson, *sup.*

provides, that the old extent shall be 'distinct from the feu-'duties in feu-lands.' This provision is understood to have originated in a clause of the act 1597, c. 277, which enacts, 'That all the stewards and baillies of onie part of his Heines 'propertie, sall, with all convenient expedition, cause retour 'the baill landes of the samin, everie ane within his awin 'boundes and jurisdiction, and that to the samin availe, quan-'titie and proportion, as onie uther landes lyand nixt adja-'cent to the same halden of his Majestie are set or retoured 'to; having, nevertheless, *ane speciall regard to the free rent 'that the feuars and rentallers hes of the same lands, besides 'their few-fermes and dewties payed be them to our Soveraine 'Lord.*' The meaning of this enactment appears to be, that, after deducting the feu-duty payable by the feuars of the crown lands, the extent of the remaining free rent was to be estimated in proportion to the retoured value of adjacent lands[1]. Hence, if it appears from any retours, that, instead of going through this prescribed process, the valuators have merely retoured the feu-duty payable to the Crown, as the old extent, then such retours have evidently not been framed in conformity with the injunctions of the act 1597. It was to guard against such erroneous retours, and to fulfil the intention of the Legislature in that statute, that the act 1661 provided that the old extent should be distinct from the feu-duties. In questions of this nature, the Court seems to have adopted the rule, that, where the feu-reddendo mentioned in the retour, and the old extent, are the same, or nearly so, and the feu-duty is payable to the Crown, there is no legal evidence of the old extent[2]. The foundation of this rule appears to be a presumption, that, where the feu-duty and old extent are the same, or nearly so, the jury have not observed

[1] See Mr Thomson's Paper in the case of Cranston, p. 66.

[2] In the case of Colquhoun v. Douglas, 18th June 1822, mentioned below, the Lord Justice-Clerk said, 'The result, therefore, is this; that, in 'all the cases as to feu-lands, where the old extent and the feu-duties 'were *nearly the same, or were the same*, the Court held, that there was no 'proof of the old extent distinct from the feu-duties.'

the directions of the act 1597, but have merely retoured the feu-duty as the extent, or have, by some process or other, been guided by the feu-duty in retouring the extent. Retours liable to this objection appear under different forms. Where they bear that the lands 'are worth the *feu-duty*, and 'were of the same avail in time of peace,' then the objection is at once established. Where, again, a retour was framed in this manner, 'quod totæ et integræ prædictæ terræ valent 'nunc per annum summam septem mercarum et quadraginta 'denariorum usualis monetæ regni Scotiæ, et valuerunt 'tempore pacis summam antedictam;' and farther stated, that the lands were held feu of the king, 'pro annua solu-'tione summæ septem mercarum et quadraginta denariorum [1];' or where the retour was in these terms: 'quod dictæ terræ 'valent per annum summam 53 solidorum et 8 denariorum 'et tempore pacis tantum,' and bore, that the lands are held feu of the king, 'pro solutione 53 solidorum et 8 denariorum 'monetæ Scotiæ,' &c. 'una cum 2 solidis mon. anted. in novam 'augmentationen rentalis dict. terræ [2];' or, where the old and new extents were L. 7 : 6 : 8, and the feu-duty L. 7, with 6s. 8d. of augmentation [3]; in these and similar cases [4], it was held not enough that a *distinct* answer had been given to the question regarding the old extent; and the extent was held not to be *distinct* from the feu-duties in the sense of the act 1681.

[1] Kerr v. Redpath, 10th November 1747; Elch. M. P. 49. The extent is erroneously stated in the report at 7 nierks 4d. The statement in the text is corrected from the retour.

[2] Freeholders of Perthshire v. Macara, 24th June 1747; Falc. 1. 266.; Kilk., p. 497.

[3] Freeholders of Linlithgowshire v. Cleland, 14th June 1746; Falc. i. 138.

[4] In the case of Dickson of Newbigging, 10th November 1747; Elch. M. P. 49, the old and new extent, and feu-duty, were each L. 6, and the augmentation 6s. 8d. In the case of Gray v. Dickson, 16th January 1823; Shaw ii. p. 130. (in absence), the old and new extent were L. 5 : 3 : 4, the feu-duty L. 5, and the augmentation 3s. 4d.

The same judgment was given where the new extent was stated at L. 4, 5s., the old at L. 4 : 3 : 8, and the feu-duty at L. 4, 5s. [1]

From what has been said, there appears to be no foundation for the interpretation which has been put upon the clause of the act, and upon the decisions quoted above, according to which, it is held that the extent must amount to 40s., after *deducting* the feu-duty. The *deduction* was not to be made in that stage of the proceedings, but at the time when the jury were retouring lands in obedience to the act 1597, at which period it was incumbent on them to estimate the 'feu-'rents,' previously *subtracting* the 'duties paid' to the king. The account of the matter given by Mr Wight [2], does not appear to bear the construction which has been put upon it. After quoting the act 1597, he says, 'it was reasonable that 'those who held their lands of the Crown in feu, should 'prove that their *free-rent*, after payment of their feu-du-'ties to the king, *was of that extent*, these feu-duties being 'no part of their estate,' which seems to be quite intelligible, upon the idea that the deduction was to be made by the jury [3].

[1] Colquhoun *v.* Douglas, 18th June 1822; Shaw i. 507, affirmed. If one were to indulge in speculation in this case, it might be conjectured, that the feu-duty had been formerly L. 4 . 3 : 8, and afterwards, by augmentation, at some renewal of the investiture, had been raised to L. 4, 5s. and that the jury had retoured the former as the *old* extent, and the latter as the *new*.

[2] Page 179.

[3] An argument in favour of this view of Mr Wight's meaning is derived from an opinion of that lawyer on a case submitted to his consideration; which case and opinion were annexed to one of the papers lodged in the case of Colquhoun *v.* Douglas *sup.* The question related to the estate of Glenmoriston. Two retours were said to contain, in the descriptive clause, certain parcels of forty shilling lands; and the old extent of the whole was stated in the valent clause at *L.* 27, and corresponded with the total amount of the particulars in the descriptive. The feu-duty was mentioned in the retour at *L.* 27 : 6 : 8. The old extent was thus *less* than the feu-duty; and yet Mr Wight, in his answer on this case, was of opi-

Although the Court has undoubtedly held that the old extent is not distinct from the feu-duties in the sense of the act 1681, even in cases where the old extent and feu-duties were not of the same amount, yet in those cases they were nearly the same; and the Court has not yet directly decided in any case that it is necessary, that more than 40s. should remain after deducting the feu-duty mentioned in the retour [1].

nion, that each parcel of forty shilling lands afforded a freehold. It will be observed, that there is a distinction between this case and that of Colquhoun, inasmuch as in the former the *particulars* of the old extent of the valent clause are stated in the descriptive; and this circumstance may be held to overcome the presumption, from the nearly coinciding value of the feu-duty and old extent, that the jury were influenced by the amount of the feu-duty in retouring the extent.

[1] See particularly the opinion of the Court in the Faculty Report of the case of Colquhoun *v.* Douglas, *supra*. The following views on this subject, from the manuscript of Lord Auchinleck already alluded to, are very interesting; and, it will be observed that he says not a word as to the necessity of any *deduction*. 'In the act 1681,' says his Lordship, p. 13, 'it is 'said, that the old extent must be distinct from the feu-duty in feu-lands; 'which is a passage some people are apt to mistake. But, when it is ex- 'plained, it will appear to be quite obvious. In order to this, it is proper 'to observe, that it came to be a practice when lands held feu, the inquest, 'in answer to the question, *Quantum terra valent nunc, et quantum value- 'runt olim et tempore pacis*, very improperly returned their answer, *valent* 'the precise sum that they were bound to pay of feu-duty, *et tantum va- 'luerunt tempore pacis*. It is obvious that this was a most absurd answer 'to the question put by the brieve, and truly was answering cross pur- 'poses. For the question was, what the lands were worth according to 'the old extent or tax-roll of Scotland, and according to the new extent, 'which was appointed afterwards to be contained in every retour; where- 'as the answer given, that the superior was entitled to a certain feu-duty, 'both in time of war and in time of peace, was no answer to the question 'put. However, as this had come to be a general practice, it occurred to 'the Parliament 1681, that, when they were to fix the qualification of an 'elector at forty shillings of old extent, it was necessary to guard against 'this kind of improper old extent, which was to be met with in feu-lands, 'lest a trifling property, suppose an acre of ground only, which paid forty 'shillings Scots of feu-duty, should have entitled to a voice in the elec- 'tions, upon the faith of one of these blundering retours; and therefore 'the law requires that it shall be a proper old extent, not the erroneous

From this explanation it is evident, that it is from feu-duties *payable to the king* that the extent must be distinct; and, it has accordingly been decided, that, where the retour is that of a subvassal, and the duty is payable to a subject superior, no objection lies against it, even although the old and new extent, and the feu-duty, are all retoured as of the same amount[1]. Although there seems every reason to believe, that a retour, framed in such a manner, could not have proceeded on any

'extent taken only from the feu-duty; and, accordingly, in many cases 'there are feu-lands which have their old extent properly ascertained by 'a regular retour, and these lands entitle to a vote, although there may 'be also blundering retours, fixing the extent to the feu-duty; for it is 'proved by the regular retour, that they are a forty shilling of old extent, 'properly so called, which consequently is distinct or different from the 'feu-duty, or the extent taken from it. It is to be observed, that some 'retours of the blundering kind above mentioned bear expressly, that the '*valent* arises from the feu-duty by adding *tanquam feudifirma ex dictis ter-'ris debita*. Others of them make no mention of the *Feudifirma*; but when 'one sees the feu-duty mentioned in the retour, which it always is in the '*Tenend.* clause, and that it and the old extent and new all agree, this is 'sufficient evidence that the extent was taken from the feu-duty.

'It is a very nice question, how far, when a retour bears the old and 'new extent to be the same, it ought to be regarded as proof; because this 'has almost constantly proceeded from a blunder in the inquest; and if 'the retour *ex facie* appears to be blundering, it may well be argued that 'no regard ought to be paid to it. And in my own private opinion, every 'retour which makes the old extent and new the same, of lands which 'made no part of the old kingdom of Galloway, I should look upon as 'blundering: for it is absolutely impossible to suppose, that lands conti-'nued to be of the same rent from the time at which the old extent was 'taken up, to the time that the new extent was taken up; for that was a 'period of above 200 years; and it is well known, as was observed above, 'that the new extent was three, four, and even five times the old extent 'in different counties. But if the lands were part of the old kingdom of 'Galloway, and consequently it was altogether uncertain when the old ex-'tent of them was fixed, and therefore the disproportion between the old 'and new could not enter into the scale of evidence, I should, in that case, 'follow the authority of the retour, unless it happened that the lands 'truly held feu, and for the same feu-duty which was made the old and 'new extent. I have seen very old retours of Adamton, where the old 'and new extent are the same.'

[1] Gibson *v.* Cranston, *sup.*

accurate estimation, and that the jury had carelessly returned the feu-duty as the old extent; yet, as the clause in the act 1681 has been interpreted to relate to crown feu-duties, and as the statute 16th Geo. II. admits retours in general, without exception, the Court could hardly act otherwise than sustain such a retour as that in question.

### 2. *Of Valued Rent.*

The other measure established by the act 1681, of the valuation of the estate requisite for a freehold qualification, is the *valued rent;* to the history of which it will now be proper briefly to advert.

It has been already stated, that the present system of taxation by valued rent, was introduced in the year 1643. By act of convention in that year[1], an aid was imposed, and rolls of valuation were ordered to be drawn up, in each shire, by parishes, in framing which the commissioners were directed 'to informe themselffes of the iust and trew worth of every 'p̃soun or persouns thair p̃nt yeares rent of this crope and 'yeir 1643, to landward, as weill of lands and teinds as 'of any uther thing, whereby yeirlie proffeit and commoditie 'aryseth.'

In the year 1649, commissioners appointed by act of Parliament[2], were directed to inquire into the true worth of the whole rents within each shire; to rectify former erroneous valuations; to 'set down a roll for every paroch,' in every shire, consisting of various items; and then 'to cast up the totall 'of the valuation of the whole shire.' The valuation by old extent was revived, in one instance, in 1665[3], and was then abandoned for ever, in so far as regarded taxation. In 1667[4], the system of valued rent was resumed, and the com-

[1] 15th August 1643.
[2] 4th August 1649.
[3] 4th August 1665.
[4] 23d January, Act of Convention.

missioners were directed 'to consider the valuations of all 'lands, teynds, and other reall estate;' to approve of those where they seemed just; to value of new such portions of lands, as had formerly been valued together, from belonging to one proprietor, and were now in the hands of different proprietors, and, in general, to rectify erroneous valuations. From the original rolls, which are in few counties preserved, the cess-books have been drawn up; and, according to the valuations in these books, the land-tax is imposed, and the requisite value which affords a freehold qualification is estimated. Each proprietor's estate, although consisting of various lands, is generally valued in one sum in these books. Hence where purchases have been made, and it is intended to ascertain the requisite valued rent for a vote, it becomes necessary to have recourse to the Commissioners of Supply, for the purpose of having the total valuation divided amongst the portions into which the original estate has been separated.

As it thus appears that the Commissioners of Supply have important functions to discharge, in dividing cumulo valuations, and as questions are continually arising with respect to the regularity of their proceedings, it will be necessary to enter into some inquiry relative to the qualification of those commissioners, the constitution of their courts, the forms and rules which they must observe in framing their judgments, and the power of review of their proceedings possessed by the Court of Session.

Since the annual land-tax was made perpetual, under the power of redemption, by act 38th Geo. III. c. 60, commissioners, for the purpose of carrying that act into execution, are still appointed, from time to time, by acts of Parliament. A particular qualification is, however, attached, by the acts to the office, although the individuals are specially named. The statutes refer to the act 38th Geo. III. c. 5, by which the same qualification is imposed, which was required by the previous supply acts. It is required that those named shall be infeft in property or superiority, or possessed as

proprietor or liferenter of lands, valued in the roll of the county where they act at L. 100 Scots per annum[1], with the exception of the eldest sons and heirs apparent of persons so infeft, who are entitled to vote in those characters without farther qualification. Both superior and vassal are entitled to act on the same L. 100 of valued rent[2]. Two persons were also found entitled to act, in virtue of infeftments in the same lands, although neither held immediately of the crown, but were both removed several steps from it[3]. A penalty of L. 20 is imposed by the acts, for every 'acting' without this qualification, to be recovered in a summary way, at the suit of any heritor, before the county court, or Court of Session; and this provision has been interpreted in the latest judgment on this point, so as to inflict one penalty only for the appointment of a clerk, and the fixing of his salary, although two acts, but taking place at one meeting[4]. The penalty is recoverable, at the suit of any heritor, before the county court or Court of Session.

Besides the persons thus qualified, certain office-bearers of boroughs, if named or appointed in the statute, are entitled to act as commissioners; such are the provost, bailie, dean of guild, treasurer, master of the Merchant Company, deacon-convener of the Trades for the time being, of any royal borough, and any bailie for the time being of any borough of regality, or barony; and these do not require the above mentioned qualification in point of valued rent[5].

[1] The provision was enforced in the case of Gordon *v.* Forbes, 12th February 1766; Fol. Dict. iii. 410.

[2] Hay *v.* Hepburn, 25th July 1735; Fol. Dict.

[3] Gordon *v.* Anderson, 21st Jan. 1766; Fol. Dict. iii. 409; and Wight, p. 192.

[4] Macadam *v.* Logan, 25th July 1775; Fac. In the Folio Dictionary, the meeting is said to have been adjourned from one day to another, and still only one penalty was inflicted. It is added, that a different decision was given in two preceding cases, 1766, Gordon *v.* Forbes; Id. *v.* Forsyth.

[5] Sinclair *v.* Dean of Guild of Wick, &c. 1st January 1729; Fol. Dict. iii. 410.

By the later statutes naming commissioners, no one who has been an inspector or surveyor of assessed taxes, can act as a commissioner, although named.

The statute 38th Geo. III. c. 5, and the previous Supply Acts, since the year 1748, direct those named to take the oaths of allegiance and abjuration, and to subscribe the assurance. The question therefore arises, whether the proceedings of commissioners, who have neglected to take the oaths thus prescribed, are null; or whether the only consequence is, that those thus neglecting to qualify are liable in the statutory penalty of L. 20. The act merely directs the commissioners, before acting, to take the oaths, and does not declare either that the proceedings of those not complying with the regulation shall be null, or, as is the case with respect to their qualification of valued rent, that none shall be 'capable' of acting who do not qualify. Hence the true interpretation of the statute appears merely to be, that the penalty is incurred by neglecting the provision, but that the proceedings are not vitiated. This was the construction adopted by the Court, in the last reported case on the subject, after an inquiry into the practice in various counties, from which it appeared that the regulation was very generally neglected[1]. The same construction was also observed in an older decision[2]; although, in an intermediate case, in 1751, the other interpretation was followed[3]; but the recent occurrence of the rebellion has been supposed to have had some influence on the determination, and, at all events, the judgment was reprobated in the later case.

The last mentioned acts name the day for the first meeting of the commissioners, and empower them to appoint the sub-

[1] Campbell v. Macdowal, 20th February 1787, Fac.; and Supplement to Wight, p. 35. The point was not expressly decided, because the case was determined on another ground; but the Court took occasion to deliver their opinions unanimously to the effect stated in the text.

[2] Irvine v. Forbes, 1728; Fol. Dict. i. 153.

[3] Sutherland v. *eund.* 22d February 1751; Elch. M. P. 52; Falc. ii. 246.

sequent diets. The convener also may call a general meeting. A private meeting, not appointed in any of those ways, has no power to divide a valuation[1]. The proceedings, however, at such a diet, become valid, if referred to, and homologated by a posterior regular meeting[2].

By the Scots act 1706, c. 2, to which reference is made in the last mentioned acts, the commissioners are authorised to appoint their convener, *from time to time*, that is, whenever a vacancy occurs; and it has been decided that commissioners may remove their convener at pleasure[3]. In one case, the Court found that where there is no convener, a private commissioner may call a meeting[4]. Perhaps, however, the more

[1] Abercromby v. Leslie, 21st February 1753; Fac.; Id. Dec. No. xli. Cuningham v. Stirling, 9th January 1754; Fac.

[2] Campbell v. Stirling, 6th March 1754; Fac. Brodie v. Gordon, 20th July 1773; Wight, p. 194. Mr Wight, Ibid. however, mentions a different decision, Hope Weir, March 1768.

[3] Pulteney v. Gordon, *inf.*

[4] Pulteney v. Gordon, 24th December 1767; Fac. The following opinions, not before published, from Lord Hailes' notes, were delivered in this case:—

'*Coalstoun.*—Sir John Gordon was legally elected convener: he might, 'however, be removed. This Court has no power to inquire into the 'causes for which the commissioners removed him. The suspension 'could not replace Sir John Gordon, although it displaced Braelangwell 'for the time. In such circumstances any commissioner could have cal-'led a meeting *pro re nata*.

'*Monboddo.*—There have been extraordinary doings in this country, owing to the madness of elections; votes have been created, commis-'sioners of supply have been created. The commissioners had power to 'depose Sir John Gordon. When they named Braelangwell, they must 'have deposed Sir John Gordon. Here were two acts, the deposing of 'Sir John, and the nomination of Braelangwell. The nomination of 'Braelangwell was suspended, not the deposition of Sir John Gordon. 'The question comes to this, Whether may any one Commissioner call a 'meeting?

'*Hailes.*—A case like the present one must have occurred, when the 'convener was absent, or happened to die, at a time when an extraordi-'nary meeting became necessary. I fear that the Bar will not be dispo-'sed to give us much aid in pointing out precedents. Perhaps the most

advisable way is that which was adopted in a subsequent instance, in which an application having been made to the Court of Session, the Sheriff was empowered to call a meeting, at which the commissioners were authorised to choose a convener, and proceed to business; but the day named by the Sheriff having been too distant, the Lord Ordinary on the Bills, in vacation time, named an earlier day[1].

Although a meeting of commissioners stands regularly adjourned to a particular day, the convener may, notwithstanding, upon the application of any having interest in the matter for which the adjournment was made, call a general meeting on an earlier day[2].

The provisions with respect to the quorum of Commission-

'proper method of calling a meeting would have been, in consequence of 'an application to the Sheriff, whose duty it is to put the Commissioners 'of Supply in motion. At the same time I should think it hard to annul 'the whole proceedings of this meeting, which was numerous, and may 'be said to have acted *bona fide*. Sir John, indeed, did not summon the 'meeting *tanquam quilibet*, but in the character of convener, which did not 'belong to him. This false designation, however, is not sufficient to an-'nul the proceedings of the Commissioners, when met. Had the adjourned 'meeting indicted by Braelangwell's party been to some day before the 'Michaelmas head court, I should have thought that the meeting called 'by Sir John would have had less the appearance of *bona fides*. But it is 'to be observed that the commissioners had adjourned to a day after the 'Michaelmas meeting. This had the appearance of an attempt to prevent 'that division of valuation, to which Sir John Gordon and his friends 'were just as well entitled as Mr Pultney and his friends.

'*Elliock.*—Any commissioner may, *ex necessitate*, call a meeting, and any 'commissioner does in fact call such meeting.'

'On the 16th December 1767, the Lords assoilzied from the reduction, 'in so far as respected the alleged illegality of the meeting; and, on the '24th December 'adhered.' But they reduced the division made, in re-'spect that Glenurquhart ought to have had a share of the division of St 'Martin's.'

[1] Hog of Newliston, 11th March 1768; Wight, p. 194. In the Fol. Dict. it is said, that in this case the Court authorised the last convener to call a meeting; vol. iii. p. 410.

[2] Gordon v. Grant, 14th December 1756; Fac.

ers of the Scottish Supply Acts, of the year 1690, and of the preceding years, which are referred to in general terms, in subsequent acts, are variously expressed. In practice the commissioners act as if no particular quorum were necessary. In one or two cases[1], the Court of Session named five as the number who should meet[2].

The form of application to the commissioners to have a valuation divided, is by petition. A proof is then led by a committee of commissioners; a scheme of division is reported by them to a general meeting, who approve of it, if correct, and appoint the division to be made in the cess-books[3].

Although a variety of parties have a direct interest in a process of division, it is not held to be essential to call all those thus interested. Tenants, although taken bound to pay the whole or a part of the land-tax, need not be called[4]. And, where a vassal holding certain lands of a subject superior, valued *in cumulo* with other lands held of the crown, had obtained a division of the valuation, without calling the subject-superior, the latter failed in an attempt to reduce this division, although he insisted that as freeholds were now a valuable kind of property, he ought to have been made a party[5]. Every actual proprietor of land valued *in cumulo*, the land-tax of which has not been redeemed, has of course a direct and material interest in the division of this valuation. Freeholders at large, however, or Commissioners of Supply, have no title to urge as an objection to a division at the in-

[1] Earl Panmure *v.* Commissioners of Supply of Forfarshire, 15th November 1766; Fol. Dict. iii. 411. Stephen *v.* Abercromby, 21st June 1774, Ibid. Brown *v.* Hamilton, 6th December 1780, Ibid.; and Fac.

[2] This is the number mentioned in the act 1649; Mr Thomson's Acts, vol. vi. p. 496. In the Faculty Report of the case of Campbell *v.* Macdowal, 20th February 1787, it is said that the Court *seemed* to be of opinion that five were not necessary. See the Notes of the Opinions of the Judges, by Lord Hailes. See also Lord Kames' Statute Law abridged, p. 441, *et seq.*

[3] Bell's Election Law, p. 219.

[4] Wight, p. 196.

[5] Earl of Home *v.* Bloomfield, 24th July 1760; Fac.

stance of the superior, that the vassals have not been called, unless the objectors can shew that the division is materially erroneous [1].

In dividing valuations, it becomes of importance to ascertain what subjects were valued by the commissioners, under the early acts. In considering this subject we shall have an opportunity of seeing what subjects, besides lands, when valued, are capable of affording a right to vote.

The instructions which were given to the original commissioners were expressed in very comprehensive terms. Thus, in the act of convention 1643, directions were given to ascertain the true worth of the rents 'to landward, as weill of 'lands and teinds, as of any other thing, whereby zeirlie prof-'feit and commoditie aryseth [2].' In the statute 1649, the objects of valuation are stated to be 'money-rent,' 'victual,' ca-'sual rent' for 'salt, coal [3], salmond-fishing, and other fish-'ings in propertie, whereby there is yeirly benefit [4], &c.; and, in 1667, the commissioners are directed 'to consider 'the valuationes of all lands, teynds, and other reall estate [5].'

Mills certainly were valued in some instances; but it rather appears that this practice was not universal [6]. When valued, there can be no doubt that they afford a qualification. The titles of the claimant, however, must be so broad as, in the whole circumstances, to shew that he has right to the mill. Whether a disposition of lands carries a mill which is not specially mentioned, is a *quæstio voluntatis* [7]; and, in a

[1] Montgomery Cunningham v. Hamilton, 6th December 1780; Fol. Dict. iii. 409; Wight, 196.

[2] Mr Thomson's Acts, vol. vi. p. 30, 15th August.

[3] By a subsequent act, however, in 1681, it is declared, 'that coal 'and salt is not to bear any part of the supplie, providing always that the 'total of the shire be keeped entire, without any diminution.'

[4] Ibid. vol. vi. p. 496 and 498, 4th August.

[5] Ibid. vol. vii. p. 545, 23d January.

[6] See Wight, p. 199.

[7] Erskine, b. ii. tit. 6. sect. 5.

case of this kind, the Court was of opinion, that, if it appeared to have been the intention of the disponer to convey the mill along with the lands, provided it had not been established as a separate and distinct tenement before, a general disposition would carry it as part and pertinent; and decided that such a title did carry a mill [1]. It would seem, that, in one case, the Court, in considering the question whether a mill had probably formed part of a valuation or not, went into the distinction that mills enjoying a right of thirlage, as thus possessing a constant value, had probably been taken into account, whilst those supported only by voluntary customers were probably excluded, as their rent must have been of a precarious nature [2]. In this case, the Court thought that a part of the valuation of certain lands had arisen from the mill; and as the claimant had no right to this latter subject, his valuation fell below the requisite amount [3].

Fishings of various descriptions have been valued, and have been sustained as the basis of a freehold qualification. Salmon fishings are specially mentioned in the act 1649, already quoted. In one case, a claimant had right to lands of a certain valuation, and likewise to two half-nets salmon fishing, also valued, and unconnected with any lands belonging to the claimant; and it was found that the fishing might be taken into account, in making up the requisite amount [4]. In another case, a claim was rested partly on a right of white fishing in the sea, attached to a small fishing station, consisting of houses, yards, &c. for the whole of which, and not merely for the right of fishing, it was stated that the tenant paid rent. The subject was called the Boats of Doun, and was valued in the cess-books at upwards of L. 46. It was held to be a proper subject to give a right to vote [5]. Oyster

[1] Rose v. Ramsay, 17th June 1777; Fac.

[2] Abercromby v. Gordon, 10th August 1773; Wight, p. 200.

[3] Bell, p. 50.

[4] Freeholders of Aberdeenshire v. Fordyce, 10th July 1745; Falc.

[5] Gordon v. Duff, 7th August 1773; Fac.; Bell, p. 52; Wight, p. 199.

and mussel fishings, of which exclusive rights are granted by the sovereign, were also undoubtedly valued by the commissioners[1], and are fit subjects to be the basis of a qualification.

With respect to the question, Whether, in the division of a cumulo valuation, any part of it ought to be allotted to feu-duties payable to the superior, it is stated by Mr Wight[2], that, 'if the cumulo comprehends lands that were feued out 'before the general valuation, a part ought regularly to be 'allotted to the feu-duties payable for such lands, and the re-'mainder upon all the property land. But no instance can 'be given of allotting any part of a cumulo to feu-duties, 'where the feus have been granted since the general valua-'tion.'

With respect to the rule here laid down as to lands feued out before the general valuation, it may be observed, that some doubt occurs as to its application, from the nature of the directions given to the commissioners by the acts 1643 and 1649, upon the supposition that these directions were adhered to. The former of those acts directs that rolls shall be made for each person's rents, 'deducing off the saids rentis 'and commodities what is payit furth yr'off to ministeres, 'schoolmasters, superiors, taksmen, lyverenteres, colleidges, 'and (hospitals); whilk deductiounes (aff) the said lyveren-'ters, takismen, and superiors, shall be chargeit upon the 'said lyverenters, taksmen, and superiors, by articles apairt, 'togidder with any (other) rent, if any they have within the 'said paroshe.' Hence, by the directions of this clause, feu-duties, at least those payable to subject superiors, were to be *deducted* and charged on the superiors; and if we suppose that these directions were observed, such feu-duties could not have entered any cumulo with the lands themselves, and consequently ought not to receive a share of that cumulo when now divided. These feu-duties might, however, enter a cumulo composed of the *superior's* lands, and other sources of profit;

[1] Wight, p, 199. [2] Page 200.

and, where this appeared to have been the case, would be entitled, in dividing such a cumulo, to their share of the valuation [1]. Again, the act 1649 instructs the commissioners to state the value 'of all feu-duties or tak-duties payable to any 'person, his Majesty's duties excepted;' and they are ordered to prepare a roll for every parish, which is to consist of various *separate* articles, and, amongst others, of, 'fifthly, the 'feu and tak-duties, his Majestie's excepted, and what the 'same doth amount to;' and, 'seventhly, the duties paid to 'his Majestie's Exchequer, and the sum thereof.'

Where cess is levied from feu-duties, although it is the superior or any third party who has obtained right to such feu-duties, who immediately pays the cess, still it is the lands which in reality bear the burden of this cess; because it is out of the feu-duties that the superior or third party pays this land-tax. Now, the act 1681 bears, that every one is entitled to vote who 'stands infeft in lands liable in public 'burdens for his Majesty's supplies for L. 400 of valued 'rent,' holding of the crown. It is not said that the claimant must necessarily pay the whole or any part of these burdens. It is enough that the *lands* pay them; and, accordingly, a superior is entitled to vote on the lands which are held under him, although the whole of the cess may be paid by his vassal. Hence, where a subject had obtained a gift from the crown of the feu-duties of certain crown-lands in Orkney, and these duties and the lands were afterwards respectively valued in 1653, the proprietor of the lands, who was the true crown vassal, was found entitled, on claiming to be enrolled, to add to their valuation that of the feu-duties

[1] From an analysis which I have seen of the old valuation of Selkirkshire, of the year 1643, it appears that the commissioners in that county proceeded upon principles conformable to a considerable extent with the directions of the act 1643. The feu-duties and teinds are frequently deducted from the valuation of the lands. Sometimes, but not often, feu-duties are entered as separate articles; and even when this is not the case, their amount is stated as often as they are deducted, although not stated as separate articles.

paid out of his lands to a third party, who had right to them as being in the place of the king's original donatary [1]. As the whole cess was ultimately paid out of the lands, it was thought to be of no consequence in what manner it was divided amongst those who were immediately liable for it. The same principle was recognised in a subsequent decision[2]. It follows *a fortiori*, that, if the feu-duties payable to a superior from lands held under him, were valued, and the cess paid by him for those feu-duties, he would be entitled to add that valuation to the valued rent of the lands in making up a qualification. His right to vote would still be entirely founded on the lands held under him, because the cess which he would pay for the feu-duties would ultimately be derived from the lands.

But although the valuation of feu-duties may thus be taken into account in making a claim for enrolment on lands, a qualification cannot be rested either in whole or in part on feu-duties, where the claimant is not proprietor of the lands out of which those duties are payable. Questions of this kind have originated from the proceedings which took place at the Reformation, and subsequently to it, relative to church property. A considerable part of those lands which, on the abolition of popery, were forfeited to the crown, were erected into temporal lordships in favour of certain individuals, who were called Lords of Erection. After the general annexation to the crown in the year 1587 of church property, with the exception of erected benefices named in the act, Charles I. thought proper to institute reductions of those erections; and the matter was afterwards compromised by the Lords of Erection surrendering their superiorities into the hands of the King, they being allowed to retain the feu-duties. The vassals of these lords thus became crown vassals, whilst the interest of the former superiors was reduced to a mere right to draw the

[1] Freeholders of Orkney v. Trail, 23d February 1791; Bell, p. 58; Fac.
[2] Erskine v. Glasford, 18th January 1812.

feu-duties. In these circumstances, a claim of enrolment having been made, partly upon certain lands, and partly on certain feu-duties, of the nature just described, payable out of other lands, and valued in the cess-books, it was found that feu-duties, in this situation, were not such a subject as gave a right to vote [1]. A similar decision was given in a later case [2].

All the original Supply Acts expressly mention teinds as a subject of valuation; hence it cannot well be doubted they were taken into account. When drawn by a titular, they were sometimes, if not always, valued apart. In like manner, when let, the tack-duties payable to the titular were valued apart; and the remainder of the teind was valued *in cumulo* with the stock upon the vassal [3].

The questions respecting the right to found on valuations of teinds, in making up qualifications, are of considerable difficulty. Where lands have been valued without distinguishing between stock and teind, the heritor or superior is entitled to found on the whole valuation of the lands, although he has no heritable right to his teinds. This was

[1] Campbell *v. eund.* 17th January 1755; Fac. There is a note written on the Session Papers of Lord Kames, presented by his Lordship to the Advocates' Library, as illustrative of his "Select Decisions," which is well worthy of being transcribed. It is as follows: 'To vote, one 'must be infeft in superiority or property. The lord of erection, or 'his assigney, having right to the feu-duties, is infeft in neither. Feu-'duties are not the subject of feudal holding. It is only the reddendo 'of a feudal holding. The lord of erection is in the same case as if 'he had an assignation from the crown to the feu-duties; therefore 'he is not the king's vassal, but the king's assigney. If so, the lord of 'erection holds not this subject in superiority, because he has no vassal. 'He holds it not in property, because he has no superior.' In the report of this case, however, by Lord Kames (Sel. Decis.), it seems to be erroneously stated that the qualification was rested on the valuation of the lands out of which the feu-duties were payable. From the Faculty Report and the Session Papers, it appears that the feu-duties themselves were valued.

[2] Boyces *v.* Hamilton, 21st December 1780; Wight, p. 206.

[3] See the case of Gordon, 2d March 1753, as reported at length by Lord Elchies in his second volume, p. 275.

held in a case where the bishop, who had right to the teinds of certain lands, had let those teinds to the proprietor of the lands, who subset them to the same person to whom he feued the lands, and where, besides a separate valuation of the teind tack-duties, the lands were valued, without distinguishing between stock and teind, but, as the Court thought, taking the remainder of the teinds, after deducting the tack-duties, into account. The claim of enrolment was made by parties deriving right to the superiority by progress from the person who had feued the lands; and although neither they nor their vassal had any heritable right to the teinds, the Court thought that the lands were, as the act requires, liable in public burdens to the requisite extent [1].

Where teinds have been separately valued, and the proprietor of the lands from which they are levied has acquired an heritable right to them, he is entitled to found on the valuation of those teinds in conjunction with that of his lands [2]. This still leaves the question open, whether a claimant would be entitled to rest a qualification solely upon teinds out of another person's lands, and separately valued, because the preceding rule may be supported on the ground that teinds being a burden on the subject from which they are drawn, the lands are the true basis of the qualification, and the whole cess is truly paid out of them, although a part of it is nominally laid on the teinds. Mr Wight is of opinion that the teinds of another person's lands, separately valued, would afford a qualification as much as fishings [3]; although it is to be recollected, that feu-duties payable out of the lands of another have not been held a proper basis for a vote, and that teinds are regarded as a burden or servitude affecting lands [4], whereas fishings constitute a distinct estate. Even on

[1] Gordon v. Freeholders of Caithness, 2d March 1758; Elch. M. P. 57.

[2] Dunbar v. Sinclair, 29th January 1745; Falc., i. 61; Elch. M. P. 27.

[3] Page 202.

[4] Stair, b. ii. tit. 8. *initio*; Erskine, b. ii. tit. 10. sect. 1.

Mr Wight's view, it would follow that a feudal title by charter and sasine must be shewn to the teinds by the person who claims on them. A patron, whose right to teinds flows *ex lege*, would not be entitled to claim on them, because he is not *infeft* in terms of the act 1681. If it shall be held that the teinds of another person's land afford a qualification, when held of the crown by charter and sasine, then it will follow of course that no proprietor of lands can found on the valuation of his teinds, where another holds them of the crown by charter and sasine; because that other will be entitled to found upon them in making up a qualification. But, when no third party can shew such a feudal title to the teinds of lands, the proprietor of those lands ought perhaps to be entitled to found on the *separate* valuation of those teinds, although he himself has no heritable right to them, and although another may actually draw them, on a principle similar to that which entitles a proprietor to found on the separate valuation of feu-duties drawn by another from his lands. The following case occurred, under special circumstances. Certain lands, and the teinds of those lands, had been separately valued; and in a subsequent division in 1707, the two valuations had been thrown together, and then divided among certain parcels of those lands, the valuation being nominally put on the lands only. The superior of one of those parcels claimed to be enrolled, but could produce no infeftment in the teinds of his lands, although he maintained that they were carried by the expressions parts and pertinents in his titles, especially as his vassal was properly vested in the teinds. He also argued that the old valuation had been derelinquished for more than eighty years. It is uncertain upon which of the various grounds which this state of facts might suggest, the Court sustained the qualification [1].

[1] Edmonstone v. Morehead, 9th December 1790; Bell, p. 63; Supplement to Wight, p. 56; affirmed on appeal, 28th February 1791; see also the printed papers on appeal.

It thus appears that various subjects besides lands entered into the valuations of the Commissioners of Supply, some of which are capable of affording qualifications. With respect to lands themselves, the general rule is, that every description of that subject, in whatever situation it may now be, or may have been in time past, provided it holds of the King, and is of the requisite valuation, will afford a vote. Church-lands are expressly mentioned in the act 1681. Lands also, which had been mortified to a college, and held by it of the king for the reddendo of prayers and supplications, and were then alienated by the college, were found to be a proper foundation for a vote [1]. There is an exception, however, in the case of lands held of the crown by burgage tenure: these constitute a part of the patrimony of the burgh which is represented by its own member, and are incapable of affording a qualification for the representative of a county. This is the ordinary rule; but questions may occur as to the competency of the evidence by which the nature of the tenure is proposed to be established. These questions have been already adverted to [2].

With respect to the mode in which the commissioners must estimate the value of lands in dividing a cumulo valuation, the general rule is, that the real rents at the time of division must be ascertained [3]. The real rents must be duly ascertained by proof. Where two claimants were infeft, each in the *half* of certain lands, it was held not to be enough for the commissioners to take it for granted that each half was of equal value, without leading any proof as to the real rents, and to divide the cumulo upon that assumption [4]. In a case

[1] Dalrymple, &c. *v.* Reid, 4th March 1755; Fac. *supra*, p. 58.

[2] *Supra*, p. 39. [3] Wight, p. 197.

[4] Duff *v.* Abercromby, 10th February 1807; Fac. *Note of opinion of Lord President Campbell, from his Session Papers.*—'Half of a superiority 'pro indiviso. Division absolutely necessary, and not easily accomplished in 'this case, as the total is precisely L. 800, and not a fraction more or less

in which lands had been let on a nineteen years' lease, for a rent of L. 32, and a grassum of L. 100, it was found to be no objection to the qualification rested on these lands, that the commissioners, in estimating the rents, had paid no attention to the grassum, as it was urged, amongst other arguments, that the effect of taking the grassum into account would have been to increase the valuation [1].

If there has been a use of payment of cess in particular proportions for a term of years; the commissioners, upon a proof of this, may adopt it as the rule in making the division [2]. This rule of division evidently has a considerable advantage over that of the real rents; because, as the object ought to be to ascertain the portions of a cumulo as nearly as possible, in the same manner that they were estimated in the original valuation, the presumption is, that the cess has been paid according to the real value at the time when such payments commenced; and thus we approximate more nearly to the rule of the first valuation.

Although, by the original land-tax acts, the commissioners had power to correct former valuations, where erroneous, such a power would be quite absurd at present, because no evidence could now be obtained, according to which the accuracy of an old valuation could be estimated. Hence the

'to be allowed on either side. L. 400 is certainly the one-half of L. 800. 'But saying this is nothing at all, unless the lands are divided into two 'distinct parcels, and these precisely equal in point of value, *i. e.* real 'yearly rent,—measuring the extent of ground, and giving the same 'number of acres and roods, &c. to each,—will not do; for the east half 'may be very inferior in value to the west, and *vice versa*. Suppose two 'heirs-portioners, and the mansion-house lies to the east, the ground to 'the east must be laid off to the eldest, and to the other heir the west half, 'but this is only advancing one step. The actual division still remains 'to be made. No actual division here at all; and therefore the decisions 'quoted don't apply.—Query as to entail and multiplication of superiors. '—Case of Giffen in Ayrshire.'

[1] Boyd *v.* Abercromby, 10th August 1774; Fac.

[2] Galbraith *v.* Cuningham, 17th January 1755; Fac. Campbell *v.* Campbell, *eod. die.*; Fac.

power of the commissioners at the present day is limited to that of dividing cumulos; in the exercise of which they are not entitled either to increase or to diminish the amount of any existing valuation attached to any particular subject, whether that valuation be an original one, or the result of some after division. They are not entitled to throw together valuations, standing separately in the valuation rolls or cess books, into a new cumulo, and then again divide this cumulo, increasing the value of some of the parts beyond their former estimate, and diminishing that of others. In a variety of cases qualifications have been found bad, where the valuation of the lands on which the claim was made had been increased, in consequence of such an operation [1]. And this was held in two of these cases [2], although, in entries in the cess-books subsequent to the original valuation, but many years *prior* to the objectionable division, the originally separate values had been united in one cumulo; because, in such a case, there is no actual *change* on the amount of the first estimate, until the division assigning a different proportion takes place; and as long as the whole is in the hands of one proprietor, there is no interest to challenge the proceeding, and therefore no room for the plea of acquiescence. On the other hand, where, in consequence of the objectionable operation of the commissioners, the value of any of the subjects has been diminished below its original estimation, although the proceeding is incorrect in itself, still, as the qualification of the claimant on such subject is in fact made to appear less in point of valuation than it really is, the claim will be sustained, although the erroneous valuation is founded upon in evidence of the valuation, provided the true valuation is made apparent. This was held in the same circumstances which gave rise to one of

[1] Scott *v.* Trotter, 19th January 1781; Cunningham *v.* Maxwell, 20th February 1787; Boyes *v.* Freeholders of Renfrewshire, 16th February 1787; all detailed in Supplement to Wight, p. 43, *et seq.*

[2] Those of Scott and of Cunninghame.

the cases already alluded to, where, by one judgment, the Court sustained the qualification on the lands which had been rated at *less* than the original valuation [1], whilst, by another, they found the vote not good which was founded on the subject which had been overvalued [2].

It has sometimes happened that parties have entered into private contracts of division of their valued rent, and have obtained the approval by the commissioners of such divisions, without the leading of any proof. In two instances, both which appear to have come into Court by complaints, and where the private arrangement did not appear to be liable to any suspicion of improper design, the Court of Session refused to inquire into the grounds of the division [3]. In a late case, where it was objected to a decree of division that it had proceeded without proof, and bore *ex facie* to have been made of consent of parties, it was answered, that public burdens had been paid for many years prior to the division, on the principles recognised in it, which were not now alleged to be incorrect, and that, as it was *ex facie* regular, it could only be challenged by reduction. The Court held that the objection was incompetent, at least by way of exception [4].

Trivial errors occurring in divisions, which cannot have the effect of creating a greater number of freeholds than the total cumulo valuation affords, are not held to constitute fatal objections [5]. In such circumstances no one can be said to suffer from the mistake. In one case, where the rent of a garden and orchard, amounting to about two acres, had not been taken into account, and where the claimants had enough left,

[1] Scott *v.* Elliot, 17th January 1781; Sup. to Wight, p. 48.

[2] Scott *v.* Trotter; *Supra.*

[3] Lord Drummore, 26th February 1745; Elch. M. P. 37; Stewart and others *v.* Maxwell, 2d March 1754; Elch. vol. ii. M. P. 69; Bell, p. 199.

[4] Denniston *v.* Campbell, 7th July 1824; Shaw and Fac.

[5] Wight, p. 198.

after making allowance for this omission, the qualifications were sustained[1]. The same rule was even followed in a case where, if the error had been regarded, one of two freeholders would not have had enough left. In this instance a gentleman had valuation to the extent of L. 800 Scots, and was himself enrolled on a cumulo of L. 423 : 17 : 8½. Wishing to convey a liferent qualification to another, he applied to the commissioners to divide this cumulo, so that along with the rest of his valuation, he might be able to convey a sufficient qualification to the other person, and at the same time retain enough himself. The cumulo of L. 423 : 17 : 8½ was accordingly divided into two portions of L. 400, and L. 23 : 17 : 8½; but it was ascertained that 7s. 7d. too much had been given to the larger portion, and 7s. 7d. too little to the smaller. The Court, however, overlooked this error, and sustained both qualifications[2].

Where errors of such magnitude have been committed in divisions, as would, if brought forward in due time, have proved fatal to the decrees, parties have, by long acquiescence, been held barred from afterwards stating objections founded on those errors. The fact inferring acquiescence has usually been payment of cess conformably to the erroneous division, although other circumstances have also occasionally led to the same result. It is not requisite that this acquiescence shall have taken place for so long a period as the years of the long prescription of forty years, and the shorter periods which have been held sufficient have varied in different cases. The errors which had occurred in the divisions have also varied. In one case, where it was alleged, that, in dividing a cumulo, the commissioners had omitted giving any part to certain lands and a mill, which were included in the subject of the cumulo,

[1] Grant v. Earl of Fife, as decided in the House of Lords, 11th March 1773, reversing a judgment of the Court of Session of 31st July 1772; Fac.

[2] Gordon v. Fairie and Falconer, 11th March 1819; Fac.

it was held that payment of cess on the footing of the division for twenty years, was sufficient to bar challenge [1]. In another case, where, in dividing a cumulo of L. 680 : 2 : 2, L. 21 16s. 4d. had been allotted to one of the parcels of land beyond its due proportion, acquiescence for twenty years, by paying the land-tax on this footing, was found to exclude objection [2]. In three cases where the error consisted in having thrown together separate valuations into one cumulo, and in having them divided of new; payment of the land-tax, according to the new division for twelve years, was held, in the first of these instances [3], by a judgment of the House of Lords, reversing a contrary decision of the Court of Session, to infer acquiescence, and to bar challenge; in the second [4] instance, a similar payment for sixteen years; and in the third instance [5], long silence during thirty-seven years, and acquiescence in previous enrolments, in virtue of the division, the land-tax having been paid by one person for the whole lands, were held in the Court of Session to exclude challenge.

In evidence of the valued rent of an estate, on which a vote is claimed, it is not necessary that the cess-books themselves, or extracts from them, shall be produced to the meeting of freeholders; all that is required is a certificate under the hands of two Commissioners of Supply, and of the clerk [6]. This evidence, however, may be disproved by the books themselves, with which it is necessary that the certificate should agree [7].

[1] Earl of Fife and Others *v.* Duke of Gordon and Others, 16th June 1774; Fac.

[2] Ferguson *v.* Shaw Stewart, 25th July 1780; Wight, p. 201.

[3] Douglas and Milne *v.* Elphinston 1768; Sup. to Wight, p. 49.

[4] Blackwell *v.* Smith, 4th July 1822; Shaw.

[5] Campbell *v.* Spears, 14th December 1790; affirmed on Appeal.

[6] Campbell and Graham *v.* Muir, 5th Feb. 1760; Fac.; Wight, p. 201.

[7] Wight, p. 201.

The certificate must shew a separate valuation attached to the lands upon which the vote is claimed. A *pro indiviso* right in the half of an estate having an undivided cumulo valuation, will not afford a qualification [1]. Such a right, indeed, cannot even be made capable of giving a vote by division of the valuation, because a *pro indiviso right* is incapable in its own nature of affording a vote; and because the process of division of the valuation cannot take place until the lands themselves have been divided, so as to ascertain the parts of the estate to which the portions of the cumulo valuation are to be attached. Hence, a person being infeft in certain lands held of the Crown, and possessed in such a way that they could not be distinguished from certain other lands, having a similar name and description, holding of the Prince, and in possession of the same vassal; a division of the cumulo value of these lands, proceeding on their respective valuations of extent, was held inept, as the subjects to which the portions of the valued rent were respectively attached had not been separately ascertained [2].

In a case where, *ex facie* of the titles, two persons appeared to be infeft each in a certain *specific half* of an estate, although it appeared, that, in point of fact, no division of the property had been made, and where the whole estate was rated at an undivided cumulo of L. 800; one of these persons claiming to be enrolled was found to have no sufficient qualification [3]. The same judgment would have followed, even if the estate had actually been divided into the two halves mentioned in the titles, because, until the commissioners lead a proof of the real rents, and actually divide the cumulo, there is no evidence that one of the parts may not be more

[1] Stewart and Cunningham v. Pollock, 6th March 1760; Fac.

[2] Gibson v. Anderson, 29th June 1819; Fac.

[3] Duff, 6th December 1800, mentioned in Duff v. Abercromby, 10th February 1807; Fac.

valuable than the other, and entitled to a greater share of the cumulo.

Although the general rule is, that every subject on which a vote is claimed must be *separately* rated in the cess-books as of the necessary valuation, still it does not follow, that, when a person, possessed of a considerable valuation, disposes of a small portion, which clearly will be very far from reducing it below the requisite amount, such an alienation will destroy his qualification, although no new division is obtained. Thus, where a person stood on the roll on a valuation of no less than L. 1761 : 11 : 2, the sale of ninety-eight acres was held not to vitiate his qualification [1]. Sometimes small portions of ground are exchanged amongst conterminous proprietors, for the purpose of straighting marches. Such alterations will not affect the valuations of these proprietors [2]. This principle was held in a case in which so much as forty acres had been given away, and another piece of land had been received in return [3]. In another case, where it was objected, that, out of lands extending to L. 157 of real rent, L. 40 had been conveyed away, the answer was sustained, that although, in the decreet of division, the valued rent of the whole lot was mentioned, there was at the same time stated the real rent of each article composing the lot, from which, by a simple arithmetical calculation, the valued rent of any part of the property might be ascertained [4].

The general rule is, that, where there has been a cumulo valuation, and it is intended to found a qualification on a part of that cumulo, the actual decree of division ought to appear in the cess-books; but still, presumptive evidence, that a division has taken place, will in certain circumstances be admitted. Thus, where particular lands included in a cumulo, appear after-

[1] Suttie 1768; Wight, p. 284.
[2] Wight, p. 286.
[3] Skene *v.* Graham, 1768; Wight, *ib.*
[4] Scot and Kerr *v.* Elliot, 17th January 1781; *id.*, p. 285, and Fac.

wards separately entered in the cess-books as of a certain valuation, and there has been a use of payment of cess, conformable to the separate entry, it will be presumed that a division has taken place, although no evidence is now to be found of it, and a claim of enrolment will be sustained on such presumptive evidence [1]. The act 1681, indeed, does not point out any particular evidence of valued rent as being necessary; but merely provides that the claimant shall be infeft 'in lands 'liable in public burdens, for his majestie's supplies for L. 400 'of valued rent.'

The numerous errors which we have seen occurring in the proceedings of the Commissioners of Supply, plainly show the necessity that these proceedings should be subject to the review of the supreme civil tribunal. It would be unjust that one might be deprived, by such errors, not only of an important political privilege, but also of a valuable patrimonial interest, resulting from the high price which is now attached to an elective qualification. This power of review becomes the more necessary, when it is considered, that the divisions of valuation made by these commissioners, regulate a variety of other civil rights, such as the appropriation of commonties, the payment of schoolmasters' salaries, and other burdens. Notwithstanding these powerful reasons, the Court of Session were at first averse from interfering in the matter. In a case in the year 1751 [2], which came before the Court both in the shape of a summary complaint against proceedings of freeholders, and of a reduction of the sentence of the commissioners, which had been produced to the freeholders in evidence of the valuation, it was, on the one hand, maintained, that the

[1] Erskine v. Hope, 25th February 1790; Fac.; Sup. to Wight, p. 39. *Note from the Session Papers of Lord President Campbell*:—'The use of 'payment of cess for a long time conform to entries in collectors' books, 'presumes a regular division. See case of Trail.' Ogilvey v. Carnegie, 2d March 1796; Sup. to Wight, p. 41.

[2] Sutherland *v. eund.*, 8th February 1751; Elch. M. P.

Court of Session had no power to interfere with the sentence of a commission of Parliament, appointed to discharge an office peculiar to that commission, and, on the other hand, it was urged that the Court of Session was the supreme civil tribunal in all civil cases. The Court, moved by the difficulty of the question, waved deciding it, and determined the case on a different point. In another case [1], however, which came on a few days afterwards, in the shape of a complaint for refusing to enrol, the Court were reduced to the necessity of determining the question, and decided that they had a jurisdiction in reviewing the proceedings of the Commissioners of Supply, and sustained an objection to a division, founded on errors which had occurred in it.

The right of challenging decrees of division before the Court Session, is competent not only to those who were parties to them, and are therefore *directly* interested, but also to the freeholders in general, whether in a complaint, or in a regular process of reduction, where the grounds of challenge are not such as can be competently discussed in the summary process [2].

When the division of a cumulo has been made by a general meeting of the commissioners, and the decree appears *ex facie* regular, it can only be set aside in a process of reduction [3].

It has sometimes, however, been held that an exception to this rule exists, in so far as regards objections to decrees of division, which objections appear from any part of the books of supply. These, it has been maintained, may competently be urged by way of exception in a complaint. In one instance, indeed, the Court expressly proceeded on this principle. It was objected in a complaint, that the meeting

[1] Gordon v. Gordon, 12th February 1751; Elch. M. P.

[2] Their title to pursue the process of reduction will be afterwards more fully considered, in treating of the common law jurisdiction of the Court of Session in election questions.

[3] Wight, p. 185; Forrester v. Preston, 18th February 1755; Sup. to Wight, p. 28.

of the commissioners which had ascertained the valuation of a claimant, had been held in consequence of an adjournment from a *previous* meeting, where only one of the five commissioners present had taken the oaths to Government. This was an objection which, of course, could not appear *ex facie* of the decree challenged, but it must have been necessary to have recourse to the proceedings at the previous meeting, to prove that all the commissioners had not duly qualified. The Court held, that, if the objection could be established by a reference to any part of the books, it might competently be made in a complaint [1]. In one or two instances, also, the Court, in proceedings by complaint, gave effect to the objection, that the commissioners had disregarded previous separate valuations, and had divided cumulos on a different ratio, as if they had never before existed in a divided state; and, in doing so, it would seem that the existence of the previous separate valuation could not have appeared *ex facie* of the decree challenged, but must have been collected from previous proceedings [2]. In these instances, however, it does not appear from the reports that any plea as to the *incompetency* of the objection was stated. In a subsequent case, where the commissioners, disregarding a previous division in 1740, had divided a cumulo of new in 1753, the question as to the competency of taking this objection into consideration, in a summary process, was in the view of the Court; but from the

[1] Campbell v. Macdowal, 20th February 1787. The decision on the point mentioned in the text, does not appear from the Faculty report of the case; but is preserved by Lord Hailes in his Notes, vol. ii. p. 1023, as follows: '*Eskgrove.* If it appears from the books of the commissioners *who* were qualified, and *who* not, the complaint is competent. '—*Braxfield.* Whenever there is need to have recourse to extraneous circumstances, a reduction is necessary, but not so when the objection appears from any part of the books.'—'The Lords found the complaint 'competent.'

[2] Scot v. Trotter, 19th January 1781; Sup. to Wight, p. 43. Cunninghame v. Maxwell, 20th February 1787; *ib.* p. 45.

circumstances that the division in 1740 was thought not to be valid, and that the subsequent division in 1753 had been acquiesced in for thirty-seven years, the point was not formally decided [1].

In a very late case, a question occurred as to the competency of an objection to a decree of division, which, it was alleged, appeared from the books of the commissioners; but the averments of the parties were very contradictory. The

[1] Campbell *v.* Spiers, 14th December 1790. In the Faculty report of this case, it is said that it was 'understood, that, as the prior decree was sufficiently regular, it was competent, without any process of reduction, to challenge the subsequent one, in which it was disregarded.' From the following notes, however, of the opinion of the Court, from the Session Papers of Lord President Campbell, it will appear that this is not altogether an accurate account of the understanding of the Court.—'*Lord President.* The division 1740, if not by private meeting, was done without evidence of any kind. Procedure in 1753 more regular, and has continued the rule for near forty years. See case of Shaw Stewart in 1789, Wight, p. 201, where twenty years' acquiescence was held sufficient against a much worse objection. No *ex facie* objection to decree 1753, and must continue the rule till reduced. The original valuation was *in cumulo*, and doubt if division in 1740 could be regarded. Commissioners of Supply entitled to act to the best of their judgment, and not tied down to such rigid rules; neither could any injustice be meant. The whole valuation was L. 863, 18s. This fully sufficient for two votes, and it is not said that more than two have been made, or that the effect of sustaining this objection would be to bring the present claimant under L. 400. This always required in similar cases, and frivolous objections disregarded. Case of Elphinstone of Glack; Duff of Logie, &c.; Wight, p. 198. As to case of Trotter in Roxburghshire, four complaints, in which the objection was made and over-ruled in three of them, because it was understood to have no effect.—*Lord Justice-Clerk.* Must say that the objection brings him under L. 400. As to the question whether *ex facie* null, may take under consideration the valuation books. Incline to think it was a public meeting; but question in 1753 was how they should proceed. But having whole before them, judged better to take original cumulo. Judged rightly. Proceeding 1740 null, for want of proof. Supposing they had been wrong, yet as acquiesced in for thirty-seven years.—*Eskgrove.* Division 1740 clearly null. (Subsequent division), Continued the rule for thirty-seven years.—*Dreghorn.* The same.'

objection, as originally stated to the commissioners, was, that certain lands had been deducted from the cumulo as having been previously separated, although no evidence of this appeared from the cess-books. When the case came into the Court of Session by complaint, the shape which the objection assumed was, that it appeared from the books of the commissioners, not only that the lands which had been deducted had been separately valued, but that the valuation of the *whole estate*, forming the subject of the division, had been previously divided, from which it was inferred that the *new* division was incompetent. In answer, it was maintained in the Court of Session, that, when this objection was alluded to in the meeting of Commissioners, it appeared from the books of supply, which were on the table, that there was no evidence in support of the allegation that there had been a previous division of the whole estate; and it was farther maintained, that freeholders were only entitled to look at the books in which the results of decrees of division are entered, and not at any previous proceedings of the commissioners. It was replied, that freeholders are not limited to the examination of any particular book of the commissioners, but must have access to all the books of the commissioners, forming a public register, and to the records of their proceedings; and that the present objection would appear from the books of the commissioners: it also seemed to be denied that the books were on the table at the meeting. The Court held that the objection could only be made effectual in a reduction [1].

If the Commissioners of Supply should refuse to proceed in dividing a valuation, upon a proper application being presented to them, the Court of Session will, when called upon to interfere, ordain them to proceed with the division. A small estate having been divided amongst a number of purchasers, the Commissioners, upon an application to have the valuation divided, refused to proceed, being unwilling to split

[1] Sinclair v. Innes, 8th March 1826; Session Papers, and Shaw.

the land-tax into so many parts; but the Court of Session appointed the convener to call a general meeting to carry the division into effect [1]. The Earl of Panmure having granted liferent dispositions of superiority to twenty-two persons, the Commissioners declined dividing the valuation, on the ground that such a measure would occasion trouble in levying the land-tax, and that they were not called on to give effect to the creation of nominal and fictitious votes. The Court ordered them to proceed; and, on further delay occurring, pronounced a special judgment, precisely defining the mode in which they were to proceed, and ordaining, *inter alia*, the commissioners, or any five of their number, to meet on a given day, to take such proof as was offered, and to proceed immediately to make the division. When the proof had been led, the majority declared it insufficient; and the minority proceeded, in obedience to the order of Court, to make the division. The freeholders having refused to enrol the claimants who founded upon this division, the Court ordered them to be added to the roll [2]. In another case, a similar special judgment, ordering the commissioners to proceed, was pronounced by the Court. At the meeting, the majority stated various objections; and, amongst others, that all having interest had not been called. They, however, did not retire, but were present during the whole proceedings of the minority, and protested that the division made by them was null and void. The decree of division was sustained in the Court of Session [3]. In a subsequent question, a person having applied, twelve days before an election, which was to be on the 16th October, to have his valuation ascertained, the convener

[1] Malcolm and Others v. Commissioners of Kirkcudbright, 4th August 1757; Wight, p. 186.

[2] Earl of Panmure v. Commissioners of Supply of Forfarshire, 15th November 1766; Wight, p. 186; Bell, p. 229.

[3] Stephen v. Abercromby, 21st June 1774; Wight, p. 188; Bell, p. 231.

fixed the second day *after* the election. The petitioner applied to the Court, and the Lord Ordinary on the Bills, in vacation time, appointed the 12th of October for the meeting of the commissioners, or any five of them. Notice was sent to the commissioners at large, or to the convener; and, on the appointed day, a few commissioners ascertained the claimant's valuation to be of the necessary amount.' In a complaint at his instance against the freeholders, for refusing to enrol him, the Court ordered him to be enrolled, as it was not alleged that the commissioners had done any wrong, and as they had precisely followed the directions of the Lord Ordinary [1].

In concluding the subject of valuation, it is necessary to advert to an exception from the general rule in the case of the county of Sutherland, both as regards valuation, and as respects the manner of holding of the lands. In that county it had always been the rule for the vassals of subject-superiors, even when not possessed of the requisite extent or valuation, both to vote at elections, and to be elected as representatives.

By the act 16th Geo. II. these anomalies were, to a certain extent, recognised, but, at the same time, were reduced within certain bounds.

By that act [2] it was provided, that 'no person shall be capable to be elected commissioner for the said shire, or shall 'have right to vote at such election, unless he be infeoft, and 'in possession of lands liable to his Majesty's supplies, and 'other public burdens, at the rate of Two hundred pounds 'Scots valued rent.'

It was farther provided [3], that 'one person, and no more, 'shall be entitled to vote at such elections, or to be elected, 'in respect of the same lands; and that where lands are now

[1] Brown v. Hamilton, 6th December 1780; Wight p. 189; Fac.
[2] Sect. 19. [3] Sect. 20.

'holden by any baron, or other freeholder, immediately of 'the king or prince, such baron or freeholder shall be capa- 'ble to be elected, and shall be entitled to vote for those lands; 'and no vassal or subvassal of the said baron or freeholder 'shall have right to vote, or to be elected, in respect thereof; 'and that where lands are now holden, or shall at any time 'hereafter be holden, of the king or prince, by a peer, or 'other person, or body politic or corporate, who by law are 'disabled to be a member of the House of Commons, or to 'vote in such elections; in such case, the proprietor and 'owner of such lands, and not any of his superiors, shall be 'entitled to vote, or to be elected, in respect of the same lands; 'and that no alienation of the superiority to be made by such 'peer, or other person, or body-politic, incapable to elect, or 'to be elected, shall deprive the proprietor and owner of the 'lands of his right to vote in the elections for the said shire, 'or his capacity to be elected; nor entitle the purchaser of 'the said superiority to vote or to be elected; and that 'the property of lands, of the valuation aforesaid, holden, in 'part, immediately of the king or prince, and in part of a 'peer, or other person, or body-politic, incapable to elect, or 'to be elected, shall be a sufficient qualification to the pro- 'prietor and owner of such lands, and shall entitle such pro- 'prietor to vote, and to be elected for the said shire, any law 'or usage to the contrary notwithstanding.'

It was also enacted [1], that a roll of the voters should be made up for Sutherland in terms of this act, and of the other acts relating to county elections; which acts, it was provided, should extend to Sutherland, except where it was otherwise provided by the 16th Geo. II; and that this roll should be annually revised at Michaelmas.

[1] Sect. 21.

## Section 4.

### *Of Votes on Apparency, and in right of a Wife.*

The act 1681 has admitted one or two exceptions to the rule, that the freeholder must be infeft in the estate on which he claims a vote.

The first of these exceptions is in the case of apparent heirs. The statute gives the right of voting to 'appearand heirs, be-'ing in possession, by virtue of their predecessor's infeftment.' *In a legal sense*, an apparent heir is the person entitled to succeed to another on his decease, but who has not yet made up titles. Hence, if an estate is held in fee-simple, the heir of line is the heir-apparent; if it is held under a destination to a certain series of heirs, the heir of investiture is the heir-apparent, in so far as regards that particular estate. Where the series of heirs contained in an investiture is exhausted, the estate becomes vested in the last of these in fee-simple, and, on his death, goes to his heirs whatsoever. His heir of line is therefore heir-apparent. In a case where a person had disponed certain lands to his eldest son, and the heirs-male of the body of that son, and assigned the precept of a crown charter, obtained to himself and his heirs whatsoever, on which infeftment followed in the person of the eldest son, the second son was held to be entitled to be enrolled as heir-apparent of his brother on his death without issue, although an attempt was made to argue, that the right had reverted to the granter on the failure of the heirs of destination [1].

The general rule is, that the fact, that a claimant is really the heir of the person in whose right he asks enrolment, does not require the evidence of a service. It is enough that the freeholders themselves know the circumstance [2]. If a service

[1] Stewart *v.* Blair, *infra*.

[2] Wight, p. 249; Bell, p. 134.

should be produced to the freeholders, in support of a claim on apparency, they must hold it as decisive proof, and cannot listen to any allegation that a nearer heir may exist [1].

In one instance, where a person at an election meeting, held on the 23d July, had been enrolled as heir-apparent to his brother, who had died on the 13th of July, it was pled, when the case came into the Court of Session by complaint, that the wife of the deceased might have been pregnant when he died, as he was in the prime of life. It was answered, that the deceased had been married for several years without children; that his widow had now lodged in process a certificate that she was not pregnant; and that, since the election meeting, the claimant had been served heir to his brother. In these circumstances, the Court dismissed the complaint against the enrolment [2].

An apparent heir may claim enrolment equally upon bare superiority as upon the full right of property [3].

The act 16th Geo. II. c. 11. sect. 10, provides, 'that no 'heir-apparent shall be enrolled until his predecessor's *titles* 'are produced, and allowed by the freeholders as a sufficient 'qualification for his voting for a member of Parliament.' Hence the production of the ancestor's sasine only, although

[1] Don *v.* Rutherford, 5th June 1814; Fac.

[2] Stewart *v.* Blair, 12th February 1803; Fac.—The following Note, by Lord President Campbell, is written on the petition and complaint in this case: 'Colonel Blair died on 13th July, seven months ago. It ought to 'be pretty well ascertained by this time whether he left his wife pregnant 'or not. In fact, the respondent has been served. He therefore had the 'character of apparency in him.' On a reclaiming petition are the following notes.—'*Hermand.* For altering, and finding that the freeholders did 'wrong. *Justice-Clerk.* Same: we must take matters as they were. *Mes-* '*dowbank.* For adhering: I take matters as they stood; but what right had 'the freeholders to make inquiries, and to appear for a supposed child in 'utero? *Methven.* For adhering. Case of a peer different. House of Peers 'very cautious; because, if he were once admitted, he must sit during his 'life.'—'Refuse.'

[3] Murray *v.* Nelson, 5th March 1755; Fac.

the charter was afterwards exhibited in the Court of Session, was found insufficient [1]. The act 1594, c. 214, however, which declares, that, when a person, or his predecessors, have been in possession by infeftments for forty years, it shall not be necessary for them to produce the precepts on which such infeftments have proceeded, has been found to be applicable to a claim at the instance of an heir-apparent. This was held in a case where an apparent heir having claimed to be enrolled in 1780, and having produced two retours of the ancestor, and the sasines following on them, both dated in 1723, an objection, founded on the circumstance that he did not produce the precepts of sasine from Chancery, was repelled [2].

The predecessor, if he has acquired his estate by singular titles, must have been a year infeft, otherwise the heir must delay his claim until the necessary period has expired from the registration of the sasine, because it would be inconsistent that the heir should be in a better situation than the predecessor himself [3]. It is not, however, necessary that the predecessor shall have been actually upon the roll [4].

The qualification of the ancestor, when a claim is made upon it by the heir-apparent, is equally subject to investigation, when the former has been on the roll, as when he has not. He may have been admitted on an insufficient title; and it is proper that when a new enrolment is asked, the qualification should undergo a new scrutiny. In a case where a person claimed as heir-apparent in lands on which his father and grandfather had been enrolled, his title was rejected, because he failed in proving the necessary valuation [5].

The clause of the act of Geo. II., which has been quoted, requires that the predecessor's titles shall be allowed as a sufficient qualification, which seems to be equivalent to a declara-

[1] Moodie *v.* Baikie, 10th February 1781; Fac.
[2] Haldane *v.* Trail, 10th February 1781; Fac.
[3] Wight, p. 249.
[4] Ibid.
[5] Haldane *sup.* Wight, p. 248, and Fac.

tion, that, unless the predecessor could have been enrolled on these titles, the claim of the apparent heir cannot be sustained; and this, accordingly, may be laid down as the general rule. If, for instance, the predecessor's titles afford a right *ex facie* revocable, a deed of renunciation granted to the heir will not entitle him to be enrolled. In a case where a father had obtained a charter to himself in liferent, and his eldest son in fee, whom failing, to his second son, and reserving power to sell and alter the course of succession, and where infeftment had followed; the eldest son predeceased his father, who then executed a deed assigning his liferent, and renouncing his reserved powers in favour of his second son. The second son then claimed enrolment as heir-apparent to his brother, when it was objected, that the elder brother had no right to vote during his life, and that the renunciation of the reserved powers after his death could not avail the claimant; and the Court found that he had no right to be enrolled [1]. The principle on which the following case was decided, may serve to reconcile it with the general rule. The predecessor had not obtained a confirmation of his infeftment during his life, and his heir-apparent had expede a charter of confirmation after his death. In these circumstances, it was held, that, as confirmation operates *backwards* to the date of the sasine, the heir-apparent was entitled to be enrolled [2]. Where, however, the predecessor, after being en-

[1] Abercromby *v.* Gordon, 3d July 1753; Fac.

[2] Macdowal and Houston *v.* Hamilton, 19th January 1793; Fac.—*Note of the opinion of Lord President Campbell, from his Session Papers.* 'Respondent claims as apparent heir. The trust conveyances may be 'laid out of the question. But, *query*, Can he claim as apparent heir, when 'his father was never publicly infeft? Will the charter of confirmation, 'expede so late as 1789, being after old Aikenhead's death, supply this de-'fect? The confirmation draws back, and makes the infeftment public from 'the beginning. The intermediate death of the party infeft does not pre-'vent the operation of it. The objection seems, therefore, not to be good. 'Were the late Mr Hamilton now in life he would be entitled to be en-'rolled upon these titles:—*Ergo*, so may his son, or apparent heir.'

rolled on a valid title, has granted a disposition of his estate, containing procuratory of resignation, and has thus rendered his right defeasible, and in this situation has died; it is held, that the heir-apparent may be enrolled, if, from any circumstance, the right becomes, subsequently to the death of the ancestor, no longer defeasible. Thus, in one instance, a person on the roll had disponed his lands for certain uses to trustees, with procuratory and precept. After his death, the trustees were infeft base; and, for a sum of money, granted to the heir-apparent an obligation not to make their holding public. In these circumstances, the heir was found entitled to be enrolled on apparency [1]. In a very late case, a person on the roll disponed the lands constituting his qualification to his second son, with procuratory and precept. His eldest son died without issue; the second son, after being infeft on the precept, died, leaving a son, who was enrolled as heir-apparent to his grandfather, the disponer, and died without making up titles, also leaving a son. This last individual then claimed as heir-apparent to his great-grandfather the disponer, when it was objected to his title, that his great-grandfather's qualification became defeasible by the procuratory in the disposition which he had granted. It was answered, that the claimant alone had the power of executing the procuratory, as the heir of the original disponee, so that the right was not now defeasible by any third party; and the Court repelled the objection [2]. With reference to these cases, it may be observed, that where the ancestor has actually been on the roll, and the objection to his qualification arises, not from any defect in the title on which he was originally enrolled, but from a subsequent conveyance which he has himself executed, there is less reason for refusing to allow the defect of defeasibility to be remedied subsequently to his death, than for denying effect to a renunciation of a power of revocation, executed sub-

[1] Murray v. Nelson, 5th March 1755; Fac.

[2] Stewart v. Earl of Fife, 20th February 1827; Shaw and Fac.

sequently to the death of the ancestor, when the right to the estate in its original constitution was *ex facie* defeasible, and incapable of affording to the ancestor a qualification.

An heir-apparent is not deprived of the right to he enrolled without delay, by having made up titles as heir [1]. Where an heir is base infeft on a disposition from his ancestor, that circumstance will not affect a claim on apparency [2]; for in such a case the public right still remains *in hæreditate jacente* of the ancestor. But it would appear that the same rule would apply even where the heir has completed a public title on a conveyance from the ancestor; for an heir is not held to lose his privileges as such, in election questions, by having made up a singular title [3].

The other class of voters, who do not require infeftment, consists of husbands in right of their wives.

By the act 1681, 'husbands, for the freeholds of their 'wifes,' are entitled to vote. There is a farther provision on this subject in the statute 12th Anne, c. 6, the last section of which enacts, that 'no husbands shall vote at any ensuing 'election by virtue of their wife's infeoffments, who are not 'heiresses, or have not right to the property of the lands on 'account whereof such vote is claimed.'

By an heiress is understood a female who succeeds to an estate by *succession*, in virtue either of the ordinary operation of law, or of a destination in a standing investiture. With respect to a female who has acquired an estate by singular titles, Mr Wight lays it down [4], that the husband of such a proprietrix is not entitled, under the clause of the 12th Anne already quoted, to be enrolled. This point has, however, been subsequently decided differently. It will be observed, that the clause is alternative, declaring, that no hus-

[1] Galbraith v. Cunningham, 17th January 1755; Fac.

[2] See the case of Stewart v. Lord Fife, *sup.*

[3] See the case of Erskine Knight v. Robinson, 26th July 1786.

[4] Page 238-9.

bands shall vote in right of their wives 'who are not heiresses, 'or have not right to the property of the lands.' In a case where a father, having four daughters, had disponed his estate to the eldest, who thus held the property by a singular title, her husband was held entitled to be enrolled in her right [1].

The clause of the 12th Anne, already quoted, as well as the 5th clause of that act, necessarily imply that the wife in whose right a husband claims, even although she be an heiress, shall have been infeft before such claim is made; and the point has been so decided [2]. The question next arises, whether it is necessary that a year shall have elapsed from the recording of the infeftment, before enrolment can be claimed by the husband. On this point it appears necessary to distinguish between the cases where the wife's right to the estate is in virtue of singular titles, and where she is infeft as an heiress. In the former case, it appears to be held that a year must have elapsed. It is true there is a decision where a different doctrine appears to have been held; but its circumstances were peculiar, because the wife, besides having made up a singular title, also bore the character of an heiress. The father of the lady had been for many years infeft on a crown charter. On his death, his daughter served in general, as heir of tailzie, to her father, and also made up a title, by expeding a charter of resignation on which she was infeft. Her husband claimed on her singular title; then withdrew that claim, and asked enrolment on her apparency. The freeholders enrolled. In a complaint it was argued, that, as the ancestor's *sasine* only had been produced, the claimant had no right to be enrolled on the apparency of his wife, and that the Court could not now judge of any other title to be enrolled, as the claim on which the enrolment actually took place, was made on the apparency, and as, even

[1] Skene v. Sandilands, 25th January 1786; Fac.—This point was also decided in the case of Fraser v. Lord Woodhouselee, 19th June 1804; Fac.

[2] Hamilton, 19th January 1745; Elch. M. P.; Falc.

if it were competent to judge of the other title, that title could not authorise enrolment, as the lady's infeftment had not been a year on record. An opinion was expressed on the bench, that, as no claim is required to be lodged at a meeting for election, it was competent for the court of review to judge of any other title to be enrolled which the claimant might have; and that the rule of waiting for a year did not apply to a claim by a husband on his wife's infeftment. The complaint was accordingly dismissed [1]. If, however, it is to be held that this judgment supports the general doctrine, that a husband may claim on the singular title of his wife, where a year has not expired from her infeftment, it is expressly contradicted by a subsequent case, which establishes the contrary rule. In that instance, the Court held that the husband of a lady who was thought not to be entitled to the character of an heiress, had no right to be enrolled, where she had not been a year infeft. A proprietor had succeeded to his estate under a destination to heirs-male, and had then made a new destination to himself, and the heirs-male of his body, whom failing, to his eldest daughter, whom failing, to his second daughter. Upon his death his second daughter had served heir of tailzie and provision in general to her father, and been infeft. It was held, although with considerable difference of opinion on the bench, that her husband was not entitled to be enrolled before the expiry of a year from the infeftment [2].

[1] Dalrymple v. Farquhar Grey, 7th March 1781; Fac.

[2] Farquharson v. Ferguson, 11th March 1807; Fac.—The following Note of Lord President Campbell is written on the petition and complaint.

'FREEHOLDER.—*Husband.*—Case of Sandilands well decided; likewise 'case of Lord Woodhouselee, 19th June 1804. Mrs Fraser Tytler had 'been more than year and day infeft. Mrs Farquharson takes as a singu-'lar successor, and title as such necessary in her person. She cannot take 'as apparent heiress on her father's infeftment, and law of election looks 'to nothing but charters and sasines. No personal rights. Must take 'both act of Queen Anne and 16th Geo. II. together. Singular successor 'must be year and day infeft.—*Hermand.* Title good. 1. She is an heir-

The question, whether a year must have elapsed from a wife's infeftment as *heiress*, before the husband can claim, appears not to have been yet finally decided. The case of Farquhar Grey would decide it *à fortiori*, were not the effect of that case weakened or destroyed by that of Farquharson. On the one hand, it may be said, that it is hard that the husband of an heiress should be obliged to wait longer than an heir-apparent himself; and that the 5th clause of 12th Anne, which reserves the right of husbands to vote, in virtue of their wives' infeftments, any thing in that act notwithstanding, decides the point. On the other side, it may be argued, that it is settled that the heiress must be infeft, and if so, it may be doubted whether the first clause of the 12th Anne, which introduced the rule as to the lapse of a year, does not apply to such a case, and that the fifth clause might as well be held to save the husband of a wife, who takes by singular titles, as the husband of an heiress, from waiting a year.

On the supposition that the husband of an heiress is not bound to wait a year from his wife's infeftment, a farther question arises. It has been already seen, that, in the case of an heir-apparent, it is understood to be necessary, that, if his predecessor has not been a year infeft in lands acquired by himself, and not taken by succession, the heir must wait till the expiry of that period, before he makes his claim. There can be no doubt that the same rule would apply as to the husband of an heiress, with respect to her predecessor's sasine, because it would be absurd that she or her husband

'ess. 2. In case of wife, no time specified for infeftment.—*Justice-Clerk.* 'Contra. 1. Not heiress. Suppose she had been a son, must produce in- 'vestiture.—*Meadowbank.* She can never connect herself with father's 'infeftment in any form.—*Newton* and *Armadale* for repelling the objec- 'tion.—*Craig.* Same.—*Bannatyne.* Objection good.' '27th February 1807, 'Dismiss the complaint of the claimant.'

A petition against this interlocutor was presented, and answers ordered. On the petition there is marked, by the Head of the Court, 'See 'former notes. Not clear.'—'11th March 1807, Adhere.'

should be in a better situation than her predecessor himself, or than an heir-apparent in similar circumstances.

The meaning of the word *property*, in the 7th clause of the 12th Anne, which has been quoted above, has given rise to several questions. On the one hand, it has been maintained that that expression was opposed to superiority, as is the case in the act 1681; and that it was made requisite by the act of Anne, that the female, in whose right a husband claimed, should either be an heiress, or should have the substantial property of the estate, and not the bare superiority. On the other hand, it has been argued that the legislature had it in view merely to prevent temporary votes, such as liferents or redeemable rights, and not to exclude votes on superiority. In the first reported case in which the question occurred, it became unnecessary to determine the point, as the case was decided on a preliminary question; but the report bears, that several of the Judges expressed an opinion, that the objection to the vote, arising from the circumstance that a part of the qualification, on which the husband claimed, was a right of superiority alone, was well founded[1]. In a subsequent case, however, in which the question was brought to a decision, a great majority of the Court were of a contrary opinion. Certain superiorities having been there purchased by the husband of a lady, and added to the entail of the lands to which she had right, with the view of completing a freehold qualification, the right of the husband to be enrolled on those superiorities was sustained[2].

Although it was thus held that the word property, in the

[1] Nisbet v. Hope, 23d February 1790; Fac.

[2] Fraser v. Ld. Woodhouselee, 19th June 1804; Fac. On the petition and complaint there is the following note of Lord President Campbell:—'Part of the qualification is naked superiority. By the act of Queen 'Anne it is said, husband not entitled to vote upon this, unless wife had 'succeeded to it as an heiress. In case of Sandilands, wife had the full 'property, and was really an heiress.—See case of Nisbet v. Hope,

act of Queen Anne, did not exclude a husband's vote on the superiority of his wife, it was held, in a recent case, to disqualify him from voting on a liferent right, in his wife's person, by virtue of which, in addition to the full usufruct of the lands, she also enjoyed the power of burdening them with provisions in favour of younger children[1].

A husband may be enrolled, partly on lands in which he is himself infeft, and partly on lands in which his wife is infeft. This was found in a case where a husband claimed in part on lands in which his wife was infeft as an heir-portioner[2].

The statute 1681 farther gives the right of voting to those husbands 'having right to a liferent by the courtesy.' The courtesy is a liferent enjoyed by a widower, of all heritage in which his wife was infeft as an heiress, and not on singular titles, provided a living child has been born of the marriage, who is his mother's heir in that heritage[3]. All these requisites must of course concur, in order to entitle a widower to claim enrolment on the courtesy. Accordingly, in a case where a claimant's wife had acquired her lands, not as an

'23d February 1790; and see case of Sir John Paterson v. Ord, 1st Fe-'bruary 1781; Skene v. Sandilands, 25th 1786. Property not 'opposed to liferent, but to naked superiority. Meant a beneficial interest 'in estate. Mr Wight's opinion not supported by authority.—See conti-'nuation of Wight, pages 69, 70.' '20th January 1804. Order memorials.' On the memorials there are the following notes taken by the Head of the Court:—'*Cullen*. Word heiress not to be strictly interpreted; and as 'to property, it is not in contradistinction to *dominium directum*.—*Her-'mand*. Same. Case of Byron Gordon, and case of Erskine Knight. Sup-'pose Lord W. had kept this part of the qualification to himself, could he 'not have voted on that and his wife's right together.—*Armadale*? Same. '—*Glenlee*. Hesitate on word property.—*Meadowbank*. Think the word is 'in contradistinction to *dominium directum*.'—'19th June 1804. Repel the 'objection.'

[1] Macgowan v. Montgomery, 16th November 1822; Shaw; Fac.

[2] Hamilton, 19th January 1745; Elch. M. P.

[3] Erskine, ii. 9. 52. *et seq.*

heiress, but on singular titles, it was held that he could not be enrolled on the courtesy [1].

If a husband has been enrolled, during his wife's lifetime, on lands to which she has no right as an heiress, but merely in virtue of singular titles, he is not entitled to continue on the roll after her death, because there is no courtesy in such a case. But, if the enrolment has been made as husband of an heiress, he is entitled to continue after his wife's death, in virtue of the courtesy. This was held even in a case, where, although the wife had the character of an heiress, in regard to certain lands, by virtue of a marriage-contract, she had made up titles, not by service, but on a disposition from her father, on which titles, and without founding on the marriage-contract, her husband had been enrolled. It was found to be unnecessary for him to lodge any new claim of enrolment, although it was agreed that he should exhibit the marriage-contract, to entitle him to continue on the roll [2].

## SECTION 5.

### *Of Votes on Adjudication and Wadset.*

By the act 1681, adjudgers and proper wadsetters are admitted to vote; and their right is reserved entire by the subsequent statute of 12th Anne, c. 6, which declares that redeemable rights are incapable of affording a qualification. The subject of votes on adjudication is little more than a matter of curiosity, as there are hardly to be found on record any questions relating to the elective franchise, arising out of the rights of adjudgers. With respect to them, the act 1681 declares, 'that apprisers or adjudgers shall have no vote in the 'saids elections, during the legal reversion; and that, after

[1] Paterson v. Ord, 1st February 1781; Fac.

[2] Erskine Knight v. Robinson, 26th July 1786; Fac.

'the expiry thereof, the appriser or adjudger first infeft shall 'only have vote, and no other appriser or adjudger coming in '*pari passu*, till their shares be divided, that the extent or 'valuation thereof may appear; and that, during the legal, 'the heritor having right to the reversion shall have vote.' The first infeft adjudger is thus entitled to vote, after expiry of the legal period of reversion, whilst, during the currency of that period, the proprietor or reverser has the elective privilege. This mode of fixing the time, when the right of the one ceased and of the other began, was accommodated to the old state of the law, according to which the right of redemption by the proprietor was foreclosed on the expiry of the legal; and the adjudger's right becoming then absolute, and no longer dependent on the will of another, his title to exercise the elective privilege was admitted. For many years, however, the doctrine has been understood as established, that a process, called a declarator of expiry of the legal, is necessary, before the debtor's right of redemption is forfeited[1], at least within the years of prescription; and, on this ground, doubts have been entertained whether effect would now, in that state of the law, be given to the claim of an adjudger before such declarator[2]. The expiry of the legal is no longer to be viewed as the period when the right of the reverser ceases, and that of the adjudger is converted into a right of property; and, even after that event, the right of the adjudger is dependent on another, till the process of declarator is brought. In so far as regards the right of a reverser already on the roll to remain on it, it may be objected to an attempt to strike him off before decree of declarator of expiry of the

[1] Campbell v. Scotland and Jack, 7th March 1794; Fac. Ormiston v. Hill, 7th November 1809; Fac. See also Mr Bell's Commentaries, vol. i. p. 601, 4th edit., where, at the same time that the law on the subject is stated to be considered as settled, in conformity with these decisions, some doubts which have been expressed on this point in certain quarters are also noticed.

[2] Bell, p. 147–8.

legal, that his right remains as strong as it was before the expiry of the legal; and that the reason why the act 1681 gave the adjudger any title to vote at that period, was because the right of the reverser then ceased, and that of the adjudger became absolute and irredeemable, which is not the case at present. Even before the date of the decisions pronounced, according to the present views of the law, it was held necessary, in order to give effect to an attempt to turn a reverser off the roll, on the expiry of the legal, that the adjudger should have been in possession [1]. In opposition, however, to the arguments on this subject, founded on the new views of the law, it may be argued, that the provision of the act 1681 remains still unrepealed, and ought, therefore, to have effect given to it.

The statute gives the right of voting to the adjudger first infeft; but in a case where a sale of lands had been referred to arbiters, and after decree had been pronounced by them in favour of the purchaser, he had adjudged in implement, and was infeft, he was found entitled to stand on the roll, although creditors had adjudged and been infeft between the decree-arbitral, and his adjudication, as his right was held to draw back to the date of the sale [2].

The act 1681 also gives the right of voting to 'proper 'wadsetters, having lands of the holding, extent, or valua-'tion foresaid.' A proper wadset, in its true and original sense, is an impignoration of land, as a security for a sum of money advanced, under the power of redeeming the lands, on repayment of the loan, the rents being in the mean time held as in satisfaction of the interest of the money, without any after accounting between the parties. In process of time, however, and long before the date of the act 1681, the lands given in wadset came to be in reality *alienated*

[1] Home Campbell and Kerr *v.* Homes, 7th June 1748; Falc.; Elch.

[2] Hay and Cockburn *v.* Lord Drummore, 26th February 1745; Falc. and Session Papers.

to the lender, and not merely impignorated, although the power of redemption still remained; so that the right of the wadsetter before redemption was a true right of property[1]; and this is the nature of a contract of proper wadset at the present day. An improper wadset, on the other hand, is merely a right in security, where, although the lands are held till the money is repaid, yet a subsequent accounting takes place between the parties, the lender receiving any deficiency in the rents below the legal rate of interest of the sum lent, and repaying any surplus. The proper wadsetter, in short, takes the *risk* of the rents, and may gain or lose, as the case may be; the improper wadsetter gets neither more nor less than the just interest of his money.

It is the proper wadset only which gives the privilege of voting under the act 1681; and considerable difficulty often arises in distinguishing this right from improper wadsets, from those redeemable rights which are declared by the 12th Anne to be incapable of affording a vote, and from fictitious and temporary rights, created merely for political purposes.

It is settled by a variety of cases, that it is not essential to the constitution of a proper wadset, that the transaction shall be framed in the shape of a regular loan, where, on the one hand, a sum is advanced on that footing; and, on the other, the lands are regularly conveyed in security of this advance. Transactions have been sustained as wadsets affording a vote, where, *ex facie* of the deed of conveyance, the right was a formal alienation, not framed as a security for a loan, but granted either with or without a specific onerous consideration, and redeemable for payment of a certain sum of money. Thus a wadset, by a father to his second son, of a superiority yielding about L. 26 yearly, redeemable for 1000 merks, but not reciting any sum given or borrowed, was found to be a

[1] Ersk. ii. 8. 4.

good title to vote[1]. A conveyance, narrating, that whereas the disponee, 'has made payment to me of the sum of L. 20 'Sterling,' &c. 'therefore,' &c. 'I, by these presents, sell, an-'nailzie, and dispone' certain lands mentioned, which are declared to be redeemable at a certain term, or any other term thereafter, for payment of L. 20 Sterling, was found to be a good title to vote, both by the Court of Session[2], and by the Committee of the House of Commons, although it was argued that this conveyance was not of the nature of a wadset, but one of those redeemable rights which are reprobated by the act 12th of Anne. In the deed in this case, it will be observed that the word wadset did not occur.

In neither of these cases did the deeds contain what is called the clause of requisition, by which the lender is empowered to reclaim his money, and reconvey the wadset lands, and which it has been argued is essential to the constitution of a proper wadset right, as implying a loan. The like want was found not to be fatal in another case[3]. It is therefore settled, that this clause is not essential to the constitution of a wadset right, which will afford a vote. Indeed, it has been maintained that the clause of requisition is a modern invention, unknown in the original form of the wadset.

The preceding cases afford instances where the difficulty was to distinguish the rights from redeemable alienations, which do not afford a qualification. Instances have also occurred, where it was maintained that the rights claimed on were truly improper wadsets; and this has been especially the case where the superiority only of the lands has been disponed in wadset. Thus, in one case, the circumstances condescended on, as inferring that the contract was an improper wadset, were, that the lands were warranted to be at the en-

[1] Freeholders of Ross v. Monro, 18th July 1745; Elch. M. P. 40. Falc.
[2] Henderson v. Dalrymple, 7th March 1776; Wight, p. 241.
[3] Galbraith v. Cunningham, 17th January 1755; Fac.

try worth the interest advanced; that the greater part of the lands conveyed was mere superiority, the feu-duty of which was certain and invariable, and therefore gave no risk to the wadsetter; and that the casualties of superiority were payable to the reverser, contrary to the principle of proper wadsets, by which the wadsetter draws the whole profits of the lands. To these objections, however, it was held a sufficient answer, that the clause of warranty applied only to the entry, and not to the future; that the wadsetter was not bound to account for the feu-duties he drew, and had the risk of the rise and fall of the rents of that part of the lands which was conveyed in property; and that the casualties fell seldom, and were not looked to by the wadsetter. The wadsetter was found entitled to be enrolled [1]. In a subsequent case, also, where it was objected to a wadset of superiority, that the wadsetter ran no risk, as the feu-duties were certain, and it was answered that it could make no difference in a wadset of the property of lands, that the rents were well paid by good tenants, the qualification was sustained [2].

These cases, it will be also observed, establish that the wadset of a simple superiority constitutes a valid qualification, if the other circumstances of the contract do not give rise to objections.

In a case which occurred a few years ago, a claim of enrolment was made on a wadset of superiority, granted in June 1817, for an advance of L. 550, and yielding a feu rent of L. 5 per annum, which was held as in satisfaction of the interest of the sum advanced. The right contained a clause of requisition. The land was declared not to be redeemable till Whitsunday 1822. The qualification was held to be bad by the narrowest majority of the Court; the majority assign-

[1] Campbell v. Stirling, 6th March 1754; Fac. Mr Wight, p. 244, has expressed some doubts as to the propriety of this decision, on account of the casualties having been reserved.

[2] Grant v. Campbell, 22d February 1760; Fac.

ing as the grounds of their judgment, that the right 'was not 'a true wadset of a superiority, in which the annual product 'bore some proportion to the interest, so as to be included in 'the provision of the act 1681; but was a mere bargain to 'let out the privilege of voting at a particular election, and 'was therefore inconsistent with the principles of the election 'law.' The minority, on the other hand, held that the right was one of proper wadset, under the act 1681, and that the series of cases on the subject established the validity of the qualification [1].

The next question relates to the possibility of creating a right of proper wadset, under the burden of a liferent. The constitution of such a right has been attempted in various ways. Sometimes the subject has been conveyed in wadset to one person in liferent, and another in fee. At another time, the lands have been disponed to one in liferent, and to another in fee, but redeemable only as to the fee. And, lastly, an ordinary right of liferent has first been created, and then the fee has been conveyed in wadset, by a separate deed, to a different person. The objection to all such rights is, that the idea of a proper wadset being, that the wadsetter enters into possession of the subject, and draws the rents, as a surrogatum for the interest of money lent, a right burdened with a liferent can only admit of a nominal possession, from which no emolument accrues to the fiar during the existence of the liferent, although it is only with respect to the fiar in the last of the above mentioned methods, that the question as to the right of voting on such a title has been expressly decided. In the decision alluded to, a liferent of the superiority of certain lands had first been created in the person of one individual, and the fee had then been conveyed to another, redeemable on payment of L. 50, 'at the first term of Whitsunday after the lapse of 'two years from the death of the liferenter.' It was argued,

[1] Scott v. Lord A. Hamilton, 15th January 1820; Fac.

that, as the fee was burdened with a liferent, it was not such a wadset as could give a right to be enrolled; and the Court decided in conformity with that argument[1]. There are one or two other cases in which instances occurred of wadsets burdened with liferents; but the questions decided were mixed up with points arising out of other circumstances, so that no certain inference can be drawn from those decisions, as to the validity of such wadsets. Thus the superiority of certain lands having been conveyed to one person in liferent, and to another in fee, redeemable as to the fee, on payment of ten merks Scots, at the next term of Whitsunday, or any subsequent term, and the fiar having been enrolled on this title, it was argued in a complaint, 1*st*, That the right was not a proper wadset, but a sale, redeemable for an illusory sum, and reprobated by the 12th Anne; and, 2*d*, That, being burdened with a liferent, it was not capable of affording a vote as a wadset. The Court ordered the claimant to be struck off the roll, but the report does not bear upon which of the objections the judgment proceeded[2]. There is another case, in which there certainly is room for an argument, that a wadset burdened with a liferent, was held to be capable of affording a vote; but there were here, also, other circumstances which leave the exact grounds of the decision uncertain. A proper wadset had been executed in favour of one person in liferent, and of another in fee; and less than a year before the fiar claimed enrolment on that title, the liferenter had granted a renunciation of his liferent to the fiar. It was objected to the claim, that a year ought to have expired from the renunciation, as the claim was made, not as naked fiar, but as sole proprietor; and also that it was absurd to grant a *liferent* of a right redeemable *at any time*. It was answered, that the fiar had a good title to be enrolled, independent of the renunciation; and that the act 1681 does not distinguish

[1] Forbes v. Blair, 6th March 1789; Fac.

[2] Colquhoun v. Hamilton, 1st July 1773; Fac.

between wadsets under liferent, and those not so burdened. The Court found that the claimant was entitled to be enrolled [1].

Although a wadset, after the term of redemption is come, is dependent on the will of the reverser, yet it is understood still to entitle the wadsetter to vote, in virtue of the clause of the act 1681, which provides, that 'rights to vote, proceeding upon expired comprisings, adjudications or proper wadsets, shall not be questionable upon pretence of any order of redemption, payment, and satisfaction, unless a decreet of declarator, or voluntary redemption, renunciation, or resignation, be produced [2].'

A deed of renunciation by the wadsetter deprives him of the right of continuing longer on the roll. This follows from the clause of the act 1681, which has just been quoted. It is, however, a different question what is necessary to reinvest the reverser with the full right of property, and to restore him to the right of voting. Mr Wight throws out some doubts whether the same renunciation, which deprives the wadsetter of the elective franchise, does not reconfer it upon the reverser, and quotes a case in which the point underwent discussion, but was not brought to a decision [3]. As a wadsetter's right, however, perfected by a sasine upon a charter flowing from the reverser's superior, is a complete right of property, to the absolute exclusion of the reverser, during the not-redemption, it is contrary to feudal principles, that the reverser should be reinvested in any other way than upon a new right flowing from the superior. In practice, a renunciation is not held sufficient in such circumstances; and it rather seems now to be understood that a new investiture is necessary to restore the reverser to the exercise of the elective privileges [4].

[1] Colquhoun v. Urquhart, 23d February 1774; Fac.
[2] Wight, p. 241. [3] Lockhart, 1767; Wight, p. 246.
[4] See Sup. to Wight, p. 78; and Bell, p. 103.

The right of proper wadsetters to vote must be considered as an exception to the general rule, that rights of a redeemable nature cannot afford a qualification.

The statute 12th Anne, c. 6, provides that 'no infeofment, 'taken upon any redeemable right whatsoever, except proper 'wadsets, adjudications, or apprisings, allowed by the act of 'Parliament relating to elections, in one thousand six hundred 'and eighty-one, shall entitle the person to vote or be elected 'in any shire or stewartry.' The same principle is readily extended to reserved powers of revocation, and the general rule may be laid down, that the title on which enrolment is claimed must be absolute, and not defeasable at the will of the granter [1]. Thus, where a father had conveyed certain lands to himself in liferent, and his son in fee, but with a reserved power to alter, the son was found not to have a legal qualification, although the reserved power had been discharged more than a year before the claim of enrolment, because the discharge had not been put on record a year before that date [2]. In like manner, when the granter has reserved to himself an interest in the lands, amounting to an absolute controul over them, the disponee will not be entitled to be enrolled. Thus, where a father, in disponing certain lands to his son, had reserved his own liferent, and a power of alienating and burdening, without the son's consent, the disponee was found to have no valid qualification, although a renunciation of the reserved power had been granted, and put on record, one month before enrolment was claimed [3]. But, in a case where a father, in a disposition of certain lands to himself in liferent, and his son *nominatim* in fee, reserved a power to sell or dispone gratuitously, *during the minority* of his son, without his consent, and declared that it should not

[1] Wight, p. 226.

[2] Grant v. Hay, 14th January 1761; Fac.

[3] Dundas v. Craig and Freeholders of Stirlingshire, 17th January 1755; Fac. See also Abercrombie v. Gordon, 3d July 1753; Fac.

be in the power of the son, at any time during his father's life, to sell or burden without his concurrence, the Court held that, as the power reserved to the father expired at the son's majority, and before enrolment, and as the other restriction, if fatal here, would also be fatal to an heir of entail, the son was entitled to be enrolled when major [1].

It follows from this last mentioned case[2], and from the rule, that an heir under the strictest entail is entitled to vote, that any restrictions imposed by the granter of a disposition, which merely have the effect of limiting the exercise of the right of property, at least where the limitations are not greater than are usually imposed upon heirs of entail, will not interfere with the elective franchise. Although the disponee is debarred from selling, or from altering the order of succession, or from contracting debt, to affect the estate, his right to vote will not be impaired.

## SECTION 6.

### *Of the Oath of Trust and Possession, and the Objection of Nominality.*

THE subject on which a vote is claimed, must be in the possession of the claimant; and must be a true estate vested in him. Many statutes have been framed for the purpose of securing those requisites, and of meeting the various devices which the desire of political influence has introduced, with the view of multiplying votes.

The act 1681 simply provides, that the claimant shall be 'in possession' of the lands. This enactment, however, was

[1] Inglis v. Cunningham, 7th February 1809; Fac.

[2] See also the case of Goldie v. Gordon, 5th January 1762; Fac.; Wight, p. 227. The objection made in this case is stated in the Faculty Collection to have been *sustained*; but this is understood to be an error.

not calculated to secure completely the true and substantial nature of the freehold. Amongst other schemes, it would appear, that conveyances in trust, or redeemable for elusory sums, had been devised, in virtue of which the claimant expected to exercise the elective franchise, whilst the real interest in the lands was vested in another. To counteract those devices, the act 12th Anne, c. 6, was passed, which, besides some other provisions calculated to secure the same end, provided, that every elector, when required, should take the following oath :—'I, A. B. do, in the presence of God, declare 'and swear, that the lands and estate of , for 'which I claim to give my vote in this election, are not con-'veyed to me in trust, or for the behoof of any other person 'whatsoever; and I do swear before God, that neither I, nor 'any person to my knowledge, in my name, or by my allow-'ance, hath given, or intends to give, any promise, obliga-'tion, bond, back-bond, or other security, for redisponing or 'reconveying the said lands and estate, any manner of way 'whatsoever. And all this is truth, as I shall answer to God.' It was farther provided, that 'in case such elector refuse to 'swear, and also to subscribe the said oath, such person or 'persons shall not be capable of voting, or being elected at 'such election.'

This oath, however, it would appear was found insufficient to prevent the new modes of creating fictitious votes which were devised. By a subsequent act, the 7th Geo. II. c. 16, a new oath of the following tenor, was therefore substituted for the old one :—'I, A. B. do, in the presence of God, declare 'and swear, that the lands and estate of , for 'which I claim a right to vote in the election of a member to 'serve in Parliament for this county or stewartry, is actually 'in my possession, and do really and truly belong to me, 'and is my own proper estate, and is not conveyed to me 'in trust, or for or in behalf of any other person whatsoever; 'and that neither I, nor any person to my knowledge, in my

'name, or on my account, or by my allowance, hath given, 'or intends to give, any promise, obligation, bond, back-'bond, or other security whatsoever, other than appears 'from the tenor and contents of the title upon which I now 'claim a right to vote, directly or indirectly, for redisponing 'or reconveying the said lands and estate, in any manner of 'way whatsoever, or for making the rents or profits thereof 'forthcoming, to the use and benefit of the person from 'whom I have acquired the said estate, or any other person 'whatsoever; and that my title to the said lands and estate 'is not nominal or fictitious, created or reserved in me, in or-'der to enable me to vote for a member to serve in Parlia-'ment, but that the same is a true and real estate in me, for 'my own use and benefit, and for the use of no other person 'whatsoever; and that is the truth, as I shall answer to 'God.'

This oath is appointed to be taken[1] by 'every freeholder 'who shall claim to vote at any election of a member to serve 'in Parliament, for any lands or estate, in any county or 'stewartry in Scotland, or who shall have right to vote in 'adjusting the rolls of freeholders, upon the request of any 'freeholder formerly enrolled.' It is, by another clause[2], provided, 'That in case he shall refuse, if required, to take 'and subscribe the oath aforesaid, his vote shall not be admit-'ted or allowed, and his name shall forthwith be erased out 'of the roll of freeholders;' and the penalties of perjury are incurred by any one wilfully and falsely swearing and subscribing the said oath.

This statute also contains towards the end a general clause, enacting[3] 'That every freeholder in Scotland shall, before 'he be either enrolled or admitted to vote at any future elec-'tion, or meeting for enrolment, in any question for the 'choice of a clerk or preses, or other question whatsoever (if

[1] Sect. 2. [2] Sect. 3. [3] Sect. 10.

'required by any freeholder present), be obliged to take and 'subscribe the oaths appointed by law to be taken by elec- 'tors of members to serve in Parliament, when required so 'to do.'

The first of those clauses, it will be observed, provides that the trust-oath may be put, before voting in the election of a member, or in adjusting the rolls; the last enacts that the election-oaths generally, may be tendered to any one before he is enrolled, or votes in the choice of preses and clerk, or other question whatever. Hence a question arose, which was stirred on various occasions, whether the last mentioned clause ought to be held to have superseded the first, and to have rendered it necessary for a freeholder, when required, to take the trust-oath before the election of preses and clerk. This question, after some variation in the decisions of the Court of Session, was determined in the negative by a judgment of the House of Lords[1].

By the subsequent statute 37th Geo. III. c. 138[2], however, it is provided, 'That if any person *at an election* for a 'member to serve in Parliament for any county, shall offer 'to vote in the election of preses and clerk, it shall and may 'be lawful for any freeholder, to put the oath of trust and 'possession to him, *before* giving his vote, *in the same manner* '*as is now practised* after the preses and clerk are chosen.' This enactment, it will be observed, does not apply to Michaelmas meetings.

It is equivalent to a refusal, if the freeholder, when the oath is tendered, makes no answer, and leaves the Court[3]; or if, before it is tendered, he retires, comes in, just in time to

[1] 31st March 1773, reversing the contrary judgment of the Court of Session, in the case of Grant *v.* Duff, 24th February 1773; Fac. In the previous case of Fraser *v.* Gordon, 19th November 1768; Fol. Dict. iii. 422, the Court of Session had decided in conformity with the judgment of the House of Lords, in the case of Grant.

[2] Sect. 2. [3] Ferguson *v.* Campbell, 9th December 1780; Fac.

vote, and then refuses the oath, on the ground that it is too late to administer it [1].

A person who has voted in the choice of preses and clerk, and is then elected clerk himself, is not entitled to refuse the oath, on the ground that he has resolved not to vote in any other question [2].

If a freeholder has been enrolled on a large valuation, and parts with a comparatively small portion, clearly retaining enough to afford a legal qualification, it is not a refusal, in the sense of the statute, if he decline taking the oath, assigning those circumstances as his reason for so refusing [3]. The oath bears that the freeholder is in possession of 'the lands and 'estate of , for which *I claim a right to vote*;' which words are calculated to meet such circumstances as those just mentioned.

In one instance a freeholder, who had been enrolled on a wadset, and, after obtaining the right of reversion, had conveyed the fee to another, presented a petition to the freeholders to be continued on the roll, in virtue of the liferent. He was not present at the opening of the Michaelmas meeting, and his name was therefore not taken down in the minutes by the clerk; but having afterwards come in, without, however, qualifying himself for voting, by taking the oaths to government, and the trust-oath having been tendered to him, he left the room, saying that he was not a member of the meeting.

[1] Brodie v. Urquhart, 7th July 1784; Sup. to Wight, p. 83; Fol. Dict. iii. 421.

[2] Freeholders of Caithness v. Rose, January 1790; Sup. to Wight, p. 86; Fol. Dict. iii. 421.

[3] Gordon v. Heron, 25th February 1803; Fac. The report of this case bears, that it was observed on the Bench, 'That the blank in the oath 'ought to be filled up by the party himself, not by the person who calls 'the roll, who has no power to exercise his judgment about the matter. 'If the party acts improperly in filling up the blank, or swears falsely, he 'will be liable in the consequences of such conduct.'

In these circumstances, the Court held that his name ought to have been expunged from the roll [1].

The following case occurred under peculiar circumstances: The trust-oath having been tendered to a person on the roll, who said he was willing to take it, another freeholder proposed that certain interrogatories should be put to him; and upon his refusing to answer them, he was struck off the roll, but continued to vote under protest. The trust-oath having been again tendered, the president refused to allow it to be put, as he was not on the roll. He afterwards applied to the Court of Session to be replaced, when the gentleman who had tendered the trust-oath, appeared, and stated that the proposal of the interrogatories was the result of a previous concert to screen the other from taking the trust-oath. Of this averment the Court allowed a proof, which, however, afterwards failed [2].

It is not in all cases essential that the oath shall have been actually tendered to the individual, in order to authorise the striking him off the roll, as having acted in a manner equivalent to refusing to take the oath. In a case where notice had been given, that any one leaving the room, after voting for preses and clerk, should be held as having done so, in order to avoid the trust-oath, a freeholder, who left the meeting before it was tendered, was struck off the roll, as if he had actually refused it [3]. But, where a freeholder had left the meeting, before the notice was given, and, as it would appear, before the choice of preses and clerk, he was allowed to remain on the roll [4].

In another case, after the choice of preses and clerk, a mo-

[1] Macleod and Urquhart *v.* Rose, 12th February 1790; Fac.

[2] Anstruther Paterson *v.* Elliot and Rutherfurd, 12th February 1791; Sup. to Wight, p. 89; Bell, p. 365, *et seq.* Mr Bell says the proof was before answer.

[3] Turnbull *v.* Carnegie, 26th February 1796; Sup. to Wight, p. 88. Fol. Dict. iii. 422.

[4] Macdowal *v.* Maxwell, 24th December 1790; Sup. to Wight, p. 88.

tion was made for certain freeholders to take the trust-oath, and one of these parties left the meeting, after having voted in the choice of these officers. On the one side it was averred, that this individual had left the meeting before the motion for taking the trust-oath was made; whilst, on the other, it was asserted, that he left it upon that motion being made. The Court ordered him to be struck off the roll [1].

A person who is enrolled, in virtue of his wife's estate, is not bound to take the trust-oath[2]. He cannot swear, in terms of that oath, that the lands belong to him, and are his own proper estate; and it could not have been the intention of the legislature, in passing the act 7th Geo. II., either to deprive husbands of a right confirmed to them by former statutes, or to involve them in perjury.

The person who takes the oath swears that the estate is actually in his possession. Where the qualification is rested on an estate, of which the property, as well as the superiority, the liferent, as well as the fee, belong to the voter, the possession alluded to in the oath, of course means the actual natu-

[1] Dunbar v. Davidson, 20th January 1790; Session Papers, and Fac. Col. The following is a note on the Session Papers of Lord President Campbell:—'The cases of Mungo Campbell and Urquhart of Meldrum 'were decided upon a just construction of the act of Parliament. Where 'a person comes to meeting, and votes for preses and clerk, he thereby 'acts as a freeholder; and the fair presumption is, that he means to pro-'ceed farther, if not stopt by putting the trust-oath to him. In the case 'of Rose of Aitnoch, he did not vote for preses. I did not, however, ap-'prove of the decision in the case of Rose of Aitnoch. The respondent's 'construction would make the act of Parliament so far nugatory. It is a 'fraud against the law.—*Hailes.* Defect is in law.—*Henderland.* We can-'not go beyond the act.—*Swinton.* Contrary. Presumption is, that when 'he votes for preses, he means to do more; if go to the strict word, he 'has no occasion to go away. May say he does not mean to vote.—*Rock-'ville.* Same.' It ought to be mentioned that the interlocutor in the case of Rose of Aitnoch, here animadverted on, was altered by a subsequent judgment.

[2] Mackenzie v. Mackenzie, 23d February 1811; Fac.

ral possession of the lands by the elector, or by his tenants. But certain rights are capable of affording a vote, which do not admit of this natural possession. Thus the fiar of a property liferented by another, is entitled to be enrolled along with the liferenter, and is admitted to vote in his absence; yet while the liferenter lives, the natural possession of the fiar is excluded. In such cases, the possession required by the trust-oath, and by the act 1681, is merely such as the case admits of.

In the case of a superior, where the reddendum is of an elusory nature, and payable *si petatur tantum*, it cannot be maintained that he is not in possession, although he never levies such duties. The manner in which it is competent to freeholders to establish want of possession, shall be afterwards considered.

The person taking the trust-oath also declares, that he has not given any promise or back-bond other than appears from the titles, for redisponing the lands on which he votes, or for making the rents or profits forthcoming to the use of any other person. In one case, where a father had disponed certain lands to his son, who, after obtaining a charter from the crown, reconveyed the property to his father, retaining the superiority, it was held to be fatal to the claim of the son to be enrolled, that a claimant must be in a condition to swear that he has not made any disposition of the lands, or promise to that effect, other than appears from his titles [1]. In a subsequent case, where the right had been constituted precisely in the same manner, but the obligation to reconvey the property appeared from the titles, the qualification was sustained, there being no room in such a case to urge the objection on the trust-oath [2].

The person taking the oath farther swears, that his 'title 'to the lands is not nominal, created, or reserved in me, in

[1] Freeholders of Kincardineshire v. Burnet, 30th July 1745; Falc.

[2] Forrester and others v. Fletcher and others, 9th January 1755; Fac.

'order to enable me to vote for a member to serve in Parlia-
'ment, but that the same is a true and real estate in me, for
'my own use and benefit, and for the use of no other person
'whatsoever.'

The circumstances which have been brought forward as constituting the objection of nominal and fictitious, have been different at different times. At one time this objection has been maintained to depend on the unsubstantial nature of the right, in a pecuniary point of view, and to mean, that there was, in reality, no estate in the claimant, owing to the smallness of the return which he drew from his right. At another, it has been mixed up with an inquiry as to the nature of those rights to which the elective privilege was attached by the legislature; as, for instance, whether liferents of mere superiority were in the contemplation of the legislature, when, by the act 1681, the privilege of voting was conferred upon liferenters generally. In the course of certain important cases which depended in the House of Peers during the Chancellorship of Lord Thurlow, his Lordship took occasion, in more than one instance, to express his views of what constituted this objection. In one of those cases[1] he observed, 'It seems, therefore, upon every question of that sort that 'arises before the Court of Session, the single point for them 'to try is, not what is the extent of the estate, but whether it 'is vested in the grantee *bona fide*, and is a true and real es-'tate for his own use and benefit only, and for no other pur-'pose. For, if the *jus disponendi* remains in any other per-'son, it is in vain that the parchment conveys the right to the 'grantee: For the real use of the estate remains in another, 'and that objection is now competent.' And again, in another case, his Lordship thus expressed his views: 'It is said 'at the bar, that *nominal* and *fictitious* were terms undefin-'ed: I define it—the not being really the man he describes

[1] Case of the Honourable William Elphinstone, *infra*.

[2] Case of Sir John Macpherson, *infra*.

'himself to be. The counsel who said so, did himself define 'it in the next sentence very nearly, by *aliud agit aliud si-* 'mulat. He produces titles, which, on their face, import to 'convey an estate, but he has obtained them under circum- 'stances which, if disclosed, would shew that nothing like 'such a conveyance was in the contemplation of the granter 'or grantee.'

The question which has now nearly superseded all others on this subject is, whether the vote has been conveyed under such circumstances of mutual confidence between the granter and grantee, as to render the latter subservient to the wishes of the former in the exercise of the elective franchise, and to make it incumbent on him to abandon his right, when this may suit the pleasure of the donor.

Before, however, proceeding to inquire more particularly concerning the various circumstances from which, singly, or taken conjointly, it has been attempted to infer the quality of nominal and fictitious, there is a preliminary point which requires attention, relating to the means which a meeting of freeholders, or the Court of Session, are entitled to employ in investigating the existence of this objection.

About the time of the general election in the year 1768, the question occurred, whether it was competent to employ any other means than the trust-oath for investigating the quality of nominal and fictitious. This point arose in a case where the claimant rested his qualification on a liferent of superiority, conveyed to him by the Earl of Panmure, the feuduties payable by the vassal being only sixpence and two-thirds of a penny. The claimant took the trust-oath, and was enrolled. In a complaint it was maintained, that the qualification was nominal and fictitious; and the following particulars were referred to his oath, in proof of this allegation: 1*st*, That it had been transacted between him and Lord Panmure, that he should accept of the liferent, for the single purpose of creating a vote, in order to support his Lordship's

interest at the ensuing election. *2d*, That, at, or soon after, obtaining the conveyance, he had granted a back-bond, missive, or some other security in writing, obliging himself to denude in his Lordship's favour, when required. *3d*, That he paid no value for the conveyance granted to him. *4th*, That he received no revenue or profit of any kind in consequence of that conveyance. *5th*, That it had been made out at the expence of Earl Panmure, the granter; that the claimant neither had bestowed nor intended to bestow any expence, in order to render it effectual; that the titles never had been so much as delivered to him; and that he took no concern in the complaint then depending against him; and, *6th*, That he understood himself to be bound in conscience, and as an honest man, to renounce his liferent at any time Lord Panmure should ask it of him.

It was objected to the putting of these interrogatories, that, having taken the trust-oath, the claimant was not bound to answer any other questions. It was answered, that the trust-oath was not intended to supersede special interrogatories. The Court sustained the competency of putting the questions on oath, and, on the claimant declining to answer, held him as confessed, and ordered him to be struck off the roll [1].

A similar course was adopted, and a similar result followed, in another case, decided about the same time, in which the only circumstance of difference from the preceding case was, that it does not appear that the oath of possession had been tendered to the claimant [2].

In a third case, also determined about the same period, the trust-oath had not been offered to the claimant; and he having answered the special interrogatories, his qualification was held to be nominal and fictitious, and he was ordered to be struck off the roll [3].

[1] Skene v. Wallace, 9th March 1768; Wight, p. 262.

[2] Ross of Inverchasly; Wight, p. 264.

[3] John Johnston; Wight, p. 266, Note.

Those three cases were all reversed, on appeal, on the same day [1]; and it was thus held to be decided at that time, that it was not competent for the Court of Session to order special questions to be put to the claimant, with the view of ascertaining the fictitious nature of his right [2].

But not only was the effect of those reversals held to be the exclusion of interrogatories, but the idea was taken up that those judgments went the length of establishing the trust-oath as the sole criterion of the quality of nominal and fictitious, so as to render it incompetent to assign that character to a qualification, from a consideration of the situation and mutual relation of the parties, and other circumstances of the case. Indeed, for a period of twenty years after those reversals, we do not find any reported cases involving the question of nominal and fictitious. The great increase of votes of this description, which was the consequence of this security from challenge, unless by the trust-oath, led at last to a change in the views of lawyers on this point. In 1787 we find several cases, in which the objection of nominality was sustained, from a consideration of the general circumstances of the case. Thus, in one instance, an obligation having been obtained by an entailed proprietor from the heirs of entail, not to challenge the making of liferent votes on the estate, and one of the qualifications having been granted to the curator of some of the heirs upon his signing the obligation, his qualification, the reddendo of which was only 6$\frac{1}{2}$d., was found to be nominal and fictitious, although it was argued, that the trust-oath was the sole criterion, and no regard could

[1] 9th May 1770.

[2] During the period in which the idea prevailed that special interrogatories could not be put, qualifications of a nature considered fictitious greatly increased; and the voters on such rights being in the habit of taking the trust-oath without scruple, an attempt was made in 1785 to convict some of these voters of perjury in the Court of Justiciary. Lawson of Westertown was actually brought to trial, but was acquitted by the Jury, 27th June 1785; Bell, p. 281; Hume, vol. i. p. 361.

be had to the extrinsic circumstances attending the constitution of the vote [1]. In another case a liferent qualification, also granted by an entailed proprietor, was decided to be nominal and fictitious [2]; and an appeal having been entered to the House of Lords, the cause was remitted to the Court of Session, with instructions 'to hear parties farther thereupon, 'with liberty to receive such new allegations and evidence as 'the case may require [3].'

This judgment of the House of Lords evidently sanctioned the receiving of extraneous evidence, in determining the question of nominal and fictitious. But still there was no express authority for the mode of proceeding by special interrogatories, which had formerly been found incompetent in the House of Peers. In a case which occurred in 1788, the claimant voluntarily answered certain questions put to him by the opposing freeholders [4]; but it does not appear that this mode of inquiry received the full sanction of the Court on that occasion; and in the case of Sir John Macpherson, which was decided the following year, the Court of Session found that it was incompetent to investigate the matter in this manner [5]. The claim was there made upon a liferent of superiority; and in order to shew that the qualification was nominal and fictitious, the claimant was called upon to confess or deny, 1*st*, Whether the conveyance of the lands contained in Sir John's titles was not made out without his previous consent or knowledge? At least, whether Sir John was not solicited by the Duke of Gordon, from whom he derived his right, to accept of a freehold qualification? 2*d*, Whether the expence of making out the title-deeds was not paid by his Grace? 3. Whether those title-deeds were delivered to Sir

[1] Macdowal v. Buchanan, 20th February 1787.
[2] Campbell and Tod v. Elphinstone, 20th February 1787.
[3] 30th April 1787.
[4] Lindsay v. Drysdale, 6th March 1788; Fac.
[5] Forbes v. Macpherson, 6th March 1789; Fac.

John before his enrolment? or, Whether they were in his possession at any time previous to this period? *4th*, Whether, when he was informed of the conveyance, he thought himself called upon to defray the expence of defending his title in the Court of Session, or elsewhere? *5th*, Whether he did not, when he accepted of this conveyance, and does not still, consider himself as in honour bound to vote for the candidate who may be patronised by the Duke of Gordon, and to renounce his freehold qualification at his Grace's pleasure?

The Court of Session found it to be incompetent to put those questions; and repelled the objection of nominal and fictitious. This judgment was, on the motion of Lord Chancellor Thurlow, reversed on appeal, and the claimant was ordered to confess or deny the facts referred to him [1].

Since this judgment of the House of Lords, the practice of putting special interrogatories, when thought necessary, to investigate the real nature of the qualification, has been constantly followed, both in the Court of Session and in the meetings of freeholders. If the claimant refuse to answer, he is held as confessed on the questions.

Although the remit in the case of Elphinston [2], authorised the receiving of such 'evidence as the case may require,' it was considered doubtful whether the alleged nominality of a qualification might be established *prout de jure; i. e.* by every kind of evidence, including the testimony of witnesses. This point was, however, set at rest in a case where an offer of proof *prout de jure*, including the parole evidence of different persons, was made to establish the nominal and confidential nature of a qualification. It was argued, on the one hand, that, by the act 1696, trust cannot be established by parole testimony; and, on the other, that a nominal vote being of the nature of a legal fraud, a proof by witnesses must be ad-

[1] 9th April 1790.

[2] *Supra*, p. 180.

mitted. The Court sustained the competency of the proposed evidence [1].

Every kind of evidence is therefore now competent to investigate the alleged nominal and confidential nature of a qualification, whether that evidence be afforded by the examination of the party, by writings, or by witnesses. But in so far as regards the proof by witnesses, that kind of evidence is unfit for a court of freeholders, who have no authority to administer oaths or cite witnesses, and therefore, ought to be reserved for the Court of Session, when the case shall have been brought into that Court by complaint [2].

The statute 16th Geo. II. sect. 4, provides that every complaint to the Court of Session against the enrolment of a person 'whose *title* shall be thought liable to objection,' must be brought within four months, otherwise the individual shall remain on the roll, until such an alteration shall take place in his circumstances as to warrant his being struck off. After it had been firmly established that the objection of nominal and fictitious might be proved by other means besides the trust-oath, it came to be a question, whether the time within which those other modes of proof might be used, was limited by the above clause of the act 16th Geo. II. On the one hand, it was maintained, that an equal latitude ought to be allowed in this respect as with regard to the trust-oath, which may be put at any time, however distant, after enrolment; and that the expression 'title' in the above clause, related only to the title-deeds. On the other hand, it was argued, that the clause clearly related to such an objection as that of nominal and fictitious; that the Court had no jurisdiction in this matter; except in virtue of that act; and that, therefore, the limitation of four months must necessarily apply. In a case where a person who had been several years on the roll, but in whose circumstances no alteration had taken place, had

[1] Ferrier v. Morehead, 22d December 1790; Fac.

[2] See p. 47.

been struck off for refusing to answer certain questions relative to his qualification, the Court, on the ground that the objection was really made to the title of the claimant, and that the limitation of the act must therefore apply, ordered him to be restored to the roll [1]. In a subsequent case, however, the Court found that it was competent to bring forward the objection of nominal and fictitious, after four months, even although no change of circumstances had taken place [2]. But after this, the former of these two cases was affirmed [3], and the latter was reversed on appeal [4]. It is now, therefore,

[1] Pringle *v.* Freeholders of Roxburgh, 8th December 1790.—*Note of the opinion of Lord President Campbell, from his Session Papers.* '1mo, Competency of insisting in objection of nominal and fictitious after the party 'has stood four months on the roll unchallenged. It is an objection to *title*, 'and on this ground it was found, that oath could not be put before choice 'of preses and clerk *. See case of Sir Ludovick Grant and Archibald Duff. 'Even one who has no title at all may vote for preses and clerk. Some 'rules necessary to be established. One is, that after four months the 'question of title is at rest, unless alteration of circumstances happen, 'and even then certain forms required before he can be derolled. Unless we adhere to those rules confusion will ensue; no remedy after four 'months but trust-oath. Objection of nominal ought not to be pushed 'so far. If party was once in possession, and afterwards ceased to be so, 'this may found an objection upon *alteration of circumstances*. But no such 'thing alleged here. See minutes and interlocutors annexed. Nor, indeed, was any objection lodged. See case of Melville of Greigston in 'Fifeshire, where an alteration of circumstances was alleged.—*Justice-Clerk.* Cannot get over the rule of four months; but fact of possession 'may be inquired into.—*Dreghorn.* Doubt upon argument in p. 6, and 7, 'of answers.—*Monboddo.* What if I produce back-bond. Interrogatories 'now put in place of oath.—*Eskgrove.* Concluded by the four months.—'*Henderland.* Bound to assert at every meeting that his title is not nominal.— Cannot distinguish between title and possession.—'*Hailes.* If satisfied with judgment of House of Lords, all these nominal 'voters would have died of themselves. If these catechisms not sufficient, 'will find out others.—*Rockville.* No alteration upon the constitution of 'the vote.'

[2] Milne *v.* Freeholders of Aberdeenshire, 31st May 1791; Fac.

[3] 5th March 1792. [4] 1793.

* This now altered by 37th Geo. III. c. 138.—See p. 171.

settled, that, after four months have elapsed from the date of enrolment, and no alteration of circumstances has occurred, no other means than the trust-oath can be resorted to, in order to establish the objection of nominal and fictitious.

The same rule has been established with respect to the proof of want of possession, on the part of any person who has been enrolled. Within the period of four months from such enrolment, the freeholders are entitled to put such interrogatories as they think proper, to ascertain the fact of possession. But after that time has elapsed, and where no change of circumstances has taken place, the only competent mode of investigating this matter is the trust-oath; so that, even if there be reason to suppose that there was an imperfect possession at the time of enrolment, yet, if no alteration has taken place, and the four months are elapsed, it is incompetent to have recourse to any other remedy than the oath of trust [1].

Having thus pointed out the methods by which the objection of nominal and fictitious may be established, we shall proceed to consider those circumstances in the constitution of a qualification, from which it has been endeavoured to infer this quality.

If some of the expressions of the trust-oath were considered literally, they might be regarded as striking against every qualification which has been acquired expressly for the purpose of affording the privilege of voting. The elector swears, that 'my title to the said lands or estate is not nominal or 'fictitious, *created or reserved in me, in order to enable me to* '*vote for a member of Parliament.*' The interpretation, however, which has been put upon those expressions, and which is borne out by the words of the oath which follow, is, that the title shall not be nominal and fictitious, *and also* acquired for the purpose of conferring a vote. If the subject is a *true* estate, and the right in other respects such a one as

[1] Livingston v. Dundas, February 1791; Bell, p. 387.—Dickson v. Wood, 23d February 1819; Fac.

confers the privilege of voting, that privilege will not be affected by the circumstance, that the right may have been acquired for the purpose of exercising the elective franchise. This point was decided in the first reported case, in which the objection of nominal and fictitious appears to have been brought forward. A father had disponed part of his estate to his eldest son, who gave a subfeu of it to the granter; and the objection, that this arrangement had been entered into, on purpose to give the son the right of voting, was repelled [1]. The same doctrine has been repeatedly recognised in subsequent cases [2], and is the sole foundation of that extensive traffic in votes which has so long prevailed.

The want of value in the subject on which a right of voting is claimed, does not of itself render the qualification nominal and fictitious. If the qualification is a superiority, it is the right of lordship in the lands which gives the privilege of voting, and not any emolument which the superior may draw from the vassal. Hence, a superior, who had feued out his lands, and discharged the feu-duties for ever, was found entitled to vote, it being plain that this method had been fallen on merely to evade the legal necessity of feuing at a competent avail [3]. On the same principle, a superior, obliged by his charter to pay to the crown L. 24: 14: 8 Scots of yearly feu-duty, and receiving only 1d. Scots of blench-duty from his vassal, who, however, was bound to relieve the superior of the crown feu-duty, was found entitled to be enrolled [4]. In like manner, a qualification claimed by a superior, who received an elusory feu-duty, and whose casualties were taxed at elusory sums, was sustained [5]; and the same judgment was

[1] Freeholders of Kincardineshire v. Burnet, 30th July 1745; Falc.

[2] Campbell and Graham v. Muir, 5th February 1760; Fac. Grant v. Campbell, 23d February 1760; Fac. Macdowal v. Crawford, 20th February 1787; Fac.

[3] Freeholders of Dumfries v. Ferguson, 30th July 1746; Falc.

[4] Stewart and others v. Dalrymple, 28th July 1761; Fac.

[5] Forrester and others v. Fletcher and others, 9th January 1755; Fac.

given with respect to the qualification of a liferent superior, who drew a feu-duty of only 2s. 6d., and twice that sum at the entry of heirs and singular successors[1]. In short, it is quite settled that the right of voting may be conferred by superiority, the casualties and other profits of which are altogether illusory; although, undoubtedly, the want of value may have its weight, when taken in conjunction with other circumstances, tending to show that a right is nominal and fictitious.

Although it has thus long been settled, that the right of voting does not depend on the pecuniary advantage which the elector derives from his estate, it was, for a considerable time, uncertain whether that limited right, consisting of a liferent of mere superiority, as distinguished from a liferent of property held of the crown, did not come under the denomination of nominal and fictitious, and whether it was not incapable of conferring the elective franchise. Questions of this nature have generally been more or less mixed up with an inquiry, whether the right has not also been confidential, or conveyed under a secret understanding between the granter and grantee, as well as having also been of too limited or imperfect a nature to give the privilege of voting. The amount of the pecuniary emolument derived by the liferenter has also been almost always brought into consideration.

It may be proper to give a short view of the history of liferent votes.

The act 1661, c. 35, is the first which specially confers the privilege of voting on liferenters; and the liferenters mentioned are those holding of the king, and 'whose yearly *rent* 'doth amount to ten chalders of victual, or L. 1000, all feu-'duties being deducted.' The amount of this qualification would evidently exclude by far the greater number of the liferent votes of the present day; and indeed appears to refer

[1] Lindsay *v.* Drysdale, 6th March 1786; Fac.

only to liferents of *property* held of the crown. The act 1681, c. 21, after giving the right of voting to those infeft in property or superiority, and holding of the king, further confers it on 'appeirand heirs, being in possession, by virtue of 'their predecessor's infeftment, of the holding, extent, and 'valuation foresaid, and likewise *liferenters* and husbands, 'for the freeholds of their wives, or having right to a liferent 'by the courtesie of the saids lifeenter's claime their vote, 'otherwayes the fiar shall have vote.'

The sense in which the word liferenters was used in this act has given rise to much difference of opinion. By some it has been thought to refer only to liferents by reservation in family settlements, a kind of right of a higher nature than a liferent by constitution. Some have doubted whether, at the date of the act 1681, such a right existed as a liferent of mere superiority. Others, again, have supposed, that as, by that statute, the privilege of voting was attached to superiority as well as to property, the liferenters alluded to must comprehend liferenters both of bare superiority and of property. Without determining to which of these opinions the greatest weight is to be attached, it will be enough to state that the interpretation of this statute must now be drawn from the decisions of our supreme courts, and not from any speculative notion regarding what may have been the views of the legislature at the time.

The like difference of opinion has existed with respect to the meaning of the expressions nominal and fictitious in the trust-oath, as applied to liferent qualifications. In the view of some lawyers, those expressions were precisely intended for the purpose of characterising liferents of superiority, and of depriving those possessed of such rights, of the privilege of voting; because the words of the previous trust-oath of Anne were peculiarly applicable to trust conveyances, and when those were gotten the better of, liferent qualifications still required an efficient check. According to others, the expres-

sions nominal and fictitious, were applicable generally to such rights as were not in reality what their titles bore, and had no particular reference to liferent qualifications.

But, as already observed, it is by turning to the practice of our Courts that we shall be able to determine what is to be held as the law, with respect to the validity of liferent superiorities; and we shall therefore take a short view of the reported cases on this subject.

In the years 1760 and 1761 liferents of superiority, formed by constitution, the fees being vested in the peers from whom these rights were derived, were sustained as legal qualifications in several cases [1]. But about the time of the general election in the year 1768, the Court adopted more rigid ideas with respect to qualifications, and, as has been already explained [2], fell upon the method of putting interrogatories, with the view of investigating their nature. This plan was followed in regard to a liferent of superiority, derived from the Earl of Panmure, the reddendo of which was only 6⅔d., and the claimant having refused to answer certain questions, tending to show that the grant was confidential, and that he derived no profit from it, he was ordered to be struck off the roll [3]. This case, and some others of a similar nature, were, however, reversed on appeal [4]; and, for a period of nearly twenty years after this, we do not find any reported cases in which the objection of nominal and fictitious was brought forward. We find a variety of decisions in regard to liferents of superiority taking place on one day in the year 1787; and, on that occasion, the Court decidedly went upon the principle of rejecting all liferents of superiority where the pecuniary emoluments were trifling, especially when that circumstance was joined with other circumstances tending to in-

[1] Campbell and Graham v. Muir, 5th February 1760; Fac. Stewart v. Dalrymple, 28th July 1761; Fac.

[2] Page 177. [3] Skene v. Wallace, 9th March 1768; Wight, p. 264.

[4] 9th May 1770.

fer a confidential understanding, such as the right being granted in opposition to the prohibitions of an entail. Thus, in two instances, where the liferents were granted by entailed proprietors, and of small pecuniary value[1]; and, in a third, where the feu-duties were 10s. and the casualties taxed at twice that sum[2], the qualifications were found to be bad. But, on the same day, a liferent of superiority was sustained as a valid qualification, where the feu-duty was L. 71 : 7 : 8 Scots, and the casualties were not taxed[3]; and another was also sustained, because it appeared that the property had been separated from the superiority thirty years before, without any political object[4]. One of those cases, that of the Honourable William Elphinstone, in which the liferent of superiority had been found a bad vote, as coming from an entailed proprietor, and being of trifling value, was carried by appeal to the House of Lords; and, on the motion of Lord Thurlow, was 'remitted back to the Court of Session in Scotland, to hear parties farther thereupon, with liberty to receive such new allegations and evidence as the occasion may require[5].' The view which his Lordship took, in delivering his opinion on this case[6] was, that the Legislature intended, by the act 1681, to give the right of voting to the slightest estate within the letter of the law; that, under the trust-oath of Geo. II., the single question was, not, what is the extent of the estate, but, is it possessed *bona fide*, and for the voter's own use and benefit; that such an estate as the present, of only a shilling value, was a good qualification, although bought for the sole

[1] Macdowal v. Buchanan, 20th Feb. 1787; Fac. Campbell and Tod v. Honourable W. Elphinstone, as decided in the Court of Session 20th February 1787; Fac.

[2] Campbell v. Ingram, 20th February 1787; Fac.

[3] Roebuck v. Cunningham and others, 20th February 1787.

[4] Lamont and Campbell v. Alston, 20th February 1787.

[5] 30th April 1787.

[6] See Luder's Election Cases; Appendix to Elgin Case; also Note appended to Faculty Report of Drummond v. Adam, 26th January 1813.

purpose of voting, if not held in confidence, and that this point of confidence must be determined from the general state of the transaction. No farther steps were afterwards taken in this case, Mr Elphinstone having given up his vote.

A question, which occurred in the following year 1788, was decided by the Court of Session on the principles laid down by Lord Thurlow. The qualification, which was a liferent of superiority derived from an elder brother, with a reddendo of only 2s. 6d., doubled at the entry of heirs and singular successors, was sustained [1], as it was thought that the circumstances of the case did not establish the existence of any latent or implied trust in the claimant. In the subsequent case of Sir John Macpherson, who rested his qualification on a liferent of superiority of small value, derived from the Duke of Gordon, the Court of Session sustained the claim, and held it to be incompetent to put the interrogatories proposed by the opposite party, with a view to ascertain whether a confidential understanding existed between the granter and grantee [2]. On appeal, however, the interrogatories were ordered to be answered [3].

In the year 1791, opposite judgments were given on the same day with respect to the validity of two liferent qualifications, obtained by different persons from the same quarter. In the one, the Court sustained the qualification by a majority of one, after having previously determined that a disposition to the fee, which had been obtained by the claimant the day before the election, might be received as evidence of the *bona fide* nature of the qualification, although not as constituting the title, and being of opinion that the allegation of a confidential understanding had not been substantiated [4]. In the other case, however, of which the circumstances are said

[1] Lindsay v. Drysdale, 6th March 1788; Fac.

[2] Forbes and others v. Macpherson, 6th March 1789; Fac.

[3] 9th April 1790.

[4] Cheap v. Morehead, 12th February 1791; Bell, p. 321.

to have been similar, the qualification was rejected by a majority of one; the Judge, who held a different view of this case from what he had entertained in the other, resting his opinion partly on the ground, that the claimant was the brother of the confidential agent of the grantor of the vote [1]. Reclaiming petitions were presented against the judgments in both cases, when the Court adhered to that in the latter case, but altered that in the former, finding both qualifications nominal and fictitious [2].

In a case which occurred a few years afterwards, the objection of nominal and fictitious made to a liferent of superiority, was repelled, on the ground, that an onerous disposition of the fee had been obtained and produced on the day of election; from which ground of decision, the inference seems to be, that the qualification would not otherwise have been sustained [3].

Several years afterwards, it was decided that a liferent of superiority, yielding a feu-duty of L. 40 Sterling per annum, bestowed gratuitously by a father on his second son, was a valid qualification, although it was argued that the son must be entirely dependent upon the will of the father in exercising

[1] Ferrier *v.* Morehead, *eod. die.* Ibid.

[2] This final result of the case of Cheap *v.* Morehead, does not appear from Mr Bell's account of it; but I find it stated in the Session Papers on both sides, in the subsequent case of Macadam *v.* Home; *Infra.*

[3] Macadam *v.* Home, 10th February 1797; Fac.—*Note of the opinion of Lord President Campbell, from his Session Papers.* 'Case of super-'added fee. See Case of Morehead *v.* Cheap, 12th February 1791. Court 'much divided there, and the ultimate decision was erroneous. One who 'has the whole estate in him, both liferent and fee, although by separate 'titles, cannot be nominal; at least this is not to be presumed, and not 'necessary to be year and day infeft in the fee, the preceding title being 'good on the face of the record; and the acquisition of the fee only ne-'cessary to remove an extrinsic objection, viz. that of nominal and ficti-'tious.—*Justice-Clerk.* Clear that year and day not necessary; *e. g.* latent 'back-bond.'

the right of voting[1]. In this case, however, the value of the liferent was much greater than that of such rights usually is.

The next important set of cases which occurred, involving the validity of liferent qualifications, arose out of certain gratuitous grants of liferents of superiority, yielding little or no return, made by Viscount Keith to his nephews, the Honourable Charles Fleming, and William George Adam[2]. The claimants having been enrolled at Michaelmas 1808, by the freeholders of Kincardineshire, petitions and complaints were presented to the Court of Session against these enrolments; in which the complainers maintained, that, from the whole circumstances of the transactions, it was evident that the rights were nominal, fictitious, and confidential. The Court, on the 2d of December 1809, ordered the claimants to be expunged from the roll. Both cases having been carried by appeal to the House of Lords, they were remitted to the Court of Session, with instructions "to hear parties 'further thereupon, with liberty to receive such new allega-'tions and evidence as the occasion may require; and with 'liberty for the complainer, in the Court of Session, to call 'upon the defender to confess or deny such averments as to 'the alleged nominality, as the complainer, by interrogato-'ries or otherwise, according to the course of the Court, shall 'call upon him to confess or deny.' In delivering his sentiments in the case of the Honourable Charles Fleming, Lord Chancellor Eldon is stated to have expressed his opinion, that, if a bare liferent superiority afforded a right to stand on the roll by the law of Scotland, he could not think that the circumstance of its being granted betwixt relations could have any weight, especially when, as in this case, the appellant had expressed his willingness to undergo interrogatories[3].

[1] Belsches v. Smith, 29th June 1809; Fac.

[2] See Bell, p. 303, and Drummond v. Adam, *infra*.

[3] Bell, p. 307.

When the case of Mr Adam returned to the Court of Session, a list of interrogatories was answered by him in a manner which amounted to a complete denial of all confidential understanding between him and the granter; and parties having been again heard, the Court altered their former judgment; and found that Mr Adam had been properly enrolled[1].

It may now, therefore, be considered as settled, not only that a liferent of superiority, affording little or no return, constitutes a valid qualification, if there are no other circumstances shewing a fictitious or confidential nature; but also that such a right, when derived gratuitously from a near relation, cannot be held, from that circumstance alone, to be of a confidential character.

The circumstance that a qualification has been obtained *gratuitously* from the granter, is of less weight as affecting the question of nominality, when the right has been derived from a relation, than where it has been acquired from a stranger; because, in the former case, the affection which is presumed to exist between the parties, will be held to be the cause of the gift; whilst in the latter, there may be more reason to suspect that the inducement to a gratuitous conveyance was some tacit understanding, that the grantee would attend to the wishes of the giver in the exercise of his franchise. Even among those not connected by relationship, however, this circumstance does not appear to be held as sufficient *of itself* to establish nominality[2]; and in several of the cases which have been noticed, we have seen qualifications expressly sustained, when derived gratuitously from relations.

[1] Drummond v. Adam, 26th January 1813; Fac.

[2] In the recent cases from Renfrewshire, arising out of votes created by Lord Eglinton, (See p. 211.)—Lord Chancellor Eldon stated the proposition generally, that a gratuitous vote, if *bona fide*, is valid; Bligh, p. 193.

In some of the cases which have been adverted to, we have seen the Court taking into view the circumstance that the right was derived from a person holding his estate under the fetters of an entail. The manner in which the objection to a qualification on this ground was first stated, was, by urging that the claimant truly had acquired no right to the estate, as his author was prohibited from alienating [1]; or by maintaining that the right was defeasible at the instance of third parties, since any heir of entail might challenge the conveyance [2]. But such objections were held to be *jus tertii* to freeholders, since the challenge was competent only to the heirs of entail, and the rights were good, until reduced by them; and this was held, whether the objection arising from the entail appeared from the titles produced to the freeholders [3], or could not be discovered from those titles [4].

This principle of *jus tertii* is by no means peculiar to the objection of entail; and when it is considered that it has been sustained as debarring freeholders from stating other objections of certain kinds, the propriety of applying it in the case of entails will become the more apparent. Thus, it has been already shewn, that freeholders are, on this principle, debarred from stating the objection of the multiplication of superiors, an objection which renders the right defeasible at the instance of the vassal, and which is held to be only competent to the vassal in a proper action, but not in his capacity of freeholder, if he should happen also to be on the roll [5]. In a case also, where the charter, by which certain chaplanries were granted by James VI. to the College of Aberdeen, bore

[1] Campbell and Graham *v.* Muir, 8th February 1760; Fac. Affirmed on Appeal, 1st December 1760.

[2] Houston *v.* Ferrier, 23d January 1781; Fac. The objection was thus stated in this case: '*Ex facie* of the titles produced, they only 'convey a limited or qualified right, subject to a *power of defeasance*, 'competent by the tailzie engrossed in the charter to every heir of 'entail.'

[3] Houston, *supra.* [4] Campbell, *supra.* [5] See p. 61.

that these subjects should remain united, annexed, and mortified to the said college for ever; and where, notwithstanding this provision, these subjects were sold to certain persons who claimed enrolment upon them, the objection stated by the freeholders, that this alienation was null and void, was met by the plea of *jus tertii*, and was repelled by the Court[1].

After it had been held that it was *jus tertii* to freeholders to state the objection of entail, with a view to establish the defeasibility of the qualification, the objection was brought forward in a new point of view. It was conceived, that, although the freeholders might not be entitled to plead the defeasibility of the right, yet that the circumstance that the qualification flowed from an heir of entail, ought to have material influence in determining the question of nominal and fictitious, since there would be strong reason to suppose, that, in order to prevent the heir of entail from incurring a forfeiture of his estate, the voter would be under an obligation to reconvey, when the right of the granter should be called in question by an heir of entail, on account of the conveyance. On this, amongst other grounds, the Court of Session found the qualification nominal and fictitious, in the case of the Honourable William Elphinston[2], already more than once adverted to; but it appears in this case to have been distinctly admitted, even by the majority of the Court who decided the case, that 'a conveyance from the proprietor of an entailed estate might, in some instances, afford an unexceptionable right to vote[3].' This case was remitted by the House of Lords, 'to hear parties farther thereupon, with liberty to receive *such new allegations and evidence* as the occasion may require;' from which deliverance, there is room for an implication, that the Noble Lord (Lord Thurlow) who moved the judgment, was of opinion that the circumstance

[1] Dalrymple and others v. Reid, 4th March 1755; Fac.

[2] Campbell and Tod v. Elphinston, 20th February 1787; Fac.

[3] See the Faculty Report of the case.

of the right having been derived from an heir of entail, was not *per se* decisive against the qualification.

In another case already mentioned[1], in which the vote was derived from an entailed proprietor, and which was decided in the Court of Session on the same day as that of Mr Elphinston, although the vote was set aside, it does not appear that the judgment proceeded on the point of entail alone; and, indeed, in the opinions, quoted very fully in the report of the case, we do not find any mention of that point at all. The granter had thought to secure himself from challenge, by taking from the heirs of entail, and, amongst others, from the claimant, who was curator of some of those heirs, an obligation not to call the alienation in question. This obligation, which it was thought would strengthen the right, was, however, turned into an argument of considerable weight against its validity, because it bore to have been granted to '*increase* '*the* '*influence of the family*[2]." It will be recollected, that, at this period, there was a strong disposition in the Court to set aside all liferent votes of small pecuniary value, whether derived from entailed proprietors or not.

These instances of qualifications derived from entailed proprietors, were all examples of liferent rights. In a case which occurred a few years afterwards, an heir of entail had conveyed over the fee of a superiority, for the purpose of making a freehold, and had qualified the conveyance by clauses

[1] Macdowal *v.* Buchanan, 20th February 1787; Fac.

[2] It may be observed, that, in the memorial for the objectors in this case, drawn by Sir Ilay Campbell, the objection of entail is very slightly touched upon. The argument is to show the general nature of nominality, and the means of investigating it, and to prove the nominality of the qualification under consideration, principally from the effect of the obligation which had been granted. The author is the more anxious to explain this and the other circumstances mentioned in the text, because he has heard this case mentioned as an example of the *objection of entail* being sustained, even in the *favourable circumstances* of the heirs having granted an obligation not to challenge.

of return and of pre-emption. The lands, which were held under a strict entail, had been conveyed by the Earl of Fife to a disponee and the heirs-male of his body, under the provision, that, in the event of the disponee selling this property, he should give the first offer to the heir of entail of Braco; and that, on the failure of lawful heirs-male of his body, the estate should revert to the family of Fife. The qualification was, under all the circumstances, thought nominal[1]. This case, however, obviously cannot be viewed as proceeding on the effect of the entail alone, because the clauses of return and pre-emption contributed to the result.

A few years afterwards, a question came before the Court, under very special circumstances, relative to the validity of a liferent qualification granted by an heir of entail. The circumstances were as follows:—In 1791, objections were lodged before the freeholders of Ayrshire, against a number of voters who had been enrolled on liferents acquired from Lord Eglinton, as heir of entail; and, as they made no attempt to answer these objections, they were struck off the roll, as having nominal and fictitious qualifications, in which proceeding of the freeholders they acquiesced at the time. In 1812, they again claimed enrolment on the same titles, and were rejected by the freeholders. One of them having complained to the Court of Session, it appeared, amongst other circumstances, that the late Lord Eglinton, his author, had, in the mean time, resigned *ad remanentiam* the property of the lands into his own hands, as fiar of the superiority, whilst the present Lord had made up his titles without taking notice of the liferent; and also, that the complainer had never levied the feuduties until immediately before the renewed claim, when he received all the arrears at once. In the whole circumstances, the Court found that the qualification was nominal and fictitious; but so far from this judgment having proceeded on

[1] Souter v. Freeholders of Banff, 26th November 1803; Fac.

the effect of entail *alone*, a majority of the Judges delivered an opinion, that that objection was not sufficient *per se*[1]. It is true that the entail was not recorded, but that circumstance does not prevent a substitute heir from irritating the right of the heir in possession on any act of contravention; and although the deed probably did not effectually prohibit an alteration in the succession, at least in a question with third parties; yet the prohibition to sell or dispone, appears to have been duly fenced by irritant and resolutive clauses; and a substitute heir could therefore have pursued a forfeiture against the contravener; and he could have challenged the

[1] Montgomerie v. Cathcart and Oswald, 2d March 1813; Fac. The opinions of the Judges on the point of entail, were as follows:—'*Lord Meadowbank.* I think it (the vote) also bad in respect of the tailzie. 'There is no occasion to resolve the right of the contravener, but he may 'void the vote. Lord Eglinton himself may void it, as he does not represent 'the contravener. The claimant holds at the will of Lord Eglinton, and of 'every Montgomery who is in the entail. Any one of them may bring 'a reduction. I think, therefore, it is a defeasible vote, and I understand 'that a defeasible vote is void by the statute. There are many cases 'where that has been found.—*Lord Bannatyne.* Another question is, 'How far the mere circumstance of its having been derived from an heir 'of entail is material? Certainly where an heir of entail grants a liferent 'of part of his estate, it is a right which is open to challenge on the part 'of the substitute; but, so far as I have been able to see, the decisions of 'the Court seem to have again and again found, that that did not of 'itself afford an exception. It has been found to be *jus tertii*, and that no 'person has any interest in the fetters of the estate but the heirs of en-'tail. I conceive that to be a fixed point. How far it may be an ingre-'dient of nominality is a different thing, but certainly of itself it is not a 'sufficient objection.—*Lord Craigie.* It appears to me, that a liferent on 'an entailed estate is good. It is, to be sure, reducible by the heirs of 'entail, but that is their part. No third party has any interest in it. '—*Lord Glenlee.* I do confess that, for my own part, I have great scru-'ples about putting down the vote. I am quite of the opinion of Lord 'Craigie, as to the disposition's being by an heir of entail, being not of it-'self sufficient, when stated by the freeholders. But it certainly implies 'a very strong confidence.'

alienation, which was gratuitous[1]. The majority of the Court, who thought the objection of entail not *per se* sufficient, appear to have delivered their opinions in general terms, as if the entail had been effectual in all respects.

The preceding question, it will be observed, arose out of a set of qualifications which were constituted twenty years before the question was brought into Court. A new question, however, afterwards arose, under the same entail. This entail not having been recorded, and being, moreover, conceived not to contain an effectual prohibition against altering the order of succession, Lord Eglinton granted a procuratory for resigning into the hands of the crown a portion of the estates held under the entail, and obtained a charter to himself, and his heirs and assignees, in fee simple. Having thus altered the order of succession, he granted liferent qualifications to two of his brothers, and assigned to them the precept of this charter; and, about the same time, he sold to other persons the *dominium utile* of a considerable portion of the entailed estate. Under these circumstances, when the qualifications which Lord Eglinton had conveyed to his brothers were challenged in the Court of Session, as nominal and fictitious, on the ground that there must be a confidential understanding to denude in case of challenge,—it was answered, that it was, at all events, clear, that Lord Eglinton did not *believe* himself fettered; that the risk of forfeiture for having conveyed these votes, was as nothing compared to the risk from the sales of the estate; and that as the entail did not effectually bar an alteration of the order of succession, it was competent to change that order, and when so changed, to make the alienation, because the heirs of entail had no longer an interest to enforce the prohibitions of the entail. The Court found the votes good; but it is plain, that, from the specialties of the

[1] See *infra*, p. 203, for a part of the argument maintained by the parties in this case; and also, p. 200, for a fuller account of the objections to which this entail was liable.

case, this decision cannot be said to decide the general question as to the validity of an entail [1]. It must be remember-

[1] Montgomeries v. Spiers, 13th Nov. 1813. This case has not been reported; and it may therefore be proper to give some farther account of it, not only on its own account, but as shewing the nature of the defects in that entail, which was, in the view of the Court, in the case of Montgomerie v. Cathcart, *supra*, and which was also partially under the view of the Court, in the subsequent important cases of the Messrs Crawfurd and others.

Alexander, Earl of Eglinton, executed a deed of entail of the lordship of Eglinton, which was never recorded in the Register of Tailzies, but was recorded in the Books of Council and Session in 1749. It contained the following prohibitory, irritant, and resolutive clauses: 'And, 'in like manner, it is hereby provided and declared, that it shall be no- 'wise leisome or lawful to the said Alexander Lord Montgomerie, nor to 'any others of the heirs of tailzie above mentioned, who shall succeed 'to our said estate, to sell, dispone, wadset, or in feu-farm let, the said 'lands, either in whole or in part, nor to burden the same with yearly 'annualrents, liferents, or other real burdens, nor to grant tacks thereof 'in diminution of the rental, nor to contract debts, nor do any other deed 'by which the said lands and others foresaid, or any part thereof, may 'be anyways evicted or burdened in prejudice of the present tailzie; as 'also it is declared, that all deeds done, or to be done or contracted, in 'prejudice of the present tailzie, are, and shall be, null and void, in so 'far as they may anywise operate, or be extended to burden the said 'lands, or any ways prejudice the succession of his present tailzie.

'And farther, it is hereby declared, That, if the said Alexander Lord 'Montgomery, or any of the heirs above mentioned, succeeding in the 'fee of the said lands, or who may succeed to the same, shall do or act any 'of the deeds above prohibited, and shall contravene the present provi- 'sion, the person so contravening shall immediately lose, forfeit, and 'amit his right of succession in favour of the person being or coming next 'in place to him, by the order of this present tailzie, so that it shall be 'lawful to the next person who shall not contravene as said is, either to 'enter himself heir to the person contravening, or losing his right as said 'is, providing it can be done without the burden of the deeds and debts 'so done, committed and contracted by his predecessors, or otherwise to 'enter himself heir to the person last infeft, &c. so as whichever of the 'said methods best subsisting by law he shall follow, the said estate shall 'be transmitted free of all the said deeds, debts, and burdens hereby pro- 'hibited, and so as the deed and right of the contravener shall be no bur- 'den or impediment to him.'

Under this deed, Hugh, late Earl of Eglinton, succeeded to his estates

ed, however, that although the preceding case of Montgomery *v.* Cathcart, arose out of the same entail as this last

as heir male and of tailzie of Archibald, the preceding Earl, his cousin, in preference to Earl Archibald's own daughter.

Earl Hugh having been advised that the above clauses did not effectually bar an alteration of the succession, on the 4th of January 1811, granted a procuratory for resigning a part of these estates into the hands of the crown, in favour of himself, his heirs and assignees, omitting altogether the conditions of the entail. He thereupon (4th Feb. 1811) expede a crown charter, disponing to himself, and his heirs and assignees, 'totas 'et integras sequentes partes et portiones comitatus de Eglinton, in retor- 'natu specialis servitii dicti comitis content. tanquam propinquioris et le- 'gitimi *hæredis taliæ* demortui Archibaldi Comitis de Eglinton, ejus con- 'sanguinei,' &c.

Having thus altered the order of succession, Lord Eglinton executed gratuitous dispositions to his brothers General Montgomerie and Mr Montgomerie of Stair, of the superiorities of certain of the lands contained in this charter; and assigned the unexecuted precept of that charter. The disponees were infeft, and their sasines registered, on the 25th April 1811.

Not long afterwards (as it is understood) Lord Eglinton sold, for an adequate price, to strangers, the *dominium utile* of a considerable part of the entailed estate. It does not appear very distinctly from the session papers, whether the lands thus sold were included in the above charter or not, neither is the precise *period* of their sale mentioned.

At the Michaelmas head court of Renfrewshire in 1812, General Montgomerie and Mr Montgomerie claimed enrolment, and produced as their titles the charter, dispositions, and sasines above mentioned. To these claims, it was objected, that the qualifications were nominal and fictitious, in respect of the entail, which appeared from the retour referred to in the disposition, and that the gratuitous nature of these conveyances was farther evidence of their confidential character. The freeholders refused to enrol; and complaints having been brought, it was argued on the part of the respondents, in support of the

1*st Objection of Entail.*—The entail was sufficiently effectual to prevent such alienations as the qualifications in question. It will not do to say, Lord Eglinton might alter the succession, and *then* alienate; because any change of the succession is effectually barred. The clauses which have been quoted first prohibit a number of acts specifically, and then it is declared generally, 'that all deeds done, or to be done or contracted, in 'prejudice of this present tailzie, are and shall be null and void, in so far

mentioned case, yet that it was a former Lord Eglinton who constituted the qualifications in the case of Cathcart; that

'as they may any ways operate, or be extended to burden the said lands, 'or any ways prejudice the succession of this present tailzie.' These words are sufficient to nullify the charter of the Noble Lord. Then follows the clause resolving the right of any heir 'who shall contra-'vene the present provision.' The conditions *prohibitory* and *irritant* constitute one clause, and cannot be separated. In the Eastfield entail, (25th May 1808, Fac.) there was nothing in any of the clauses expressly referring to the act of altering the order of succession. Even if there was an omission in the prohibitory clause, in the present instance, an entail, with irritant and resolutive clauses, is effectual under the act 1685. If then, the entail is effectual, an action of declarator of contravention, on the ground of the alienation, might be brought by any substitute; and this being the case, there arises a *præsumptio juris et de jure*, that the qualification is confidential, and bestowed under a power of controul by the granter. It is inconceivable that he should have bestowed it in a way to run the risk of forfeiture. It is no answer to say the entail was not recorded, because in a question *inter hæredes*, that makes no difference; and besides, gratuitous dispositions are challengeable, even if the entail is not recorded.

It was farther maintained, that, in a question *inter hæredes*, an expression of intention was sufficient, that a resolutive clause was a prohibitory, under the high sanction of an irritancy, and that the resolutive clause in this case referred plainly to the provision as to the alteration of succession in the conclusion of the irritant clause, and was therefore effectual in a question with a substitute. Reference was made to the cases of Don *v.* Don, 15th February 1713; Lord Strathnavor *v.* Duke of Douglas, 2d February 1728; and Gordon *v.* Gordon, 29th July 1761. It was farther argued, on the authority of Sir George Mackenzie and Erskine, that a gratuitous alienation in prejudice of a prohibition against alienation, is reducible under the act 1621.

*2d Objection, no consideration given.*—A qualification given gratuitously by a brother, who has a family himself, must be presumed confidential. Even in the case of a father, the want of consideration, if joined to the other circumstances in this case, would be decisive.

The complainers *replied*:—

1*st*, Whether Lord Eglinton holds his estate under an entail effectually preventing alienation or not, one thing is certain, that his Lordship does not believe himself so fettered. He has sold to perfect strangers the *dominium utile* of a valuable part of the estate; and if he has thereby incurred an unpurgeable irritancy, what reason has he to fear the consequences

the order of succession had not then been altered; that, consequently, the heirs of entail retained their interest to enforce the prohibitions; and that no sale of any part of the *dominium utile* of the estate had then been made, or had probably even been contemplated [1].

Some years afterwards, nine votes were at once created by

of such conveyances as the qualifications under consideration; or what need was there for an express or implied agreement to reconvey? But, farther, Lord Eglintoun does not hold his estate under an entail effectual to prevent alienation. This assertion is not founded on the want of recording, for that is of no consequence *inter hæredes*; but the entail does not effectually bar an alteration of the succession; and the succession being altered, no substitute had longer an interest to enforce the other prohibitions; in other words, the estate became an unlimited fee. The *prohibitory* clause is identical with that in the Eastfield case, and does not forbid altering the succession. Nay, the Eastfield prohibitory clause was even stronger, because it prohibited any deed whereby the estate might be adjudged or evicted, in prejudice 'of those who, by virtue thereof, shall be 'then to succeed.' The irritant clause cannot supply the place of the resolutive; for nothing is better established, than that there must be a prohibitory, an irritant, and a resolutive clause. The contrary is a novel and dangerous doctrine. But, farther, it is not every deed which may prejudice the succession which is declared null in the irritant clause, but only the deeds previously mentioned in the prohibitory clause.

2d, *Want of consideration.*—Lord Eglinton has only one son, who is of course disqualified from voting. He could not do better than give the qualifications to his brothers, and brotherly love may exist as well as paternal affection.

The Court, 13th November 1813, repelled the objections to the qualifications, and found expences due.

[1] In the case of Montgomery *v.* Cathcart, it appears from the Session Papers, that the claimant, when the question came into Court, founded on the alleged defective nature of the entail, and also on the sale of the *dominium utile* of certain lands by the subsequent Earl (see Replies), but to this it was answered by the objector, that it was not the views of the subsequent Earl which must regulate the question, but those of the maker of the qualifications, who was so well persuaded of the validity of the entail, that he allowed his estates to descend, in virtue of that destination, to his cousin, to the prejudice of his daughter, to whom he conveyed his whole disposable property, (Duplies, p. 9, *et seq*).

Lord Eglinton on lands which were included in the above entail. Previous to the constitution of these votes, his Lordship appears to have gone through the same process of resignation, to get quit of the fetters of the entail, as in the preceding instance; and although the entail was founded upon in the court of freeholders, and was probably one of the grounds on which those nine votes were there rejected, that objection was hardly, if at all, touched upon in the Court of Session, when the cases were brought there by complaint. The question then came to depend, as will be immediately seen [1], on the inference of nominality, arising from the general circumstances under which the votes were formed, and particularly from a correspondence which took place between Lord Eglinton and some of the parties [2].

On a review of the whole question, regarding this objection of entail, the preponderance of authorities certainly seems to be against the efficacy of the objection, when stated *per se*. Considered as affecting the validity of the right of the claimant, or as establishing the defeasible nature of the right, it has been seen, that it was many years ago decided, that the objection was in those points of view *jus tertii* to the freeholders, and it does not appear that this principle has been yet shaken. Con-

[1] See p. 211.

[2] On one occasion, however, when one of these cases, Macknight Crawford v. Stewart, 7th March 1818, Fac., was before the Court, the Lord President expressed himself thus: 'Then a question arises as to the defeasible nature of the vote. Suppose that the heirs of entail of the estate of Eglesham were to pursue an irritancy on the ground of this alienation, is the claimant prepared to say, that he would hold his vote, even to the effect of evicting his estate from Lord Eglinton? If he cannot go this length, I apprehend he cannot be entitled to consider himself as holding his vote free from all confidential understanding with Lord Eglinton.' But so far from holding this view fatal to the vote, his Lordship concurred with the other Judges in allowing the claimant to be examined by interrogatories; and at a subsequent advising of the answers to those interrogatories, he formed one of the majority of the Court who *sustained* the qualification.

sidered as tending to show such a degree of confidence as will induce the disponee to abandon the right, rather than allow his author to incur a forfeiture, it does not appear that it has, in any case, been held as conclusive evidence *per se* of such understanding, or of that kind of general confidence which often constitutes nominality. On the contrary, we have seen that, in one instance, a majority of the Court, whilst they set aside the qualification on its general complexion, admitted that a qualification on entailed property might, in some instances, be good; and that Lord Thurlow remitted this case for farther evidence, thereby giving room for the implication that the objection was not decisive of itself. We have also seen a much later instance, where, in like manner, a majority of the Court, although the qualification was found bad in its whole circumstances, delivered opinions that this objection *alone* was not sufficient [1].

It has frequently been the practice to insert in conveyances, on which votes have been claimed, clauses of return to the granter and his heirs, either upon the death of the disponee, or upon the failure of certain series of his heirs. In the first instance in which an objection appears to have been made to the validity of a qualification, on the ground of such a clause of return, the conveyance seems to have been not merely of the superiority, but of the property also. In that case, a claim was made by a person infeft, 'tam in feodo quam in vitali-

[1] It is, however, not meant to give it as a point quite fixed, that, generally speaking, a qualification may be constituted on entailed property, although certainly the weight of authority, quoted in the text, leads to that conclusion. It is understood that a different opinion, or at least doubts on the subject, are entertained by some eminent lawyers. It is proper here to mention, that the cases of Maxwell *v.* Macdowal and Chichester *v.* Maxwell, which are regarded by Mr Bell (Election Law, p. 311) as decisions affecting this question of entail, did not turn on that point at all, but on the effect of the clause of return, and of the answers to special interrogatories. See what is afterwards said as to those cases, p. 207-8.

'reditu, (hæredes suos et assignatos excludendo) quo morte 'deficiente Comiti de Galloway (the granter) vel Alexandro 'Domino Gairlies, ejusque hæredibus et successoribus redire 'et assignatis quibuscunque,' with power to the disponee, who was the son of Lord Galloway, to burden the lands to the extent of L. 400 Sterling; and another claim was made, on a disposition precisely of the same nature, except that no power to burden was given. It was objected, that these qualifications were not liferents, although the heirs of the disponees were excluded, and that the fees were nominal and fictitious; but the objection was repelled, in regard to both claims [1]. In a case which afterwards occurred, the method of the clause of return was adopted, because the qualification was already liferented by a person at that time abroad. The fee was conveyed to the grantee, whom failing to the eldest son of the granter and his heirs whatsoever, under an exception of the previous liferent; and an objection of nominal and fictitious to this vote was repelled [2].

At a later period, great proprietors, instead of creating votes by means of liferents of superiority, adopted this method of the clause of return, in framing qualifications on fees of superiority. The plan followed, was to convey fees of superiority to individuals, or to them and their heirs-male, and to insert a clause of return to the granter and his heirs, on failure of the grantee or of the substitutes. Various attempts were made to have such rights declared nominal and fictitious. In the first case of this description which occurred, and which has been already noticed [3], the reality of the right was affected not only by a clause of return, but by the introduction of a clause of pre-emption in favour of the granter of

[1] Freeholders of Wigton v. Stewart and Hay, 24th June 1747; Falc. and Session Papers.

[2] Scott and Tod v. Millar, 20th February 1787; Fac. and Session Papers.

[3] Souter v. Freeholders of Banff, 26th November 1803; Fac. *sup.* p. 197.

the qualification, and by the circumstance that he was fettered by a strict entail. The qualification was, under the whole circumstances, held to be nominal and fictitious. In the next case which occurred, the Earl of Galloway had conveyed a superiority to a purchaser, and the heirs-male of his body, whom failing, to himself and his heirs of tailzie and provision in the lordship of Galloway; and although the claimant had stated, in answer to interrogatories, that he considered himself at liberty to vote for whom he pleased, and that he was under no obligation to renounce under any event, the qualification was declared nominal and fictitious [1]. In a subsequent instance, an attempt was made to remedy the effect of a clause of return, and other circumstances inferring nominality, in the following manner. The granter of the qualification executed a regular deed, whereby he renounced the benefit of the substitution; and this deed having been recorded in the Sheriff-court books, was produced, a few days afterwards, at an election meeting at which the claimant asked enrolment. The freeholders, however, rejected the claim; and the case having been brought into the Court of Session by complaint, before which time it was also registered in the record of sasines, the judgment of the freeholders was affirmed [2].

[1] Maxwell v. Macdowal, 24th December 1803; Fac. and Session Papers. If this conveyance was in prejudice of any entail, that objection is not at all argued in the papers.

[2] Soutar v. Ferguson, 3d March 1807; Fac. and Session Papers. —*Note from Session Papers of Lord President Campbell.* 'Objection 'ought to be sustained. Clear distinction between title qualified *ex facie*, 'and one which is *ex facie* legal, but against which extrinsic objections 'may lie. Renunciation here not registered, except in probative writs, 'which is not registration at all, as principal always given back, and may 'be returned to granter. Ought to have been registered in Register of 'Sasines and Reversions and a year before. See Lord Bankton, vol. ii. 'p. 499. as to register of probative writings. Clause of registration here, 'but is only registered as a probative writ. It can neither answer the 'purpose of preservation or publication.—*Justice Clerk.* Clearly nominal. '*Craig.* Same.—*Hermand* and *Balmuto.* Bad vote.—*Armadale.* Good vote.'

In this state of the law, regarding the effect of a clause of return, the Court distinguished between the grant of such a right to a son and heir, and a similar conveyance to a stranger disponee, as the former can defeat the destination at pleasure [1], and is therefore not fettered by the clause of return, whilst the latter cannot alter the destination, unless for an onerous cause [2]. They, therefore, sustained a qualification, rested on a conveyance of superiority, made by a father to his son and heir, and the heirs-male of the body of that son, whom failing, to return to the granter and his heirs and assignees whatsoever [3].

In a later case, however, the Court seem to have done away with this distinction, and also to have destroyed the effect of the previous decisions, which bestowed the character of nominality upon a right of superiority, with a clause of return. The Earl of Galloway had granted a disposition to his son-in-law, and the heirs-male of his body, whom failing, to himself and his heirs of tailzie, and successors appointed, or to be appointed, to succeed him in the estate of Galloway; and the disponee had stated, in answer to certain interrogatories, that he conceived he was entitled to vote for such candidate as he thought proper, and not bound to reconvey his qualification at the desire of the Earl. In these circumstances the Court, by a first interlocutor previous to the separation of the Divisions, found the qualification to be nominal and fictitious; but the case having been again brought before the First Division, after the separation of the Courts, it was held that there was no evidence of any secret understanding affecting the validity of the vote; and the former judgment was altered, and the qualification sustained [4].

[1] Marquis of Clydesdale *v.* Earl of Dundonald, 26th January 1726; Fol. Dict. i. p. 308.

[2] Duke of Douglas *v.* Lockhart, 18th February 1717; Fol. Dict. i. p. 308.

[3] Gordon *v.* Gordon, 27th June 1807; Fac.

[4] Chichester *v.* Maxwell, 28th January 1809; Fac.

It may now therefore be held, that a clause of return, in the conveyance of the fee of a superiority, will not *per se* be fatal to a qualification, although, perhaps, it may still have its weight in conjunction with other circumstances in forming an estimate of the substantial nature of the right on the whole.

Questions which arise, involving the objection of nominal and fictitious, are now almost entirely limited to an inquiry, whether, in the whole circumstances, and more especially when these circumstances are taken in conjunction with the answers made by the claimant himself to interrogatories, there is evidence of a confidential understanding between the granter and the grantee, relative to the manner of voting, and to the abandonment of the right. By the numerous decisions which have been pronounced on the question of nominality, the effect of particular objections taken singly, such as the right producing little return, or being a liferent, and many others, has been in a great measure determined. But the inquiry as to confidence, on a view of the whole circumstances and evidence of different kinds adduced, may arise in a variety of shapes, some one or other of which the question of nominality now generally assumes. In a recent case[1], Lord Chancellor Eldon observed, 'I have found no case in which 'it has been decided, that, if the sensation in the mind of the 'granter does not pass to the mind of the grantee, and the 'sensation in the mind of the grantee does not pass back 'again to the mind of the granter; if there is not an under-'standing created between them, that the man shall vote as 'the granter of the estate shall direct him to vote, that it will 'not be a good vote. It has been held, and Lord Thurlow 'himself has stated, that he cannot meddle with estates when 'the persons voting in respect of them, vote from gratitude 'or common obligation, but that there must be a sort of pa-'ramount and perfect obligation disappointing the law, as he

[1] Crawford, *infra*.

'expresses it; an understanding, that the man who made the 'vote, made it for the purpose of making the grantee his crea-'ture, and that the man who took the vote understood that 'he so took, and was under, if we may so call it (I cannot 'easily define it), an honorary obligation, that he would, in 'truth, become the creature of the man who meant to give 'him the estate, for the express purpose of his voting as he 'the granter pleased[1].'

This confidential understanding, when not the subject of express paction, was thus described by Lord Thurlow, in the case of Sir John Macpherson. 'What a man thinks, in his 'own mind, may be a mere sensation, and amount to nothing. 'But, if that impression upon his mind arises out of the rest 'of the transaction, it extends itself to the granter, and may 'shew what was the consideration of the grant. If it has 'passed from the mind of the granter to the grantee, and 'from the mind of the grantee to the granter, that the grantee 'is to employ the estate for the benefit of the granter (I do 'not ask whether it is in writing or in words); but if, in fact, 'there exists such an understanding, it comes within the very 'terms of the act of Parliament.' It is mutually understood between them, that the right of voting is to be exercised by the voter, according to the pleasure of the granter; and, as a consequence of this, that, if the former should not accommodate himself to the view of the latter, he is bound to give up his right. Thus, in the instance of the numerous votes made at one time by the Duke of Gordon, many of the voters, after it had been found in the House of Lords that they must submit to interrogatories, admitted, in answer to certain questions, 'that the freehold qualifications had been framed with 'a view of increasing the political influence of the Duke of 'Gordon; that, although the persons to whom they were 'granted had come under no express engagement to vote for 'the candidate patronised by his Grace, they did not think

[1] Bligh's Appeal Cases i. p. 193.

'themselves at liberty, as men of honour, to vote in opposi-
'tion to his wishes; and that they could not, with propriety,
'refuse to renounce their freehold qualifications, when it was
'necessary for the Duke's accommodation.' On considering these admissions, the Court decided that the votes were nominal and fictitious[1].

It seems to be a consequence of a recent decision in the House of Lords, that the evidence of confidence, arising from the general circumstances of the transaction by which the right has been constituted, and even from letters indicative of the understanding of the parties, must be very decisive, before it can be held to supersede an examination of the claimant by interrogatories, and to entitle the Court *de plano* to pronounce the vote confidential. In that instance, it was held by the Lord Chancellor, that an opportunity ought to be given to the claimant to explain, if he can, any suspicious circumstances which may appear from the other evidence in the case. The Court will not be bound to give effect to the explanation, unless it is satisfactory; or even to believe the statement of the party, if they see reason to doubt his veracity, from the weight of the evidence afforded by the other circumstances; but it must be a very strong case to entitle them to refuse an opportunity to the claimant to explain the suspicious appearances, if he can.

The recent case alluded to, originated in a number of liferent qualifications which the Earl of Eglinton conveyed, at one time, in favour of different individuals, the price paid for them being calculated on the value of the annuity afforded to each person by the reddendum paid by the vassal, with the addition of a small sum which the correspondence bore was intended to meet the prejudices of the world. Besides those suspicions of confidence which might be supposed to arise from the general circumstances of the case, such as the number of votes made at the same time, the nature of the right,

[1] Forbes v. Tait, 15th June 1790; Fac.

&c.; which, however, would not, of themselves, be sufficient to stamp the votes as nominal; evidence of great weight was derived from a variety of letters which had passed between the different parties at the time. In regard to one of the claimants, Mr Hugh Crawford, letters were produced from the Earl to him, with the answers returned to these letters. In one part of the correspondence, his Lordship observed, 'Few persons will be more agreeable to me, being grateful 'for the friendly *support* I have received from you.' The letters written by the claimant certainly did not directly express any intention of supporting the political views of the Earl; but they bore marks of a strong disposition to oblige his Lordship, and meet his wishes, in regard to the manner of constituting the votes. The claimant, both at the meeting of freeholders and in the Court of Session, offered to answer any interrogatories which might be put to him. The Court were of opinion, that the correspondence established the confidential nature of this vote, and without allowing the proposed interrogatories to be put, found that the claimant had no right to stand on the roll [1]. The correspondence was found to be fatal also to the other votes which had been formed at the same time. One of the claimants, however, Mr Macnight Crawford, on bringing his case again under the view of the Court, succeeded in making out a distinction between his situation and that of the others, and in obtaining an alteration of the judgment of the Court with respect to himself. He was possessed of a landed estate in Renfrewshire, which afforded a part of a qualification; and, before he purchased one of the liferents, an attempt was made to complete it from Lord Eglinton's superiority. The Court, principally upon this ground, altered their former judgment, so far as to allow an examination of the claimant by interrogatories. No direct correspondence had taken place between the Earl and this claimant, except one letter from the latter to the former,

[1] Crawford v. Stewart, 12th November 1817; Fac.

which established nothing; and the principal point which was investigated in the interrogatories was, whether Mr Macnight Crawford had been privy to the understanding which the Court held to be proved, as existing between the Earl and Mr Hugh Crawford, and accepted his vote with similar views. The Court, on considering the answers made by Mr Macnight Crawford to the questions put, held that he had satisfactorily explained the footing upon which he had obtained his qualification, and ordered him to be added to the roll of freeholders [1].

These cases were carried by appeal to the House of Lords, when that of Mr Macnight Crawford was affirmed, whilst the others were remitted back to the Court of Session; with instructions to allow the examination of the claimants upon interrogatories. In delivering his sentiments, Lord Chancellor Eldon adverted to the opinion which had been expressed by Lord Thurlow, in the case of Sir John Macpherson, that 'it 'must be upon the general state of the transaction, that the 'Court may collect that the estate, instead of being intended 'to be used, or disposed by the grantee, was intended be-'tween them to be at the use and disposition of the granter. 'And whenever a case affords circumstances sufficient, fairly 'and roundly, to raise that presumption in an unanswerable 'degree, or to raise it in a degree which the party himself 'cannot answer; in such a case as that, the vote must be held 'to be void.'

Applying those principles to the present case, Lord Eldon stated, that he was not of opinion that such a presumption of confidence had been raised in this case, as was unanswerable, or which the parties could not answer [2]. He farther conceived, that it was the meaning of Lord Thurlow, that the parties, even after examination, might be disbelieved, if their explanation was not such as to remove suspicions from the mind [3].

Judgment was therefore pronounced, ordering the cases,

[1] Macknight Crawford v. Stewart, 7th March 1818; Fac.

[2] Bligh, p. 208. [3] Ib. p. 197.

with the exception of that of Mr Macnight Crawford, to be 'remitted back to the Court of Session, to hear parties further thereupon, with liberty to receive such new allegations 'as the occasion may require; and with liberty for the respondents, in the Court of Session, to call upon the appellant to confess or deny such averments, as to the alleged 'nominality, as the respondents, by interrogatories, according 'to the course of the Court, shall call upon him to confess or 'deny [1].'

This kind of confidential understanding, demonstrated by proper evidence, must, however, be carefully distinguished from that species of connection between the parties, which consists in relationship, or may be the legitimate result of ordinary gratitude. There must, in the words of Lord Chancellor Eldon, be a 'paramount obligation,' or 'honorary obligation,' which renders the voter the mere 'creature' of the granter. Those feelings of natural affection and of dependence experienced by a son towards a father, are not held to be fatal to a qualification derived by the former from the latter. Neither will a vote necessarily be reckoned confidential in a legal sense, although it may have been obtained from an intimate friend, towards whom the receiver, perhaps, entertains strong sentiments of gratitude for favours previously received. The voters, in these instances, may very likely feel inclined to forward the general political views of the granters, but still that sentiment which naturally arises from the relative situation of the parties, is not held to be fatal to the qualification [2].'

[1] Fac. Col. for 1819, p. 772.

[2] The law on this head is admirably laid down by Lord Eldon, in the cases which have just been referred to. See the passage which has been already quoted, p. 209: and in a subsequent passage, his Lordship observes, 'We are here upon an infinitely delicate subject. I agree the objection is founded, if the estate can be shewn from circumstances, from 'the refusal of the party to be examined upon interrogatories, or from his 'deficient answer to those interrogatories, to be an estate not given to him 'for his own use and benefit, to be used by him as he shall think proper. 'But I follow Lord Thurlow in opinion, that, if the grantee shall, from

In a case where a freehold qualification had been given to a friend in exchange for another, and where the donors were respectively candidates at the next general election for the counties to which the qualifications given away belonged, the feeling of mutual good will which might be supposed to exist between the two individuals was held not to affect the qualifications [1].

It seems also to be settled, that the circumstance of the grantee being the agent or man of business of the granter, is not sufficient *per se* to infer such a confidential understanding between the parties, as to vitiate the qualification [2].

Where a qualification has once been constituted upon such a mutual understanding between the parties, as to render it confidential in a legal sense, that character cannot afterwards be removed by the granting of a deed, on the part of the donor, discharging any obligation on the part of the receiver. Such a document may be regarded as a mere form, which cannot alter the original nature of the transaction. Thus, where a vote had been found to be confidential in the Court of Session, its nature was held not to be changed by the production of a 'declarator and discharge by Thomas Graham, 'Esq. of Kinross, (the granter of the vote), of any obligation

'the obligation of gratitude, act in the same interest as his friend the 'granter, that is no objection. Where a father gives to his son a qualifi-'cation; where an uncle gives to his nephew a qualification; where a 'brother gives to a brother a qualification; it is very difficult to suppose 'that the qualification is given by the father, uncle, or brother, without 'conceiving, that, in the one instance, filial affection, and, in the other in-'stances, the affections resulting from those relationships, will induce the 'party to vote in the same interest with his relative and patron. But 'authorities cited in argument prove, that there must be something fur-'ther; that you must make out that there is this understanding between 'the parties.'—See also the case of Belshes v. Smith, 29th June 1809; Fac.

[1] Montgomery v. Dalrymple, 2d March 1813.

[2] See the Session Papers in the case of Macqueen v. Nairn, 23d January 1823, from which it appears, that this circumstance was founded upon

'upon the said John Campbell (the receiver), to redispone, 'express or implied [1].'

## SECTION 7.

### *Of Alteration of Circumstances.*

The act 16th Geo. II. c. 11 [2] provides, that, if no complaint shall be exhibited against the enrolment of a freeholder, within four months from the date of enrolment, he 'shall 'stand and continue upon the roll, until an alteration of his 'circumstances be allowed by the freeholders at a subsequent 'Michaelmas meeting, or meeting for election, as a sufficient 'cause for striking or leaving him out of the roll.'

By another section of this act [3], an alteration of the circumstances of a freeholder is defined to be an 'alteration of 'that right or title in respect of which he was enrolled.' It will be proper to inquire what is held to be such a change of title.

It is held not to be an alteration of circumstances in the sense of the act, if a freeholder merely parts with the *dominium utile* of the estate on which he is enrolled, by creating a base right under him; for he is still superior under the Crown [4]. Mr Wight, however, observes, that it seems proper that he ought to explain the matter to the freeholders, and get his title put on its proper footing, that he may be in condition to take the trust-oath with safety.

It is no alteration of circumstances in the sense of the act, if a freeholder, in making a change in his family settlements,

in part. The objection of nominality was either repelled, or at least abandoned. See also Speech of Lord Chancellor Eldon in Lord Eglinton's cases; Bligh, p. 203, as relating to Mr Martin, one of the claimants.

[1] Stein v. Campbell, 18th November 1815; Fac. See also the case of Soutar v. Ferguson, 3d March 1807; Fac., already mentioned.

[2] Sect. 4. [3] Sect. 3. [4] Wight, p. 279.

resigns his lands in the hands of the Crown, and obtains a new charter in favour of himself, and a series of heirs, on which he is infeft[1]. It is also held, that, where a person makes up a new title in his own person by resignation and new infeftment, that circumstance does not bar him from claiming enrolment on his original titles. A person who held certain lands of the Crown, by virtue of a charter and infeftment, obtained a new charter of resignation in favour of a friend in liferent, and of himself in fee; and the liferenter having been enrolled on this title, afterwards renounced his liferent. The fiar was found entitled to be enrolled on these lands, on production of the old titles by which he held them, without producing the charter of resignation, of which an extract only was exhibited[2].

In one instance, the author of a liferenter, already on the roll, resigned into the hands of the Crown, and obtained a new crown-charter, and then granted a new disposition to the same person in liferent, and to another in fee; on which infeftment followed. The fiar lodged a claim of enrolment; and the liferenter concurred, and concluded either to be continued in his former place on the roll, or else enrolled of new, in virtue of his last infeftment. Before a year, however, had elapsed from the infeftment, a general election took place, and, at the meeting, an objection, on the ground of the new titles, was made to the continuance of the liferenter on the roll. This objection was sustained by the freeholders, but was afterwards repelled by the Court[3].

The next case which requires consideration is, where a person standing on the roll conveys away, in favour of another, the subject on which his vote is rested, by a disposition containing, in usual form, procuratory of resignation and precept of sasine. So long as the disponee holds merely by a base

[1] Wight, p. 280.

[2] Erskine *v.* Graham, 8th December 1790; Fac., and Session Papers.

[3] Campbell *v.* Fleming, 23d January 1781; Session Papers, and Fac.

right under the person from whom he derives it, the latter is not divested of the superiority of the subject, and would, in every instance, be still entitled to continue on the roll of freeholders, were not his title liable to the objection, that it is defeasible by another, since the disponee may, at any time, get his base right confirmed, or execute the procuratory of resignation, and so divest his author. To determine when this objection proves fatal to the qualification, it will be necessary to examine the different circumstances under which a conveyance may be made.

Where the disposition is granted with a view to an actual transference of the subject to the disponee for his behoof, then the disponee's right, from the time of delivery of the deed, must be held to be dependent on the will of the other, who may, at any time, complete his entry with the Crown; and will no longer constitute a legal qualification, unless the disponee is, in some way or other, bound not to make his right a public one, during the life of his author, but is merely entitled to take infeftment on the precept of sasine, and hold base of the disponer. An obligation, however, of this latter kind, will remove the objection, and entitle the disponer to continue on the roll. Thus, where a disponer had so limited the procuratory of resignation, as not to 'take effect till his death,' and where the disponee had granted an obligation, which was put on record, to hold the lands of the complainer during his life, and neither to execute the procuratory, nor confirm a base infeftment, nor adjudge in implement, the qualification was found not to be impaired[1]. In like manner, a disposition, granted by a father to a son, was found not to interfere with the qualification of the former, as the latter granted to his father, six months before the meeting at which the objection was made, an obligation 'not to 'execute the procuratory, nor take any step for divesting him

[1] Dunbar v. Urquhart, 23d February 1774; Fac.

'of the superiority of his lands during his life;' which obligation was immediately put on record [1].

If the disponee has merely completed his base right, and then executes a procuratory for resigning the subject of this base right *ad remanentiam* in the hands of his author, the latter will then of course be entitled to remain on the roll. Nor is it necessary that the resigation *ad remanentiam* shall have been executed a year before any meeting for election at which an objection may be made. This was decided in a case where it was executed only the day before the meeting, and the instrument of resignation recorded [2].

In a late case, a person enrolled on certain lands sold them by a deed, containing procuratory and precept, and also bearing a reservation, expressed in the dispositive clause in these terms: 'Reserving always to myself the superiority or *dominium directum* of the whole foresaid lands and others hereby disponed, during all the days of my life;' and expressed in the precept of sasine in these terms: 'Reserving always as aforesaid my own liferent of the superiority or *dominium directum* of the whole foresaid lands.' On this disposition the disponees were base infeft. It was objected to the right of the disponer to remain on the roll, that it was only a liferent of the superiority which was reserved; that, admitting this liferent to be separated from the property, the fee of the superiority was not so separated; that the trustees were under no obligation not to get a charter confirming their base right; and that, if they did so, the liferenter had no vassal. It was answered, that, by the dispositive clause, which is the governing clause, the fee of the superiority was reserved; that a proper vassalage was constituted by the base infeftment of the disponees; and that the reservation was a condition of the onerous contract between the parties, and disabled the dis-

[1] Russel v. Ferguson, 7th March 1781; Fac. It was stated from the Bench in the case of Stewart v. Earl of Fife 1827, that such an obligation might be granted, even in the face of the freeholders.

[2] Macdowal v. Crawford, 20th February 1787; Fac.

ponees from doing any act to defeat the title of the disponer. The Court, by the narrowest majority, found that the disponer had no right to continue on the roll, principally, as it would appear, on the ground that his right was thought defeasible [1].

The act 1681 provides, that 'no person infeft for relief or '*payment of sums* shall have vote but the granters of the 'said rights, their heirs and successors;' and the act 12th Anne, c. 6, declares that no 'redeemable right' shall entitle to a vote, except proper wadsets and adjudications. Hence where a disposition is *ex facie* a mere security for debt, it will not have any effect on the qualification of the granter, even although it contains both procuratory and precept, because any title made up under it will bear *in gremio* its redeemable nature; and this is the case with the heritable bond and the disposition in security. Dispositions, however really intended as mere securities, have sometimes been made *ex facie* absolute and irredeemable; and with respect to such, it will be necessary, in order to preserve the qualification of the disponer, either that the true nature of the right shall appear from competent evidence, or that some valid obligation shall have been granted not to make the right a public one. Thus, in one case, a person who had been enrolled on certain lands in right of his wife, granted, in conjunction with her, to a bank a disposition of those lands, containing procuratory and precept. On the day before the Michaelmas meeting, however, the bank executed a back bond, declaring that the disposition was merely in security of such debts as might arise to it, and containing an obligation to redispone the lands, on payment of these debts previous to a sale, but bearing no obligation not to make the right public. This declaration of the real nature of the right, and the circumstance that the disponer had continued to exercise all the rights of a proprietor, were held to remove any objection to

[1] Wilkie *v.* Smith, 20th November 1821; Fac.

his qualification, and to bring it within the provision of the act 1681; and he was found entitled to remain on the roll [1].

The next set of cases which requires attention, consists of those which have arisen from lands having been conveyed to trustees for certain purposes; and the question then occurs, Whether the truster is held to be so far denuded as to be deprived of his elective franchise? In some of these instances the trustees have granted obligations not to enter with the crown, but merely to hold base of the granter; and in others no such obligation has been granted. With respect to the former, it must follow at once, from the principles which have been already laid down, that the freehold qualification remains unimpaired by the trust; because, if the effect of an alienation with a view to a present sale, is obviated by an obligation not to enter with the crown, much more must the effect of a mere trust be removed by such an obligation. This was accordingly decided in a case in which, although the trust was constituted prior to enrolment, and the objection was made against a claim to be enrolled, still the principle established was equally applicable to a case of alteration of circumstances. In the question alluded to, a person having left at his death a conveyance of lands to trustees for certain uses, the trustees were base infeft, and the brother of the deceased served himself heir of conquest. The trustees then, for a price paid, granted an obligation not to enter with the crown; and the brother having claimed enrolment on the titles of the deceased, as apparent heir of conquest, the Court held that he was entitled to be enrolled [2]. In a subsequent case, in which the circumstances were very similar, it was objected to the claim of enrolment of the apparent heir of the deceased, that the right was defeasible by the trustees, notwithstanding the deed of renunciation, and that

[1] Alexander and others v. Brown, 7th March 1822, Shaw; 15th February 1822, Fac.

[2] Murray v. Nelson, 5th March 1755; Fac.

the heir apparent was not in possession, as required by the act 1681, yet the Court ordered enrolment [1]; and in doing

[1] Campbell *v.* Spiers, 14th December 1790; Fac. Affirmed on appeal, 5th March 1791. The following note of the opinions of Lord President Campbell, and the other Judges, is from the Session Papers of the Lord President.—*Lord President.* As to objection in point of title, no want of possession. It is a lucrative succession under the entail and trust. Sir Alexander represents his father, lives at Gargunnock, and receives from the trustees that portion of the rent which is allowed him. The entail dispones the estate in his favour as institute, and he is apparent heir in investitures. The possession of the trustees is his possession. Civil possession sufficient. But the objection is, that his title is defeasible, as the trustees may sell to a purchaser, who may execute the provisions. The renunciation of little consequence, as it only binds them personally, and not recorded in Register of Sasines; and even if it were, doubt if it be a feudal method of securing Sir Alexander in the superiority. But, independent of this renunciation, can it be said that he is divested of the right of apparency by a settlement in his own favour, or, which is the same thing, trustees for him, the *dominium directum* still remaining *in hæreditate* untaken up? Objector must be able to shew that a trust-conveyance for the purpose of management, and for the heir's own behoof, *quoad* the reversion, is an alienation from the heir. Sir Alexander is entitled to take a charter upon the procuratory in the entail, or, which is the same thing as to third parties, to be served upon the former investitures, and so to complete the feudal right in his person, which is not inconsistent with the feudal right being also in the trustees.—Query, Would not his wife be entitled to her terce, or to the jointure allowed by the entail, upon his making up such titles? Fraser of Lovat in a similar situation. Suppose the trustees also infeft upon a charter from the crown, would this entirely denude him of the feudal right of his estate, and his wife of the terce. What if Sir James living, and had put his estate under trust in his own life, would this have been a good ground for turning him off the roll? Case of Sir Ludovick Grant very much in point. Infeftment in security, till sale actually takes place, which will of course denude him. But, in the mean time, the estate belongs to nobody but him. See also case of G. Crauford in Renfrewshire, who was in worse circumstances.—*Justice Clerk.* Clear that nothing in the objection. Act 1681. Spirit and language of it. Reverser has the substantial interest till property evicted. Although adjudger in possession, he uplifts for reverser, and applies it to debt. Accountable. Right in security the same. Power to sell common, but makes no difference. Possession of creditors and trustee is pos-

so, they proceeded upon grounds independent of the obligation not to enter with the crown, and rested their opinion upon the general nature of a trust-right, which was held not to interfere with the elective franchise of the truster.

This general principle, indeed, that the granting of a trust right with procuratory and precept, does not impair the freehold qualification of the granter, even although no obligation should be obtained against making the right public, is now fully established. A trust is intended merely for a temporary purpose, such as the paying off the debts of the granter, to which object the rents of the lands conveyed are made available; and although a power of sale may be granted, yet the trustees are bound to reconvey the residue, after the purposes of the trust have been accomplished. The substantial interest, therefore, evidently remains with the granter, for whose benefit the trust right is intended; and the right of the trustee may be considered as a mere burden on that of the truster. In one instance a judgment was pronounced by the Court, proceeding apparently upon a different principle [1]; but it has been maintained that that case was decided on a specialty [2]; and, at all events, its force, as determining any general question, has been entirely destroyed by subsequent decisions. Thus a trust for behoof of creditors having been granted with procuratory and precept, and with power to the trustee to sell the lands conveyed, the Court, holding that the possession of the trustee was that of the truster, and that the case fell under the provision of the act 1681, relative to infeftments for relief, which was quoted above, found that the qualification of the truster was not impaired [3]. In another instance, a

session of truster. Every shilling that is uplifted goes to payment of Sir Alexander's debt. May borrow money and pay off the debt.—*Monboddo.* Same.—*Gardenstone.* Same.—*Eskgrove.* Same. Exactly in situation of his father.—*Swinton.* Same.—*Rockville.* Same.

[1] Muir and Dalrymple v. Macadam, 7th March 1781; Fac.

[2] See Supplement to Wight, p. 130.

[3] Donaldson and others v. Grant, 11th March 1786; Fac.

conveyance of certain subjects, with procuratory and precept, had been executed in favour of a trustee, for behoof of creditors, and the trustee had actually entered into missives of sale of the superiority on which his constituent was enrolled, and which was one of the subjects of the trust, but the term of entry of the purchaser had not come when the truster's right to continue on the roll was objected to at a meeting of freeholders, who repelled the objection. When the case was brought into the Court of Session, the Judges were of opinion that the missives did not amount to an actual and present sale, and that, in the whole circumstances, the truster had not forfeited his qualification [1].

In the preceding case, an agreement to sell, entered into by trustees, was held not to be sufficient to deprive their constituent of his right to vote. In like manner, where there is no trust, but the proprietor has himself granted an obligation to sell, and the term of entry is not come, he does not forfeit his qualification. In a case where a proprietor had, in September, exposed his lands under articles of roup, stipulating that the entry should be at Martinmas, when the price should be payable, and the lands had been sold on these conditions, the Court found that he was entitled to have been enrolled on these lands in October previous to the term of entry, because, until the sale took effect, he was fiar of the estate [2].

Where a freeholder disposes of a part of the lands on which he is enrolled, but clearly retains enough to afford a freehold qualification, he is entitled to continue on the roll. This has been held both where he has obtained a new division of his valued rent, shewing that the land which he retains is of the requisite valuation [3], and where it is plain, from the great excess of the whole subject over the part alienated, that the valued rent or old extent of what is retained is not reduced

[1] Lockhart v. Wingate, 19th February 1819; Fac.

[2] Don v. Cathcart and Oswald, 2d March 1813; Fac.

[3] Macleod v. Gordon, 17th January 1766; Wight, p. 284.

below the legal standard by the operation [1]. Neither do exchanges of small portions of ground between conterminous proprietors, for the purpose of straighting marches, constitute an alteration of circumstances, as it is presumed that each proprietor receives an equivalent for what he gives away [2].

A person who has parted with a small part of his valuation, clearly retaining enough to give a vote, is not liable to be struck off the roll for refusing to take the trust-oath, if he assigns this circumstance as his reason for the refusal [3].

When a person has been enrolled on the valuation, ascertained by a decree of division, which has afterwards been reduced as erroneous, he is liable to be immediately struck off the roll, if it has appeared in the reduction that his lands, if duly rated, would not have had the requisite amount of valuation [4]. If, on the contrary, it should appear that his estate has been undervalued, the question is considerably different, and has not yet received the decision of the Court [5]. On the one hand, the lands, after the reduction, certainly have no separate valuation; on the other, the proprietor is actually enrolled on lands which truly are capable, by a division of the cumulo, of affording a qualification; the error is probably attributable to the commissioners; and when his claim was made, he had no reason to doubt that an accurate division had been made.

[1] See this subject treated of in relation to Valued Rent, p. 138; and in relation to Old Extent, p. 108.

[2] Wight, p. 286.

[3] Gordon *v.* Heron, 25th February 1803; Fac. *Supra*, p. 172.

[4] Hope Weir *v.* Bruce, 14th February 1771; Fac.

[5] See Wight, p. 287.

## SECTION 8.

### *Of the Jurisdiction of the Court of Session in regard to Freehold Qualifications.*

Previous to the date of the act 1681, there is no reason to suppose that the Court of Session exercised any jurisdiction in regulating freehold qualifications. Where disputes occurred in elections of commissioners, they seem to have been made the subject of discussion in committees of Parliament, whose reports were afterwards considered by the Parliament itself[1]. The act 1681 was the first which directed a 'roll 'for election,' consisting of the names 'of the fiars, liferenters 'and husbands,' who had right to vote in the election of a commissioner to Parliament, to be made up. Any roll previous to the date of this statute, which might be used at the head courts, would comprehend not only the freeholders qualified to vote in the choice of a commissioner, but likewise all those even of lesser property who owed suit at these courts. Hence, previous to that statute, no tribunal would have any opportunity of exercising jurisdiction in preserving the purity of a roll specially intended for election purposes; but each question in an election of a commissioner would probably receive the determination of Parliament as it occurred. When, however, the act 1681 introduced the election roll, it was provided by that statute, that, 'in case objections (*i. e.* objec-'tions to the qualification of those enrolled) be made when a 'Parliament or convention is not called, a particular diet 'shall be appointed by the meeting, and intimate to the par-'ties contraverting, to attend the Lords of Session for their 'determination, who shall determine the same at the said 'diet summarily, according to law, upon supplication, with-'out farther citation.' A jurisdiction was thus, probably for

[1] See Mr Thomson's acts, vol. viii. p. 216, *et seq.*

the first time, conferred on the Court of Session in election questions; and this jurisdiction was to be exercised only in the particular circumstances and manner mentioned in the act. The usual form of application under this statute appears to have been by summary complaint [1]. It appears, however, to have been held immediately before the date of the act 16th Geo. II. that a common law process of declarator might also be brought in the Court of Session, for declaring the title of any one to be enrolled [2]; and there is also an instance of a reduction of certain enrolments having been brought, on the ground that the meeting was unlawful, as having been held on a wrong day, and by persons not on the roll [3].

No farther statutory enactment appears on the subject till the act 16th Geo. II. c. 11, was passed. By that statute [4], a right of summary complaint to the Court of Session in relation to enrolments, whether at a Michaelmas or election meeting, was given, without any distinction as to whether a parliament had been called at the time or not, provided the complaint was brought within four months of the wrong complained of; and it was declared that if an enrolment was not challenged within that time, the freeholder should continue on the roll till an alteration of his circumstances took place.

Questions, however, connected with enrolments, afterwards occurred, to which questions it was argued, that the remedy

[1] See Elchies's Decisions, *voce* Memb. Parl. previous to the year 1743, the date of 16th Geo II.

[2] Lord Elchies, in reporting a case decided in 1741, mentions, that, 'in 'declarators *founded on the common law*, one could not declare his right to 'be enrolled without calling all freeholders on the roll, because they all 'have interest,' thereby taking the competency of such processes for granted (Case of Sutherlandshire, 17th February 1741, Memb. of Parl. No. 7.); and, on referring to his notes, vol. ii. p. 259, it will be seen that this opinion was not confined to himself.

[3] Elchies, *voce* Memb. Parl. No. 6.

[4] Section 4.

afforded by this act did not apply. Thus, in a case in which one of only two freeholders attending a Michaelmas head court of Kinross-shire acted as preses, and thought proper to direct the name of an absent freeholder to be placed after another name, before which it previously stood, the freeholder thus postponed, presented a complaint to the Court of Session, praying to be restored to his former place on the roll. It was objected that that process was not applicable, under the statute, to such a case. The injured party then brought an action of declarator, to have it found that he was entitled to occupy his former place on the roll. It does not appear that any objection was stated to the competency of this action, which was taken up along with the complaint, and the party obtained decree, restoring him to his former place [1].

Other situations afterwards occurred, in which the remedy of common law processes was attempted, and in which the title of freeholders to insist in such actions was the subject of much discussion. In judging of the merits of a qualification, the freeholders, in general, cannot go beyond the claimant's charter and sasine, and the *ex facie* evidence of his valuation; and the Court, in considering a complaint against an enrolment, are subjected to a similar limitation. Hence if the defect is more deeply rooted, the question occurs, whether the freeholders have a remedy at common law? This question arose in regard to the right of the freeholders to challenge at common law decrees of division of valuations. There are certain objections which cannot competently be urged in a summary complaint, but must be brought forward in a regular process of reduction, which is of course competent to any person who has a pecuniary interest in the valuation arising from those various patrimonial rights which depend on valued rent, such as the payment of cess, and the division of commonties. But it was considered doubtful whe-

[1] Rankine c. Ramsay, 23d January 1767.

ther this action was competent to mere freeholders [1]; and in two instances in which actions of reduction of divisions of

[1] The following case occurred in the year 1767. An action of reduction of a decree of division of Commissioners of Supply of the county of Cromarty, was brought by a freeholder on the roll. Thereafter a new action of reduction was brought of the same decree, and at the instance of the same pursuer, calling certain persons who had been omitted in the former action, and who had been enrolled on the lands valued by the decree; and concluding, *inter alia*, to have it found and declared that these parties were not entitled to stand upon the roll, and that they ought to be expunged accordingly. A third process was brought by the same party, for having it declared that certain lands, which had been valued by this decree, did not lie in the county of Cromarty, and that certain parties who had right to those lands should not be admitted to the roll in that county. These three processes were conjoined. Pending the litigation, the pursuer of these actions was struck off the roll of freeholders at a Michaelmas meeting, on the ground of an alteration of circumstances. He had, however, lodged a claim, praying that his qualification should be restricted to certain lands there mentioned: and upon this claim being rejected at the same meeting, he complained to the Court of Session. In these circumstances, the defenders in the action of reduction, who had, even before this change in the pursuer's circumstances, objected to his title to pursue, brought forward a new objection, on the ground that he was no longer on the roll of freeholders. In answer, the pursuer maintained, that, as he had complained against the judgment of the freeholders rejecting his restricted claim, it could not be taken for granted that he had no right to be on the roll. The Court sustained the pursuer's title in the conjoined processes. The defenders having been afterwards assoilzied on the merits, the case was carried by appeal to the House of Lords, when the respondents urged the following objections. It was argued, 1*st*, That the demand made of striking persons off the roll by a declaratory action at common law, was not founded on the law of Scotland; the Court of Session having no jurisdiction with regard to the roll of freeholders except by express statute, which limits and defines the mode of trying such questions, viz. by summary complaint within four months. 2*d*, That the pursuer had no title to insist in these suits as a freeholder, his object not being to obtain any relief with relation to the land-tax. It was answered on the part of the appellant, that the Court of Session had an inherent jurisdiction in matters of enrolment, independent of statute. The House of Lords pronounced judgment to the following effect: 'It having been 'strongly objected that three actions brought in this cause are incompe-'tent for the relief thereby prayed, at the instance of the appellants against

valuation were brought by freeholders, their title was objected to, on the ground that, in a question with them, a formal decree of the Commissioners of Supply must be held as *por-batio probata* and unchallengeable. This objection was, however, repelled in both cases, and the title of the freeholders sustained; some of the Judges assigning as the ground of their opinion, the patrimonial interest which freeholders had to preserve the purity of the roll [1].

'the respondents, and do not lie: and the said objection having been ar-
'gued upon points of great consequence, and the Court of Session having
'given no opinion upon such points, it is ordered, by the Lords Spiritual
'and Temporal in Parliament assembled, that the cause be remitted back
'to the said Court of Session in Scotland, without prejudice to the merits,
'if the actions should be found to lie.' The case having returned to the Court of Session, and having been remitted to Lord Kennet, Ordinary, to do therein as he should see cause, his Lordship pronounced the following interlocutor: '*5th July* 1768.—Having heard parties' procurators upon
'the competency of the action of reduction, and objections to the pursuer's
'title to insist therein, finds the action competent for reducing the de-
'creet of valuation, and sustains the pursuer's title to insist in the ac-
'tion.' In this judgment all parties acquiesced. Sir John Gordon *v.* Lord Elibank and others, decided 11th February 1767, in the Court of Session on the point of title, and 2d March 1768 in the House of Lords; Session Papers and Appeal Cases.

It will be observed, that, subsequently to this, in the year 1774, the judgments which follow in the text were pronounced, by which the competency of actions of reduction of decrees of valuation were sustained, at the instance of freeholders, so that that point may be considered as fully settled; but the remit of the House of Lords in the case just mentioned, and the circumstance that Lord Kennet's interlocutor went no farther than to find 'the action competent for reducing the decreet of valuation,' must shew that serious doubts were entertained as to the competency of the other declaratory conclusions of the different processes in that case. See, however, the opinions of some of the Judges as to the competency of a common law remedy, in the case of Hope Weir *v.* Bruce, 14th February 1771; Hailes.

[1] Ross and others *v.* Mackenzie and others, 10th March 1774; Fac. Earl of Fife and others *v.* Duke of Gordon and others, 16th June 1774; Fac; Wight, p. 185. In the former of these cases there were two objections; 1*st*, That the Court of Session had no jurisdiction to review the proceedings of the commissioners; and, 2*d*, That the freeholders had no title

About the same time, a similar question occurred relative to the title of freeholders to insist in a process of declarator, to pursue. Both objections were repelled. The following notes of the opinions of the Judges are from the Session Papers of Sir Ilay Campbell. '*Hailes.* No doubt of first point. Would have had some doubt of second 'point seven years ago, but too late.—*Gardenstone.* Same.—*Kennet.* Same. 'Distinction between *ex facie* and not, proper. Errors in procedure suffi-'cient, though not null in point of form. Proper that there should be 'a cheque.—*Pitfour.* Same. A matter of greater consequence than real 'property. Distinction between *ex facie* and not, proper. Things that 'require proof and what does not require proof.—*Monboddo.* If have a ju-'risdiction to correct them, extraordinary if no person has a title to 'challenge, if do wrong.—*Justice-Clerk.* Multiplicity of questions. Wish 'to return to principles. Not intended by those who formed the act 16th 'to hang up the short and summary question of valuation, either by com-'plaint or process. Decree of division, where formal, equal to a retour. 'Could a freeholder object forgery or false evidence to a retour.—*Pitfour.* 'Do not differ as to principles; but if any thing *ex facie*, proceed upon 'that. Will not delay the matter for a proof. If prevails in reduction, 'this an alteration of circumstances.—*Justice-Clerk.* Defect in constitu-'tion ought to be corrected by legislature. Acts and commission draw 'out to great length. Some challenges may be made against real pro-'prietors.—*Colston.* Should be glad that we had no jurisdiction, without 'endangering property of the subject. Remit with instructions. Power 'of review of commission of Parliament, unless where a final power is gi-'ven. Not a committee of Parliament, but commissioners or judges ap-'pointed by Parliament. Admitted that competent to parties patrimonial-'ly concerned. This proves jurisdiction. Suppose an estate purchased 'at judicial sale of L. 10,000, and purchased by two different persons, and 'commissioners divide, so as to give one L. 7000 and the other L. 3000. 'Suppose a superiority only, not merely a political interest, will sell 'higher in a market. If jurisdiction admitted, cannot dispute title. Patri-'monial interest that freeholders cannot be increased upon him. *Ex facie*, '*&c.* A distinction attempted here between powers and legality, but no 'foundation. Null if contrary to proof. Practice of Court. Objections 'appearing *ex facie*. Cases in House of Lords. Many causes now de-'pending on it. Only question is, whether even proofs ought not to be 'allowed. In Lord Fife's causes, proofs about mills. Do not think there 'can be a reduction at instance of freeholder till claim entered.—*Kames.* 'Decreet of commissioners, like any other decree, good till reduced. 'Court of Session can reduce. Freeholders ought to put him on roll, but 'may be challenged here. Question at whose instance? Valuable pa-

that certain sasines, on which claims of enrolment were made, had not been truly registered of the date shown by the certificate. It appeared that these sasines had been presented on the 30th September, and entered in the minute-book of that date; but the entry was not signed by the keeper for a few days after, and the sasines were not fully engrossed in the register till the 3d of October. The certificate on the back of the sasines bore, that they had been presented on the 30th of September; and the keeper made a jotting in the minute-book, of the date of actual engrossing in the register. In these circumstances, and before any claim of enrolment was entered on these sasines, an action of declarator was brought by certain freeholders standing on the roll, concluding to have it found that the sasines should not be held as registered on the 30th September. In this action a judgment was pronounced, dismissing it *hoc statu;* and a reclaiming petition against this interlocutor was refused, although, in the mean time, claims of enrolment had been actually lodged. These claims were, however, afterwards insisted in. The freeholders refused to enrol the claimants; and as it was apprehended that the claimants would complain against the judgment of the freeholders, and would maintain that the objection was incompetent in a meeting of freeholders, an apprehension which the event justified, an action of declarator was brought by the same freeholders, who had insisted in the former declarator, concluding as before, that the sasines should not be held as registered on the 30th September. In defence, it was maintained that the action was incompetent,

'trimonial interest. Only difficulty is, if one freeholder fails another 'will take it up; but this occurs in other cases; *e. g.* reduction at in-'stance of one creditor not *res judicata*, but will not allow new one without 'good reason.—*Alva.* For practice.—*Justice-Clerk.* Levying tax by old 'extent very unjust. Ayrshire L. 4000, and shire of Edinburgh only 'L. 600. Altered in order to proportion land-tax equally. Low valua-'tion was then the plan, now otherwise.—*Justice-Clerk.* Doubt is upon 'right of a freeholder.' 'Sustain competency and title in reduction, and 'find *ex facie* objections competent in complaint.'

because the act 16th Geo. II. having prescribed the mode of redress by summary complaint, any common law process which might otherwise have been competent had thereby been cut off; that the defenders had accordingly already brought a summary complaint against the freeholders for refusing to enrol them; that the principle, that every wrong must have a remedy, could not avail the pursuers, because, if the objection was competent to the freeholders, it would be discussed in the complaint, and if incompetent to the freeholders, it was equally so to the Court of Session, which had no original jurisdiction in matters of enrolment. To the title of the freeholders it was objected, that they had no right to go beyond the writings produced to them; and that any *interest* they had in the result, was merely remote and consequential. On the other hand, the pursuers argued, that it was a matter of indifference to them, whether the objection was discussed in the declarator, or in the complaint; but that as no wrong could be without a remedy, one of these methods must be open to them; and that, as freeholders on the roll, they had a clear and obvious interest to prevent the enrolment of others not legally qualified, and were fully entitled to insist in the proper action for that end. The Court accordingly sustained their title to insist in the action: and afterwards, on the ground of the practice in keeping the record which had been proved in a previous case from Cromarty, repelled the objection to the registration of the sasines[1].

There does not appear to be any reported case, involving a similar question for a long time afterwards. A few years ago, however, a case occurred as to the right of a freeholder to insist in an action of reduction of titles *ex facie* unexceptionable, on which a claimant had been enrolled, where the ground of reduction was, that the lands were truly held bur-

[1] Earl of Fife and others *v.* Gordon, Skelly and others, 8th July 1774, Session Papers; and Fac. Col.

gage of the crown, and that the holding had been improperly altered to a blench-tenure. A claimant had been enrolled on a Crown charter of the superiority of certain portions of the Burgh Muir of Edinburgh, and *ex facie* of this charter, the lands were held blench of the Crown. Against this enrolment a complaint was presented to the Court, by one of the freeholders on the roll, on the ground that the lands truly formed a part of the Burgh of Edinburgh; and, therefore, could not afford a qualification in a county; and that, in obtaining the charter, the tenure had been improperly changed from burgage to blench. The complaint was dismissed as incompetent, on the ground that the titles *ex facie* afforded a good freehold qualification. The same freeholder, after the expiry of four months from the enrolment, brought an action of reduction of the claimant's titles, on the same grounds which had been insisted in, in the complaint. In defence it was maintained that the action was incompetent, as having been brought after the lapse of four months, and that the pursuer had neither title nor interest to pursue. The Lord Ordinary found that the pursuer had a sufficient title to insist in the action, 'in so 'far as the pursuer is interested as one of the freeholders 'standing on the roll of freeholders of the county of Mid-Lo-'thian, as libelled, to reduce the defender's said titles.' The case was carried by petition to the Inner-House, where it was maintained by the defender on the point of competency, that the ordinary courts of law never had any original jurisdiction in election matters, and that the statute 16th Geo. II. merely gives a right of complaint, which must be exercised within four months, otherwise the person enrolled cannot be struck off, unless on an alteration of circumstances. On the point of title, the defender argued that the title of the pursuer having been sustained only in so far as his interest as a freeholder extends, this limitation involved a contradiction, because it seemed to admit that a freeholder had no title to reduce an infeftment, in so far as it was a title of feudal

property; whilst it was legally impossible that an infeftment in blench lands, valid in all other respects, should not afford a qualification, a right of voting being by statute attached to such an infeftment; and that the qualification contemplated by the statutes was merely a primary title or existing investitute, and not an ultimate right. The pursuer maintained in answer, on the point of competency, that that point was truly involved in the merits, for that if the title were established, the competency followed of course; that the remedy of complaint as given by the statute 16th Geo. II. was intended only for those objections which could competently be made the subject of that kind of procedure; and that, therefore, the limitation of four months did not apply to cases at common law; and that this action was brought for the purpose of effecting an alteration of circumstances, which would extinguish the qualification even after four months. On the question of title it was maintained, that every freeholder, as entrusted by law with the guardianship of the roll, and also as being patrimonially interested, is entitled to challenge a claim of enrolment, on a kind of estate not affording a qualification, and if this cannot be effected by complaint, he must have a right to insist in a common law action to this effect; that, with respect to the limitation in the Lord Ordinary's interlocutor, if it should be necessary to reduce the defender's infeftment fundamentally, the pursuer's title as a freeholder, must necessarily be broad enough to effect that, even under the Lord Ordinary's interlocutor. Reference was also made to the case of Lord Fife *v.* Gordon in 1774, and to those of Ross *v.* Mackenzie, and Lord Fife *v.* Duke of Gordon in the same year, which have been already quoted. The Court adhered to the interlocutor of the Lord Ordinary [1].

In another case, which was decided at the same time, the circumstances were precisely similar, except with respect to the *time*

[1] Gibson *v.* Forbes, 19th May 1820; Session Papers, and Fac. Col.

at which the action was brought. The summons was raised before the defender had been put upon the roll; and on this ground the action was at first dismissed by the Lord Ordinary; but the defender having afterwards been enrolled, the Lord Ordinary altered his interlocutor, and pronounced judgment sustaining the title in the same terms as in the preceding case; to which judgment the Court adhered [1].

Both these cases were carried by appeal to the House of Lords, when certain difficulties were stated by the Lord Chancellor, with respect to the form of the summonses, and to what judgment it might or might not be in the power of the Court afterwards to pronounce on the merits of the cases. His Lordship observed, that 'The summons asks for a *total* 'reduction. The utmost that Mr Gibson (the pursuer) can 'get by this action is, that this appellant shall be taken off the 'roll of freeholders. *How* he is to be taken off the roll by 'the Court of Session, does not yet appear [2].' The House

[1] Gibson v. Arbuthnot, 19th May 1820; Session Papers and Fac. Col. in note to preceding case.

[2] The following are farther extracts from notes of a short-hand writer, of what passed in the House of Lords.

'*Lord Chancellor.*—The Court of Session having given leave to appeal 'before the conclusion of the cause, shews that they thought themselves 'competent to have given some final judgment in it. It has struck me 'strongly that this is a case which we must remit; as we are bound 'to suppose that, notwithstanding the form of the summons, some judg-'ment can ultimately be given.

'*Mr Grant.*—We will shew your Lordship what judgment might be 'given under this summons.

'*Lord Chancellor.*—But then we should have to give an opinion as to 'what the final interlocutor of the Court of Session may be, before the 'Court itself shall have decided.'

'*Attorney-General.*—We ask leave to appeal, on the ground, that, under 'this summons, no freeholder merely as such is entitled to pursue. I say 'that the prayer of the summons should have been, that the enrolment 'should be reduced.

'*Lord Chancellor.*—I suppose they will say the charter should be re-'duced, so far as it gives a right of voting; and that then, at the next

of Lords accordingly in both cases 'remitted the cause to the 'Court of Session, to revise the interlocutors appealed from,

'Michaelmas court, the appellant, from a change of circumstances, could 'be put off the roll.

'*Attorney-General.*—But, for this purpose, they must reduce the tenure.

'The Attorney General then concluded.

'*Mr Wetherall* for the appellant.—I will take notice of a fallacy on 'which the respondent argues. He holds the right of voting to be a part 'of the subject. The right to vote is a consequence of the tenure; no-'thing entering into the corpus of the freehold, only growing out of it; 'and stands *pari passu* with a right to vote for a freehold in England.

'This is an action to destroy *in toto* the grant.

'*Lord Chancellor.*—The inclination of this House is to remit to the 'Court of Session to consider the terms of the summons, and to find what 'remedy the Court of Session is entitled to give under it, supposing the 'judgment now appealed from stands.

'*Mr Grant.*—A pursuer is entitled to limit the conclusions of his sum-'mons as much as he pleases; and the Court is entitled also to limit them 'for him.

'*Lord Chancellor.*—Whether the pursuer restrict or the Court restrict, 'we must, if we proceed now, decide what that restriction must be, with-'out the Court of Session having decided before us.

'*Lord Redesdale.*—Does not the competency or incompetency of the ac-'tion depend upon what the Court can do; if the Court can do nothing 'the freeholder cannot sue.

'*Lord Chancellor.*—We have not here in discussion what the Court can 'do.

'*Mr Grant.*—In the parallel case of a reduction of a decree of valu-'ation, the question has always been, if the freeholder had a legal inte-'rest to pursue,— this interest might be various,—distributing the mode 'of taxation, &c.—there never was a question in such actions, that a per-'son as a freeholder merely had no title to pursue. Mr Grant read the 'terms of the summons.

'*Lord Chancellor.*—You are to restrict, then, the generality of the pray-'er of the specialty of a recital.

'*Lord Redesdale.*—How can there be a competency to sue, if nothing 'can be done under the action?

'*Lord Chancellor.*—I give no opinion as to whether any thing can be 'done or not under this summons. But we must use great caution in 'cases from Scotland, and particularly in a case like this, how we proceed 'in point of form. We should have first heard from the Court itself its

'generally, and especially having regard to the summons 'and the prayer thereof, and to what the Court, having such 'regard, can or cannot, according to law, farther do in this 'cause.'

In the second case, in consequence of the farther objection, that the summons had been raised before enrolment, this addition was made to the remit, 'and having also special regard 'to the *period* at which the appellant was enrolled on the roll 'of freeholders [1].

When the cases came back to the Court of Session, considerable discussion took place as to the manner of carrying this judgment into effect; but at length an interlocutor was pronounced, ordering production to be made of the titles sought to be reduced, reserving all objections to the pursuer's titles; and this judgment was pronounced, although the defenders refused their consent to this mode of procedure [2].

With respect to the objection in the second case, that the action had been raised before enrolment, the Court, by a majority, adhered to the former judgment, by which that objection was repelled [3].

'opinion, what it could have done ultimately under the summons. I 'should have wished the final decree to be pronounced before the appeal 'came here.'

[1] The following extract from the notes of the shorthand writer, relates to this part of this case.

'The *Attorney-General* stated, that here there was an additional point. 'The action had begun before the appellant was put upon the roll, and it 'was then found to be incompetent. The appellant having been sub- 'sequently put upon the roll, the action originally brought was allowed 'to proceed.

'*Lord Chancellor.*—So an action found to be incompetent at the time it 'was brought, was, by a subsequent event, held to have been competent 'from the beginning, to have been legitimated *per subsequens matrimonium*. 'We will make an addition to the remit in this case, calling the attention 'of the Court to the period at which the appellant was enrolled.'

[2] 23d June 1824; Fac.

[3] Gibson Craig *v.* Arbuthnot, 15th January 1825; Shaw.

These cases were in this stage of the proceedings allowed to drop.

Having thus given some account of those instances in which the Court of Session has exercised a jurisdiction at common law in election matters, it remains to direct our attention to the statutory remedy of complaint.

By the act 16th Geo. II. c. 11 [1], it is provided, 'That if, 'at any Michaelmas meeting, or meeting for election, any 'person claiming to be enrolled shall, by judgment of the 'freeholders, be refused to be admitted, or if any person who 'stood upon the roll shall, by like judgment, be struck off, 'or left out of the roll, it shall and may be lawful for him, 'or them, who is so refused to be admitted, or whose name is 'so struck off, or left out of the roll, to apply (so as such ap-'plication be made within four kalendar months after their be-'ing so refused, struck off, or left out) by summary com-'plaint to the Court of Session, who shall grant a warrant 'for summoning the person or persons upon whose objection or 'objections he was refused to be admitted, or was struck off, 'or left out, as aforesaid, upon thirty days' notice, to answer, 'and shall proceed to hear and determine in summary way 'on such complaint; and if any person shall be enrolled whose 'title shall be thought liable to objection, it shall and may 'be lawful for any freeholder standing upon the said roll, '(whether such freeholder was present at the meeting or not), 'who apprehends that such person had not a right to be 'enrolled, to apply in like manner by complaint to the Court 'of Session, so as such application may be made within four 'kalendar months after such enrolment.'

By the subsequent statute 30th Geo. III. c. 17 [2], it is provided that 'a complaint presented to the Lord Ordinary on 'the bills in the time of vacation, within the said four kalendar 'months, shall be equivalent to, and have the same effect, for 'all the purposes provided for by the said act of the sixteenth

[1] Sect. 4. [2] Sect. 4.

'of his late Majesty, as if such complaint had been presented 'to the Court of Session while sitting: Provided always, that 'printed copies of such complaint be lodged, in the usual 'form, on or before the third sederunt day of the ensuing 'session.'

Under these clauses, the first point which shall be considered is the time within which the complaint must be presented. The statutory period is four kalendar months; and the method of computing a kalendar month is from any day in one month to the corresponding day in the following month. Hence, a complaint moved in Court on the 6th of February, was held to be within four months of a meeting, which had been held on the 6th of October [1]. It is held that the *application to the Court of Session*, under the 16th Geo. II., must be made by presentment of the complaint, within the four months, to the Inner-House, whilst sitting in judgment; so that if the complaint is merely boxed and the fees paid, but is not moved in Court within the statutory period, it must be dismissed as not being duly presented. So indispensable is this rule held to be, that effect must be given to it, even after issue has been joined on the merits of the complaint. In one instance, the litigation on the merits had gone on for some years. The respondents then brought forward the objection, that the complaint had not been moved in proper time, although it had been boxed, and the fees had been paid within the limited period; and the Court dismissed the complaint as incompetent. The respondents, however, were subjected in the previous expences, because it was held to have been incumbent on them to have stated the objection in due time [2]. In a previous case, a complaint against an enrolment on the 24th September, had been moved in Court on the 23d of January, and ordered to be served; but by mistake the clerk had not written out the de-

[1] Carruthers v. Ferguson, 1762; Wight, p. 133.

[2] Spiers v. Buchanan and others, 25th January 1823; Fac. and Shaw.

liverance in due time, so that the warrant for service did not bear date till the 26th January, which was beyond the four months. Under these circumstances, the Court repelled the objection to the competency of the complaint [1].

As the complaint must be presented within four months, so it is incompetent, after the lapse of that period, to supply any omission which destroys the effect of the complaint. Thus in a case in which it had been omitted in the prayer of the petition, to crave an alteration of the judgment of the freeholders, but it had been simply asked to remit the case to the Lord Ordinary to hear parties, the Court refused to allow this defect to be remedied, after the elapse of the four months; and afterwards of consent dismissed the complaint as incompetent [2].

The clause of the act 16th Geo. II, which has been quoted, gives the right of complaint; 1*st*, to any one who has been refused enrolment; 2*dly*, to any one who has been struck off the roll; and, 3*dly*, to any freeholder, whether he was present at the meeting or not, who apprehends that another has been wrongfully enrolled. It has not, however, expressly provided for the case of the freeholders refusing to strike one of their number off the roll, on a well founded objection; but the Court have, by an equitable extension of the enactment, admitted the competency of a complaint in such a case [3].

By the words of the act, the right of complaint against the enrolment of a claimant is given only to a freeholder on the roll. This rule, however, has been sometimes relaxed. Thus, in a case where a claimant who had been rejected, presented one complaint against that refusal, and a second complaint against the enrolment of another claimant; the Court first de-

[1] Gordon v. Duff, 7th August 1773; Fac.

[2] Spiers v. Campbell, 3d March 1826; Shaw and Fac.

[3] Hope Weir v. Bruce, 14th Febuuary 1771; Fac. and Hailes. Some earlier cases to a similar effect are mentioned by Wight, p. 137.

cided, that the complainer was entitled to be enrolled, and ordered him to be added to the roll; and then, in respect of this judgment, they repelled the objection, that he was not on the roll, urged against his title to insist in the second complaint [1].

A like liberal construction has been given to the statute in interpreting the meaning of that *refusal* to enrol, which authorises a complaint. Thus, when the freeholders merely delayed enrolling certain claimants, upon the ground that a reduction of the valuation of the lands on which the claims were made, had been actually brought, and did not absolutely reject the claims, complaints were held competent, and the Court ordered the claimants to be enrolled [2]. In another instance, certain interrogatories were proposed to be put to a freeholder, who had been many years on the roll, tending to shew that his qualification was nominal, and that he never had been in possession. This gentleman having expressed his willingness to take the trust-oath, but declined answering the interrogatories, another member of the meeting proposed that he should be struck off the roll, but the freeholders did not proceed to any vote; and the minutes merely bore, that 'the oath of trust and 'possession having been tendered to the said David Ballingall, 'the same was taken by him.' A complaint having been then presented to the Court of Session, praying that Mr Ballingall should be struck off the roll, the Court held that, as the freeholders had entirely disregarded the motion made regarding him, their conduct was equivalent to a refusal to expunge, and sustained the competency of the complaint [3]. It is true, that it has now been settled, that, after four months have elapsed from the date of enrolment, and when no alteration

[1] Gordon v. Johnston, 17th February 1767; Wight, p. 138.

[2] Rose and others v. Gordon and Urquhart, January 1766; affirmed on appeal, March 1766.

[3] Campbell v. Ballingall, 3d March 1791; Fac.

of circumstances has taken place, it is incompetent to employ any other means than the trust-oath, to investigate either nominality or want of possession; but this state of the law would not affect the principle established in the case of Ballingall, that, where freeholders have altogether waved giving any judgment on an objection, whether well or ill founded, a complaint is competent in the same manner as if there had been a refusal to expunge; and the same principle would of course be applicable to the case of freeholders giving no judgment whatever on a claim of enrolment [1].

The statute has not expressly provided any means of review of the judgment of freeholders upon a claim of restriction; but the Court sustained the competency of a complaint against a judgment of freeholders, restricting a qualification to certain lands in terms of the prayer of a petition, lodged at an election meeting by a freeholder, who had conveyed away a considerable part of the lands constituting his original qualification [2]. Where a complaint is presented against a judgment of freeholders restricting a qualification to a part of the original estate, it is necessary to pray not merely that the freeholders did wrong in restricting the qualification, but also

[1] See the case of Campbell v. Macneil and Macconochy, 24th June 1773; Wight, p. 135.

[2] Dempster and others v. Lyel, 3d March 1791; Fac. According to the Faculty Report, the application for restriction was, by the majority of the Court, viewed as an objection made by the freeholder himself, to his continuing on the roll, in virtue of the lands formerly belonging to him; and on that ground the competency was sustained. In the case of Stewart v. Campbell, 9th August 1774, the freeholder asked restriction at a Michaelmas meeting, but no claim had been lodged previous to the meeting, and the Court, on the ground that no objection had been lodged in due time when the alteration of circumstances took place, dismissed the complaint. In later instances where the claim of restriction has been lodged in due time previous to a Michaelmas meeting, a complaint against the judgment restricting the qualification, has been received without objection. See Gordon v. Fairie, 16th January 1819; Fac.

that the freeholder shall be expunged from the roll [1]; for if a freeholder chooses to restrict his qualification, he subjects himself to the risk of expulsion, if the Court should be of opinion that the qualification as so restricted is insufficient.

In the case of a complaint against an enrolment, the statute provides, that the complaint shall be served 'upon the per-'son said to be wrongfully admitted to the roll [2].' Any misnomer in the service, amounting to the citing of a different person from the true respondent, as, for example, by calling him Thomas Gibson instead of George Gibson, will prove fatal to the complaint [3]. In the case of a complaint for refusing to enrol the complainer, or for striking him off the roll, the act directs warrant to be granted 'for summoning 'the person or persons upon whose objection or objections he 'was refused to be admitted [4]'. Accordingly, where only one of three objectors was cited, that circumstance was held to be fatal to the proceedings [5]. A misnomer would be equally fatal here as in the case of a complaint against an enrolment. If the minutes do not express the objectors, those who voted to sustain the objections must be called; and if the minutes give no light on that point either, then all the freeholders who were present at the meeting must be cited [6]. But where, in consequence of the minutes not bearing the names of the objectors, a complainer is obliged to have recourse to those more troublesome and expensive modes of citation, he is entitled to the costs which he has incurred in serving the complaint [7].

[1] Lord Macdonald v. Grant, 6th March 1827; Shaw and Fac.

[2] 16th Geo. II. c. 11. sect. 4.

[3] Dickson v. Gibson, 13th February 1745; Falc. See also the case of Young v. Johnston, January 1766, relating to burgh elections; Wight, p. 338.

[4] 16th Geo. II. c. 16. sect. 4.

[5] Williamson v. Smith, 15th May 1790; Fac. [6] Wight, p. 146.

[7] Govan v. Douglas and others, 4th March 1796; Fac. and Sup. to Wight, p. 11.

When a complaint has once been brought into Court, it is held to become the common cause of all the freeholders, so that it is not competent for those who are more immediately parties to it, to put an end to the proceedings by abandoning them, if any of the other freeholders wish to sist themselves as parties. If the original complainer against an enrolment dies or withdraws, it is competent for any other freeholder to take up the complaint, even after the lapse of four months from the enrolment [1]; and where the objectors against whom a complaint has been served, have withdrawn their opposition, the Court do not grant the prayer of the complaint, until they have first ordered the abandonment of the objections to be intimated by the Sheriff, to a meeting of the freeholders called for that purpose, so as to give any of them an opportunity of still insisting in the objections, if they see cause [2]. In like manner, in a case where there was ground for suspecting a private understanding between the complainer and respondent, the Court allowed another freeholder to give in answers to the complaint [3].

When the merits of a qualification have been brought before the Court of Session by complaint, the Court are not limited to the consideration of those particular objections which have been stated to the freeholders; but may also decide on the validity of objections now brought forward for the first time [4].

The next subject of inquiry is, whether a claimant can produce, to the Court of Session, on a complaint, titles or evidence which have not been laid before the freeholders.

[1] Fraser *v.* Lord Woodhouselee, 19th June 1804; Fac.

[2] Sinclair and Sutherland *v.* Mackay, 17th January 1765; Wight, p. 147. Ogilvie *v.* Sutherland, 14th June 1826; Shaw.

[3] Anstruther Paterson *v.* Elliot, November 1790; Sup. to Wight, p. 12 and 89; Bell, p. 427.

[4] Stewart *v.* Dalrymple, 28th July 1761; Fac.

On this point, it is necessary to distinguish between those titles upon which the claimant's right to be enrolled more immediately rests, and collateral or explanatory documents or evidence. The former comprehend his charter, sasine, and disposition or retour, connecting his infeftment with the charter, and also the evidence of his valuation, whether retour or certificate of the commissioners. With respect to these, the general rule is, that they must be produced to the meeting of freeholders, in order to entitle the claimant to be enrolled, and that they cannot be afterwards supplied in the Court of Session. This subject has, however, been already considered, and one or two instances have been mentioned where the rule was somewhat relaxed [1].

On the other hand, with respect to collateral documents and evidence, it has been held, that, where objections to the claimant's qualification have been made to the freeholders, on grounds not foreseen, such objections may be removed by new explanatory evidence before the Court of Session [2]. Questions of this nature have generally occurred with respect to the identity of the lands contained in the charter of the claimant, with those lands entered in the cess-books as of the requisite valuation, and alleged by the claimant to be the same with those contained in his titles. Claims of enrolment have been repeatedly rejected by the freeholders, on the ground that there was no evidence of the identity of the lands in the charter and those in the cess-books; and it will be observed, that, as the objections on this ground are made, without previous notice to the claimant, it cannot be expected that he should be prepared with evidence to rebut them before the freeholders. The question has therefore arisen, whether it is competent, when the proceedings have been brought before the Court of Session by complaint, to produce evidence calculated to remove these objections; and it is now quite settled, by many decisions, that it

[1] P. 91. See also Wight, p. 144. [2] Wight, p. 144.

is competent to bring forward such evidence Thus, where a claim was made upon certain lands, and, amongst others, upon 'the lands of Inveraurie, and the lands of Inverhebit, 'formerly called Middle or Little Inverhebit, and now called 'Bellchorach of Inverhebit;' and an article in the valuation 'roll was referred to, stated thus, Inveraurie and Inverhebit 'L. 250;' it was objected, that there were three different farms of the name of Inverhebit, Easter, Wester, and Middle or Little Inverhebit, and that no evidence was adduced to show that the article in the valuation roll referred only to Little Inverhebit. The freeholders sustained the objection; but the Court allowed a proof of the identity of the lands, and, on advising it, sustained the claim [1]. There are various subsequent cases to the same effect [2].

On the principle, that a claimant may not have it in his power to produce collateral or suppletory evidence before the freeholders, the Court, in a case which has been already mentioned, allowed the commission, under which certain persons had granted a charter for another to a claimant, to be produced for the first time in the Court of Session [3].

In the year 1790, a question occurred relative to the right of the Court of Session to investigate the objection to the continuance of a freeholder on the roll, that he had acquired by succession the right to a peerage, although he had not hitherto assumed it. The freeholders having repelled the objection, a complaint was presented to the Court of Session against their judgment, when it was argued, *inter alia*, for the objecting freeholders, that the Court of Session had a statutory jurisdiction to try all questions of enrolment, in which is comprehended the disqualification from the state of a

[1] Gordon *v.* Abercromby and others, 11th March 1773; Fac.

[2] Bruce *v.* Davidson, 1st February 1791; Sup. to Wight, p. 5. Ogilvy *v.* Carnegie, 2d March 1796; Ib. p. 6. Govan *v.* Douglas and others, 4th March 1796; Ib. p. 6. Buchanan *v.* Fisher, 7th July 1824; Shaw.

[3] Proctor *v.* Carnegie, 14th May 1796; Fac. and *sup.* p. 38.

peer, which is *jus sanguinis*, and cannot be abandoned; and that, wherever jurisdiction is given, there must be a power to try incidental questions, although not originally competent to the Court. It was answered, *inter alia*, that, although the fact of possession of a peerage might be tried incidentally in any court, when it was notorious and incontestible, the formal cognizance of the state of a peer was peculiar to the House of Peers, acting in virtue of a reference by the king. The Court allowed the complainers to prove that the respondent had succeeded to the peerage specified. Against this judgment a petition was presented, which was followed by answers, but the point was not again brought to a decision [1].

[1] Dunbar v. Sinclair, 2d February 1790; Fac. The following note of the Opinion of Lord President Campbell is from his Session Papers:

'First thing to be attended to, is the nature of the jurisdiction vested 'in freeholders and Court of Session in cases of enrolment. By act 1681, 'the freeholders entitled to revise and adjust their rolls in first instance, 'and power of review declared to be in Parliament in second instance, or 'in Court of Session, when Parliament or Convention was not sitting. 'All questions to be determined summarily.

'Power of review now in Court of Session alone, subject to appeal to 'House of Lords.

'Jurisdiction ample as to the right of voting, or being enrolled, &c. 'but freeholders a very limited court as to power of cognizance, as they 'only meet once a year, finish at one sederunt, and cannot cite witnes- 'ses, or issue diligence for production of writings, &c. But Court of Ses- 'sion does not act merely as a court of appeal, but has original jurisdic- 'tion, supplying the defects of the Court of Freeholders; and, although 'directed to proceed summarily, may grant proofs, and do every thing 'necessary for explicating.

'New matter competent. Court once found otherwise in case of Cap- 'tain Stewart, 1767; but decision erroneous, and altered in case of Gor- 'don of Whitley and others; *See act of Sederunt*, 17th December 1767, 'sect. 7. relative to proofs. Case of Sir Alexander Mackenzie and others v. Macleod of Cadboll in 1767. Cromarty Papers, No. 34; very long 'investigation.

'General rule as to jurisdiction. Every power understood to be con- 'ferred, without which jurisdiction cannot be explicated. This illus- 'trated by examples; Erskine, p. 24. even in causes before inferior 'courts; See Kilkerran, p. 277. Blair of Borgue. Court of Session

The statute has provided, 'that if the judgment of free-'holders, refusing to admit, or striking of any person from

'has supreme jurisdiction. Competent to all civil rights. In cases of en-'rolment, not only a common law jurisdiction, but ample powers given 'by statute. Same which was formerly in Parliament. Right of voting 'or standing on roll, involves in it all questions of title of qualification, 'real or personal, and of course every *quæstio status ad hunc effectum*; '*e. g.* bastardy, alienage, minority, husband and wife, peer or commoner

'*Quæstiones status* were, by civil law, considered as prejudicial, as ta-'king their rise from some other question, et aliis judicijs præjudicium fa-'ciunt, *e. g.* tit. de Agnoscendis et Alendis Liberis vel Parentibus, vel Pa-'tronis vel libertis; See Hein. Inst. tit. De Actionibus, sect. 1142.

'Such prejudicial questions necessary for determination of the main 'question, may be tried by courts otherwise incompetent; See Examples 'given by Erskine, and in Dictionary, vol. i. p. 495. &c. and vol. iii. p. 193. 'Thus, a revenue question may be tried here indirectly and incidentally, 'though not directly, being necessary to extricate jurisdiction. Same as 'to criminal and ecclesiastical cases; See Kames's History of Courts, 'p. 341, &c. Case of Browne in Court of Common Pleas.

'Action lately brought before Court of Common Pleas by P. Browne, 'upholsterer in St Paul's Church Yard, to recover L. 1900, upon two po-'licies of insurance, for house and furniture, against Phœnix Assurance Of-'fice. Defendants pleaded that he had wilfully burnt his own house. 'The cause was tried upon that issue; defendants failed; and verdict 'against them for L. 2500.

'Question of peerage not directly competent here, but incidentally may 'occur, and must be determined *ad hunc effectum*, or may be tried in-'directly. In case of Lady Kinnaird, Commissaries indirectly determined 'a case of peerage: See Mem. for Mr Douglas, p. 75.

The case of a service to any noble family is an indirect trial of a peer-'age; case of Earl of Breadalbane, Marquis of Tweedale, Duke of Ar-'gyle, &c. Sometimes a competition of brieves; late case of Caithness. 'What was it but an indirect trial of peerage? and indeed, one question 'within another.

'Service was an indirect trial of peerage; and fact of marriage of Broy-'nach's father and mother was prejudicial. All tried in this Court; and 'no doubt of competency.

'Suppose affirmed or reversed in House of Lords upon appeal, this 'would make no difference, it is still only an indirect question *ad hunc* '*effectum*, that is there tried. Yet the Earl of Caithness, his father, when 'he claimed the peerage directly, was advised to proceed in another shape, 'by petition to the King, and remit to House of Lords. Proof in service

'the said roll, shall be affirmed by the Court of Session, the 'person so complaining shall forfeit to the objector the sum 'of L. 30 Sterling, with full costs of suit[1].'

'of no avail there, but still the judgment in the competition of brieves 'was conclusive *ad hunc effectum*; and one judgment might have stood in 'the one case, and a different one in the other. Case of Lord Anglesey, 'contradictory judgments in England and in Ireland both effectual. Case 'of Lord Willoughby, the real peer excluded from sitting in House of 'Lords, by erroneous judgment in favour of another, so that there was a 'peer *de jure*, and another *de facto*.

'Case of Douglas tried before Committee of House of Commons as a 'prejudicial question to right of sitting. Judgment either way would not 'have been conclusive, even against a subsequent committee, far less 'against direct trial of the question in proper court.

'Late cases of Rutherford and Colville; served to their predecessors, 'and assumed titles, yet clerks much found fault with for calling their 'names, *i. e.* for not exercising their own judgment in first instance; 'House of Lords did it in second instance, but merely *ad hunc effectum*, 'to determine Lord Cathcart's seat. Nothing found as to right of either 'of these persons, so that they may come to next election of peers, and 'tender their votes if they please.

'Right of this Court and of freeholders to determine incidentally on a 'question of peerage, or rather upon the title of voting where the *quæstio 'status* is prejudicial, seems to be admitted in two cases, 1*st*, In case of 'notoriety, *e. g.* immediate younger brother succeeding to eldest, who 'dies unmarried; 2*dly*, In cases where the proof is easy, and the fact in- 'stantly verified, *e. g.* nephew or cousin-german succeeding. But where 'is the line to be drawn? Are we to stop at first cousins, or second cousins, 'or where? The investigation being of a greater extent, or smaller, can- 'not vary the general rule. Had decision in case of Stewart remained 'unaltered, this would have been conclusive. But, as matters now stand, 'this Court cannot, with justice, deny the proof of relevant facts, how- 'ever difficult.

'Counsel for respondent admitted, that, in cases of *property*, *e. g.* where 'entailed estate depended on succession to peerage or not, as in cases of 'Wemyss, Panmure and others, this Court was bound to try question of 'peerage, but contended that, if it was a mere *quæstio status*, to the effect 'of determining a man's rank and condition in the country, this Court 'had no power. The distinction plausible, but not well founded. It

[1] 16th Geo. II. c. 16. sect. 6.

The act, however, has not imposed any penalty or costs on freeholders complaining of an enrolment, or of a refusal to ex-

'might hold if there were no question of civil right depending on the is-
'sue; for then it would be the direct question of peerage, and nothing
'else. But right of voting at an election, and of being enrolled, or conti-
'nuing on the roll, is a question of civil right, in which both the interest
'of the party, and of others, is involved. It is not merely a political in-
'terest, but civil and patrimonial, the value of the freehold being thereby
'increased or diminished; but suppose it were a political interest only, it
'is a question of that sort, which the law has committed to Court of Free-
'holders in first instance, the Court of Session in the second, and House
'of Lords by appeal in the third. *Ergo*, If the *quæstio status* must be de-
'termined as prejudicial to that of voting, this prejudicial question must
'necessarily be subject to the cognizance of the same courts, for the law
'has not said, in any question of enrolment or of voting, that we are to
'stop short, till a question necessarily prejudicial, shall be determined by
'some other court. If marriage or bastardy happens to be the prejudicial
'question, we are not to stop till the Consistorial Court gives its judg-
'ment; (*Case of Terce or Jus relicti.*) The direct question may never be
'tried; *ergo*, there would be a wrong without a remedy,—Nobody can
'force him to apply to king.

'If the question be forgery of the titles, and suppose the Court of Ses-
sion were not competent in forgery, we would still go on to try it *ad*
'*hunc effectum*. If peer or commoner happens to be the question, we
'must try whether the party is actually a commoner, *i. e.* of that rank of
'men which, by the act 1661 and 1681, and by the Articles of Union, are
'alone entitled to elect and be elected for counties. This cannot be done
'without determining that he is a peer, or not a peer, or, in legal lan-
'guage, a greater baron, or lesser baron.

'The task of adjusting the rolls of freeholders being now left to us, we
'must perform it, just as the Scotch Parliament would have done, accord-
'ing to the best lights afforded to us, but which will not be conclusive as
'to the state of the party, if he chooses to have it tried in a different
'shape.

'We are not obliged to find that the freeholders have done right, or
'have done wrong, but, *super tota materia*, to determine whether the party
'claiming, or objected to, shall stand on the roll or not.

'The Committee of the House of Commons does no more, or rather
'does less, as it only determines *pro hac vice*, whether the party's name is
'to be counted upon the roll or not, exactly as House of Lords did in
'cases of Rutherford and Colvil.

'It was further said, that there was a material difference between a

punge a person already on the roll. In such cases, therefore, the Court cannot impose any penalty, however frivolous the

'peerage in possession, and *in remote pretence*. But how is a peerage in 'possession to be defined? Lord Colvil and Lord Rutherford have put 'themselves in possession of title, yet their right has been justly called in 'question. Sir Walter Montgomery calls himself Lord Lyle, and voted 'at an election of peers under protest. An Earl of Monteith appeared, 'and voted, though held to be an impostor. Mr Fleming is in possession 'of the title of Wigton, as far as assuming the title goes; but the House 'of Lords has hitherto disallowed his title. The late Lord Seaforth was 'no doubt a commoner, but he got upon the roll of Caithness, and was 'elected for that county, without any qualification at all. Did this pos-'session put him in a better situation as to the question of right, than 'if there had been no possession.

'A younger brother, *e. g.* Lord Elphinstone, succeeding to the peerage 'of his elder brother, and notoriously known to be a peer *de jure*, may ab-'stain from assuming the title, purposely that he may elect or be elected 'for a county in Scotland; but, will the fact of his unlawful possession 'make any difference, either upon the question of right, or upon the ju-'risdiction of this Court, to try his title of voting, on complaint from the 'freeholders? Will it preclude the House of Lords from trying the same 'question by appeal, or the Committee of the House of Commons from 'trying his right to stand on the roll, or to be returned as member for the 'county. It is the right, not the possession, that in every such case must 'be tried.

'It is said, that, if we exercise this right, we ought to do it with cau-'tion and discretion. This may be true, and it is the only argument on 'that side which deserves to be listened to. It is an argument which may 'apply more or less to every question of a prejudicial nature, where there 'is another court more competent and more fit to try the direct question.

'Had the respondent said, I have presented my petition to the King, 'and it is referred to the Committee of privileges in House of Lords; I 'have sent all the proofs, and all the materials there, to instruct my pe-'digree, and to have the question solemnly tried; in short, I am *in 'cursu* of having that matter discussed and determined by the proper 'judicature, as quickly as forms will permit;—this Court might then have 'considered, whether, *ex comitate*, it was not proper to stop short for a 'time, and to give some indulgence to a party in that situation. But, 'instead of this, he gives an evasive answer; he does not say that he has 'presented his petition; and I suspect the fact is, that it is purposely

complaint may be, but they are of course at liberty to impose costs if they think fit.

'kept back. He has not therefore proceeded fairly and *bona fide*, to have 'the question determined in that shape, which he himself says is a most 'proper one, so that we have no choice left, but to proceed without delay.

'Till the inquiry is finished he remains on the roll, and therefore sus-'tains no disadvantage.

'Case of a vagrant pleading privilege of peerage against arrest. Court 'will not shut the door against him; but, in the mean time, must remain 'in prison till he make out his case. It is his own fault if he suffers, from 'the apparent situation in which he stood.

'Case of English peer may be judged of here, as well as case of Scottish 'peer, if claiming as a freeholder in Scotland. This Court cannot make a 'minister of the Gospel, but we may try whether he is duly presented or 'not, to the effect of judging whether he has a right to the stipend.

'As to the conflict between different jurisdictions, it is well discussed 'by Lord Kames, History of Courts, p. 345.

'*Lord Swinton.* Ought to have answered explicitly, whether he was a 'peer or not. Clear that this Court can *incidenter* try every question 'whatever, though not otherwise competent. No ground for distinguish-'ing whether proof easy or not. But Sir James being in possession as 'a freeholder, we cannot turn him out in mean time, *nec vi nec clam*, &c. '*Dunsinnan.* Clear that complainers have a title and interest. Plea re-'levant, and must judge of it. Act contains no exception of case of peer-'age. Competency alone the question here. If Sir James elected, Com-'mittee of House of Commons will determine *ad hunc effectum.—Dreghorn.* 'Doubt of that opinion. Assertion in point of fact, that petition signed, 'and either presented, or purposely withheld. First question, Whether 'have complainers a title and interest? No doubt as to that, if *de facto* a 'peer. Admit that he is not by asserting that in petition? He is claiming 'no privilege as a peer, *e. g.* to be free of arrest. Interest here too re-'mote. Plea is, that he ought to have assumed a state which would have 'disqualified him. Is there any power to compel a man to assume peer-'age? I think there is a common law for the constitution, as well as for 'private rights. If a remedy lies elsewhere, not necessary for this Court 'to interfere. Think, in case of an entail, next heir may apply to King 'or Parliament. But, *secundo*, Sir James in possession, and this com-'plaint not competent. While he is in course of establishing it, is he *an-'nihilated*? What is intended for a man's advantage, not to be turned to 'his prejudice. Case of Oliphant found, that a man might resign his 'peerage. There is no case but that of a child *in utero*, where the law ac-'celerates his state for his benefit. A *quæstio status*, and a possessory

In the event of the Court of Session altering the judgment of the freeholders, by ordering any one to be added to the

'question. Proper part is not here, nor the proper evidence. As to ju-
'risdiction of Court, great doubt of it. If cannot judge of it by declara-
'tor, *multo minus* incidentally. Cases of incidental jurisdiction do not ap-
'ply here. They apply only where the end is to forward justice, *e. g.* no
'occasion to stop here in a question of aliment, till marriage determined
'by Commissaries. Case of Elgin, *remitted to Court of Session to try prejudi-
'cial question.* Suppose a case of thirlage,—will sist till master called.
'King ought to be called.—*Gardenstone.* Clearly of the opinion last de-
'livered,—not competent in any form to try a case of controverted peer-
'age. In certain cases may enquire, but not in such a case as this,—no-
'toriety. But here no such evidence of peerage as we can admit,—must
'be continued in possession. Case of Forbes and Lady Strathmore,—
'called here for payment of debt,—could not proceed till declarator of
'marriage before proper court.—*Rockville.* Objection here relevant. *In
'Court of Justiciary, if objection of peerage made, it would be very inconve-
'nient to stop short.* Same as diligence,—tendency of plea is to make him
'both peer and commoner.—*Henderland.* Distinction of peers and com-
'moners. Jurisdiction of freeholders, &c. goes to disqualification real or
'personal. If allegation now made goes to a change of his personal si-
'tuation, every freeholder entitled to bring it here. Fixed, that title of
'peerage devolves *jure sanguinis.* Nature and substance of issue is this—
"You are not a commoner.' He answers, 'I hope to be so, but am not
"so yet.' Change in your personal circumstances. Every man vested
'with a right, entitled to try it. Every door-keeper of House of Lords
'trys it every day in first instance,—not merely a possessory question,
'must try the right. At a loss to determine what is possession of peer-
'age. Do not know whether there is another case to decide or not. Case
'of Sir William M———, bill signed William Montgomery.—*Eskgrove.*
'If personal situation altered, this must be competent, *e. g.* attainted of
'high treason. Succession to a peerage no exception from that rule.
'Line of notoriety will not do,—no instance of a jurisdiction regulated
'by popular opinions or ideas,—no instance of a direct trial of peerage,
'except in two cases, either that the party himself applies to king, or that
'an order issues, directed to particular peers. As to possession, his as-
'suming the title or not, will not vary the right.—*Monboddo.* Clear that
'jurisdiction is competent; distinction between *right* of peerage and *exercise*
'of *that* right. Freeholders would apply to no other court. No matter
'whether goes to ten generations or one. If election turns upon his vote,
'will not House of Commons determine?—*Eskgrove.* In case of Mr Dou-
'glass would not listen to any objection to——

roll, or expunged from it, the act provides, that 'the she-'riff or steward's clerk shall, upon presenting to him the ex-'tract of such judgment, forthwith make the alteration there-'by directed, in the books that are kept by him[1],' under a penalty of L. 100 to the person in whose favour the judgment has been given.

[1] 16th Geo. II. c. 16. sect. 5.

## CHAPTER III.

### OF CERTAIN PERSONAL DISQUALIFICATIONS FROM BEING ENROLLED OR VOTING.

A MINOR cannot be admitted on the roll. The act 1681 provides, that 'Minority being instantly verified' shall be a disqualification; and from the context it may be collected, that it is meant to be enacted that it shall be an objection to 'the 'admitting to' the roll, and not merely to voting, although certainly Mr Wight has taken up a different view of this provision [1]. The act 1707, c. 8, declares, 'that none shall be 'capable to *elect or be elected* for any of the said estates, but 'such as are twenty-one years of age complete;' but, from a decision in regard to the formula against popery, to be mentioned immediately, it appears that it would be held that those expressions amount to a disqualification from being admitted on the roll, and also would authorise the freeholders to strike off one already on the roll, even after four months, if he was discovered to be a minor. In a previous case, indeed, the Court either giving this interpretation to the act 1707, or proceeding on the act 1681, ordered a gentleman to be struck off the roll who had been enrolled a few months before attaining majority, under a *proviso* that he should not be entitled to vote in any question until he was of perfect age; and this judgment the Court pronounced, although he had in the mean time become major [2].

A person who has been cognosced as insane cannot be enrolled. But suppose that a claim is presented for one who has not been cognosced, and is not otherwise under legal tutory as insane, it would appear that the claim cannot be re-

[1] Page 267. Mr Bell supports the view in the text, p. 338.

[2] Macleod *v.* Gordon, December 1765; Wight, p. 267.

jected on mere allegation that he is not of sound mind; and it seems doubtful, if any other evidence would be admissible, unless, indeed, the personal appearance of the claimant should carry conviction to the minds of all present. Again, let us suppose that a person who is already on the roll, should appear and claim a vote, although evidently labouring under strong insanity, it would seem that the preses would be justified in rejecting the vote. A plan which has been recommended in England for excluding such votes, and which, to a certain extent, might be effectual, is to be strict in requiring the person to take the usual oaths [1].

The act 1707, c. 8, provides, that 'none shall be capable 'to elect or be elected, for any of the saids estates,' but such as are 'protestant, excluding all papists, or such who, being 'suspect of popery and required, refuse to swear and sub-'scribe the formula contained in the third act, made in the 'eighth and ninth sessions of King William's Parliament, in-'tituled Act for Preventing the Growth of Popery.' If the terms of this statute are taken literally, there is perhaps no authority for holding that a person already on the roll may be struck off for refusing the formula [2]. But in a case in which a claimant having been enrolled at Michaelmas, and having, at an election meeting in July thereafter, refused the formula of the act of William when tendered, the Court of Session found that he must be expunged from the roll, although more than four months had thus elapsed between the enrolment and the presenting of the complaint [3].

[1] Male on Elections, p. 165. Second Edition.

[2] See Wight, p. 269, note.

[3] Ferguson v. Glendonwyne, 17th February 1803; Fac.

*Note of the opinion of Lord President Campbell from his Session Papers.*

'Objection of being a Roman catholic. Respondents' construction of 'the act 1793 not well founded. Clear that the disqualification of the act '1707 continues as to elections, though Roman catholics are freed from other "disabilities. No distinction between papists and Roman catholics in 'our statutory language. The act 1707 says nothing about enrolment,

By the act 19th Geo. III. c. 38, it is provided, that no person shall be capable 'of being elected, or of voting in any 'election of a member of Parliament for any shire or borough,' who shall have been twice present within a year of such election at divine service in any episcopal meeting in Scotland, not held and allowed in pursuance of the act 10th Anne, c. 6 [1], or not registered as directed by the act (19th Geo. II.), or where the minister did not in express terms pray for the king by name, and all the royal family; and it is declared, that this objection may be stated by 'any candi-'date or member of the meeting assembled for any such elec-'tion;' and may be proved by one or more witnesses upon oath, or by referring it to the oath of the person objected to, which oath the preses or clerk of such meeting is empowered to administer.

It seems to follow, from the expressions of this act, that this objection cannot be stated before the election of preses and clerk; because the disqualification is stated to be 'from 'voting in any election of a member of Parliament;' and, because it is the preses or clerk of the meeting who is em-

'but as it makes a total disability of electing or being elected, it follows 'of course, that the party liable to such disqualification, ought not to be 'enrolled, or, when the objection is discovered, which can only be on his 'refusing to take the formula, he ought to be expunged; as in the case of 'minors, peers, &c. The rule of four months does not apply to latent 'personal disqualifications. Clear that the objection here was made be-'fore the election of member, and he ought then to have been struck off, 'on account of his refusal. Whether his vote must be counted for 'preses and clerk, it is not *hujus loci* to enquire. Had the legislature 'thought that it was possible for a Roman catholic to be on the roll, he 'would have been included in the description of persons mentioned in the 'act 37th Geo. III. c. 136.—*Justice Clerk.* Roman catholic not entitled to 'elect, or to be elected. Act 1707 not repealed.—*Meadowbank.* Same; 'but hesitate as to the question of form, whether he may not stand on the 'roll, though not entitled to vote?—*Craig.* Cannot be allowed.'

[1] By this act it is, *inter alia*, provided, that the pastor must be ordained by a protestant bishop, and take certain oaths to Government, and pray for the Queen, and that the meeting shall be with open doors.

powered to administer the oath of reference[1]. It seems clear that it cannot be stated at a Michaelmas Meeting.

The statute 2d Geo. II. c. 24, has provided, that no person convicted of wilful and corrupt perjury, or subornation of perjury, shall be capable of voting in any election of a member of Parliament.

The further question occurs, whether those, who have been declared infamous by the sentence of a court for other offences, or have been convicted of other crimes inferring infamy, are disqualified from voting. Infamy is sometimes appointed under certain statutes as the punishment of certain offences, as in the case of fraudulent bankruptcy, bigamy, &c.; and sometimes it naturally attaches to a conviction, by the verdict of a jury, of offences of a base and degrading nature, as theft, or which involve deep deceit and wilful wrong, as forgery and swindling[2]. This stigma has also been affixed by the Courts of Justiciary and of Session to persons guilty of malversations in situations of public trust.

By the act 1621, c. 18, fraudulent bankrupts are declared false and infamous, and incapable of honours, dignities or offices, or of being jurymen or witnesses; and yet it was found in one instance, that a person declared, by the Court of Session, infamous in terms of this act, was capable of voting, and of being enrolled[3]. Lord Elchies, however, who reports the case, says, that several of the judges thought the objection good, and others, including himself, were not clear, and did not vote[4].

[1] See Wight, p. 273. [2] Hume, vol. ii. p. 271.

[3] Case of Sutherlandshire, 17th February 1741; Elchies, M. P. No. 7.

[4] In another case, a bailie of regality, who had been found guilty, by the Court of Session, of an illegal extortion of money, while he acted as a judge, and had been declared incapable of exercising the office of a judge in all time coming, was found not to be disqualified from being a councillor in a borough: Buckney and others v. Ferrier, 10th March 1758; Fac. and Session Papers. And yet this was an offence to which it appears that infamy ought naturally to have been attached.

In this case there certainly was no conviction by the verdict of a jury; but it has been rather with respect to sentences of inferior judges without a jury, that a distinction on this ground has been drawn regarding the disqualification of witnesses by infamy [1]. At all events, it can hardly be doubted, that persons convicted by the verdict of a jury of the higher species of crimes, such as theft or forgery, must be held as incapable of exercising the elective franchise. In England, convicted felons are held to be disqualified. This was held in the committee even with respect to a conviction at the Quarter Sessions, for stealing some horse furniture, and in which the sentence was only hard labour for fourteen days [2].

The eldest son of a Scots peer is not entitled [3] to be enroll-

[1] Hume, vol. ii. p. 342. [2] 1 Peckwell, 508.

[3] Lord Daer v. Keith Stewart and others, 24th January 1792; Fac. *Notes of the Opinions of the Judges from the Session Papers of Lord President Campbell.*

'24*th January* 1791.—After hearing.—*Lord Hailes.* Difficult to go farther back than 1587. Persons sometimes set down by mistake as present when they were not; Montrose an example in 1569. Resident freeholders only could vote, yet this afterwards fell into disuse. In Parliament 1661, and at other times, it was very desirable to have had eldest sons of peers. As to loss of records, will presume from *what I see.* Fragment 1660 not conclusive, as the heir apparent seems to have been excluded. Case of Tarbat. Parliament obsequious to crown; and Lord Cromarty a favourite. Reasons assigned, not well founded. Sacrifice to altar of popularity. No such altar then. Succeeded by Sir G. Monro of Culcairn, whose politics were very different. Then case of Lord Livingstone. Poll elections of the burghs were in consequence of recommendation of Prince of Orange. Matters ran high in Parliament during all the reign of King William. If eldest sons had been supposed to have right, would have asserted. 1708. Four counsel heard. Solemn determination. As to case of Duke of Athole,—Disability carried no farther than use had carried it.—*Ankerville.* Strange that claimant should not have same privilege with every . Constitution daily improved. To deprive him, would require positive enactment, or something very decisive. Particular reasons for resolutions in Parliament.—*Rockville.* Claimant is a commoner. Subject to trial as such. , Disuse not sufficient. *Res mera facultatis*, and depending on choice of

ed; but the eldest son of a British peer is not disqualified from being enrolled [1].

'others. Question quite new as to the House of Commons,—not very 'competent to judge of points in the law of Scotland. Lord Aberdeen 'would not have permitted his son to stand candidate for Aberdeenshire, 'if he had not thought the matter entire. English lawyers could not 'know much of Scotch law.—*Monboddo.* Two questions, 1*st*, Whether 'claimant has a right to be enrolled; 2*d*, Eligibility. In England, 'many instances of this. Eligibility not competent. Clear that he is 'entitled to be enrolled. No custom proved as to not voting.—*Dreg-'horn.* Opinion stands clear of antiquities. A commoner. Title and 'precedency to rank only. Expectancy of a peerage is not, in general, 'a good objection. Petition in 1708 does not go upon antiquity or usage, 'but singly upon expediency. As to Union, the only articles of Union 'that are unalterable, are religion and malt-tax. But redress can only 'lie in Parliament, where all parties can be present by themselves, or re-'presentatives. No difference between enrolment and eligibility. For *dis-'missing* complaint, because usage of Parliament is against it, and we can-'not give effectual redress. We cannot invert possession summarily.— '*Eskgrove.* Expediency cannot be admitted. If I could throw out of 'view every thing previous to 1685, would be of opinion that not disqua-'lified. Parliament not entitled to make law by a resolution, but could 'expound law. Persons living in 1708 may have known what we do not 'know.—*Justice-Clerk.* In what capacity they attended before 1587 cannot 'now be cleared up. In 1685 we do not see the proposition controverted. 'Clear that not eligible.—*Swinton.* Same.—*Dunsinnan.* Same.—*Hender-'land.* Question is, What was the constitution of Scotland at Union. We 'scarcely had a Parliament before Union. Usage of greatest weight. '*Series rerum judicatarum;* what passed at Union. Decision 1708.'

[1] Abercromby *v.* Speirs and others, 9th March 1802; Fac.

*Note from the Session Papers of Lord President Campbell.*

'Question, Whether eldest son of a British peer lately created can be 'enrolled? The question, in the case of Lord Daer, turned altogether 'upon the constitution of the Scots Parliament before the Union, and the 'Scots Peerage at that period. Complainer's predecessor was not a Scots 'peer, and he himself is not the son of a Scots peer or peeress; and 'therefore the disqualification does not attach to him; See Replies, p. 38, '&c. A Scots peer made a British peer since Union is in different situa-'tion, for he still remains a Scots peer, as well as a British peer, and votes 'as a Scots peer, for the sixteen peers of Scotland. Complainer has no

By the act 22d Geo. II. c. 41, it was provided, that 'no 'commissioner, collector, supervisor, gauger, or other officer 'or person whatsoever, concerned or employed in the charg- 'ing, collecting, levying or managing the duties of excise, or 'any branch or part thereof; nor any commissioner, collec- 'tor, comptroller, searcher, or other officer or person whatso- 'ever, concerned or employed in the charging, collecting, 'levying, or managing the customs, or any branch or part

'such privilege, having no connection at all with the old Scots peerage. 'He is not represented by the sixteen Scots Peers, and he has no concern 'with their elections.—*Justice-Clerk.* Although Scots peers are declared 'peers of Britain, it does not follow *e converso*, that British peers are made 'Scots. Nothing disqualifies an English peer's eldest son.—*Hermand.* 'Former decision in case of Lord Daer right; See Hatsell's Reports. *Ita* '*lex scripta.* But no precedent or rule in the constitution which applies 'to the present case. An Irish peer himself may be enrolled here, if not 'actually in Parliament.—*Woodhouselee.* Strict interpretation. Freehold- 'ers have done wrong.—*Cullen.* Judgment in case of Lord Daer well 'founded. As to case in 1708; See Lord Somer's tracts, and see collected 'decisions in Lord Daer's case.—*Meadowbank.* Transient instances in a 'few cases of Lord Stopford, &c. sitting since Union, although British 'peers, not sufficient to form usage. Peers of Great Britain not a patri- 'cian order, at least their families are not. An English peer himself was 'a commoner here, and might have been elected for a county or burgh in 'Scotland, and would have been tried by our law for a crime committed 'here, and not by his law. If the disability applies to peers of Scotland 'created British peers since Union, it is difficult to distinguish between 'their case and pure British peers. Therefore the judgment of the free- 'holders ought to be adhered to.—*Bannatyne.* The disability does not ap- 'ply.—*Craig.* A British peer has not all the privileges of a Scots peer; 'cannot elect or be elected as a Scots peer. *Ergo*, Not subject to the dis- 'qualifications.—*Methven.* Some doubt here. Suppose question had oc- 'curred recently after Union, when it was understood that peers of Scot- 'land, created British peers after the Union, were incapable of electing, 'or being elected.'

Elliot v. Freeholders of Selkirkshire, 11th Mar. 1806; Fac.:

*Note from Session Papers of Lord President Campbell.*

'Case of Abercromby decisive. Scots peers, a distinct body of men 'represented in a particular way, and not to be confounded with other 'peers.'

'thereof; nor any commissioner, officer, or other person concerned or employed in collecting, receiving or managing any of the duties on stamped vellum, parchment and paper; nor any person appointed by the commissioners for distributing of stamps; nor any commissioner, officer, or other person employed in collecting, levying or managing any of the duties on salt; nor any surveyor, collector, comptroller, inspector, officer, or other person employed in collecting, managing or receiving the duties on windows or houses; nor any postmaster, postmasters-general, or his or their deputy, or deputies, or any person employed by or under him or them, in receiving, collecting or managing the revenue of the post-office, or any part thereof; nor any captain, master or mate of any ship, packet, or other vessel, employed by or under the postmaster, or postmasters-general, in conveying the mail to and from foreign ports, shall be capable of giving his vote for the election of any knight of the shire, commissioner, citizen, burgess, or baron, to serve in Parliament for any county, stewartry, city, borough, or cinque port, or for choosing any delegate in whom the right of electing members to serve in Parliament for that part of Great Britain called Scotland is vested.'

If any of these persons shall vote during the time he holds such office, or within a twelvemonth after he gives it up, his vote is null, and he forfeits L. 100, one-half to the informer, and the other half to be paid to the clerk of the Justices of the Peace, to be applied as the Justices shall think fit; and to be recovered by any one who shall sue for the same by summary complaint before the Court of Session; and the person convicted thereby becomes incapable of bearing any office or place of trust under his Majesty [1].

This disqualification does not extend to the commissioners of the land-tax, nor to any one acting under those commissioners, in assessing or collecting the land-tax, or any other

[1] 22d Geo. III. c. 41. sect. 1.

duties already imposed, or hereafter to be imposed, by Parliament [1]. Neither does it apply to any office held, or usually granted to be held, by letters-patent for any estate of inheritance or freehold [2].

No person shall incur the penalty of this act, unless the prosecution is commenced within twelve months after such penalty has been incurred [3].

The act 22d Geo. III. c. 41, did not extend its disabilities to freeholders voting in the choice of preses and clerk, or in adjusting the rolls. This defect was remedied by the statute 37th Geo. III. c. 138, which provided, that 'no person described in the said recited act, (*i. e.* 22d Geo. III. c. 41.), 'and thereby rendered incapable of voting in the election of 'members to serve in Parliament, shall be capable of voting 'at any election for the choice of preses or clerk to the free-'holders of any county in that part of *Great Britain* called '*Scotland*, or in any questions relative to the adjustment of 'the roll of freeholders of any such county, not only at such 'elections, but at all other meetings of the freeholders of any 'such county; and if any person, hereby made incapable of 'voting, shall nevertheless presume to give his vote during 'the time he shall hold, or within twelve kalendar months af-'ter he shall cease to hold or execute any of the offices men-'tioned in the said act, contrary to the true intent and mean-'ing of this act, *such votes, so given, shall be held null and 'void to all intents and purposes whatsoever.*' The offender was farther made liable in the same penalties and disabilities prescribed by the act 22d Geo. III.; the fine to be divided in the same manner; and to be recovered by summary complaint before the Court of Session.

The commissioners of the land-tax were, by certain acts, appointed to levy the window-duties and income-tax, with power to name their collectors. A gentleman, who was collector of land-tax, appointed by the commissioners, had been

[1] Ib. sect. 2. [2] Ib. sect. 3. [3] Ib. sect. 5.

also nominated to the offices of collecting these additional duties, receiving a portion of the duties as his recompence. At the time of an election of a member for the stewartry of Kirkcudbright, he was collector and assessor of the house and window duties for Dumfriesshire, and had been collector of the income-tax for the same county, within twelve months preceding the election. The parliamentary preses at an election meeting declined, on these grounds, to call his vote in the choice of preses and clerk. The Court of Session, however, were unanimously of opinion that he was not disqualified under the act 22d Geo. II. and 37th Geo. III., as neither the appointment nor the emolument in this case flowed immediately from government [1]. In another case, a person who received a quantity of stamps from the distributor at Cupar, for distribution at Kinghorn, was held not to be disqualified, as he was not under the controul of the commissioners of the stamp-office, nor an immediate servant of government [2].

[1] Heron *v.* Maxwell, 11th February 1803; Fac.

*Note from the Session Papers of Lord President Campbell.*

'Revenue officer. Duty of Parliamentary preses. His office is merely 'ministerial. He cannot erect himself into a court, and exercise jurisdic- 'tion. His power of cognisance is of the most limited kind, no higher 'than that of the sheriff-clerk, acting in his absence, or the clerks of 'Session in the election of peers. The act 37th of his Majesty does not 'enlarge his powers. He must call every name on the roll, good or bad, 'otherwise, if he omits to call, and receive any name, he does it *suo periculo*, and is liable in penalties if he does wrong; and any person who 'wrongfully gives a vote, does it also *suo periculo*. This is the case even 'in those instances which are mentioned in p. 3. of the replies. The 'power, it is said, must be somewhere. This is true, but not with him. 'Complainer's office did not disqualify him, *ergo* his vote must be counted. 'The Committee of the House of Commons will certainly count it; and 'we must hold it good here. The best, or rather the only, defence which 'the respondent can make, is, that he truly did not omit the complainer, 'but called him, and that, if there was any mistake as to counting the 'vote, it was not his doing, but that of the clerk. If there be any dispute 'about this, the cause must go to proof.'

[2] Goodsir *v.* Hutton, 25th February 1803; Fac.

Boroughs, or other bodies corporate, although infeft in lands holding of the crown, have no right to stand on the roll of freeholders. The town of Paisley had stood for many years on the roll of Renfrewshire, and had been in the regular use of sending to the meetings of freeholders a delegate, who voted in all questions at Michaelmas or election meetings. In the year 1760, the right of this burgh to stand on the roll was objected to, on the general ground of the incapacity of bodies corporate to exercise the elective franchise in counties; and the Court of Session found accordingly that the town had no right to stand on the roll [1].

[1] Stewart v. Borough of Paisley, 6th March 1760; Fac.

## CHAPTER IV.

### OF THOSE PERSONS ENTITLED TO BE CHOSEN REPRESENTATIVES IN PARLIAMENT OF A SHIRE IN SCOTLAND.

THE qualification, in respect of estate, which entitles a person to be chosen the representative of a Scottish county in Parliament, is the same in point of holding, valuation, &c., with that which enables him to vote in the election of such a representative, no one being entitled to be chosen who has not been placed upon the freeholders' roll on a legal qualification. When a person, however, has once been duly chosen commissioner for a county, he will continue to retain his seat in Parliament, although he should afterwards be divested of the estate on which he was enrolled a freeholder, unless it be held that the House of Commons has some power to deprive him of his seat. It is at least certain, that neither the freeholders, nor any other court in Scotland, have the right of depriving him of his privilege.

There are many *personal* circumstances disabling individuals from being elected to represent a county. These disqualifications arise not only from various laws expressly applicable to Scotland, but also from a general enacting clause of the statute 6th Anne, c. 7. sect. 30, by which it was provided, that every person disabled from sitting in the House of Commons of England, should also be disabled from sitting in the House of Commons of Great Britain. This clause has had the effect of introducing all the disabilities which, before the Union, prevented any one from being chosen a member of the English House of Commons.

The eldest sons of peers, for a considerable time before the Union, were understood to be disqualified from representing

a county or burgh in the Parliament of Scotland [1]; and it is now settled that they cannot be admitted to the roll of freeholders [2], and therefore cannot be chosen to represent a county in Scotland.

Minors were, by the act 1707, c. 8, passed at the time of the Union, declared to be incapable of being elected for any of the estates in Parliament.

Aliens cannot be elected.

By act 12th and 13th Will. III. c. 2. sect. 3, it is provided, that no person born out of the kingdoms of England, Scotland, or Ireland, or the dominions thereunto belonging, although naturalized or made a denizen, unless born of English parents, shall be capable to be a member of either House of Parliament. And by act 1st Geo. I. stat. 2. c. 4. sect. 4, it is enacted, that no person shall hereafter be naturalized, unless in the bill there shall be a clause providing that such person shall not be enabled to be a member of the House of Commons.

Persons convicted of treason or felony are ineligible. The same rule also appears to apply to one outlawed for a crime [3].

By act 41st Geo. III. c. 63. sect. 2, it is provided, that if any ordained priest, or deacon, or any minister of the Church of Scotland, shall be elected to serve in Parliament, such election shall be void; and if any person, after his election, shall be ordained priest, or deacon, or become a minister of the Church of Scotland, his seat shall become void. And, by sect. 4, celebration of divine service, according to the rites of the Churches of England or Scotland, in any church or chapel consecrated or set apart for divine service, shall be *prima facie* evidence that such person is priest, deacon, or minister.

The Judges of the Courts of Session and Justiciary, and

[1] See Wight, p. 269 *et seq.*

[2] Lord Daer *v.* Keith Stewart and others, 24th January 1792; Fac. App.

[3] See Male on Elections, p. 36.

Barons of Exchequer, in Scotland, are declared, by act 7th Geo. II. c. 16. sect. 4, incapable of *being elected, or of sitting or voting*, as members of the House of Commons.

By act 21st Geo. II. c. 19. sect. 11, no sheriff or steward-depute in Scotland, shall be capable of *being elected, or of sitting, or voting*, as a member of the House of Commons.

By the act 6th Anne, c. 7. sect. 25, it is provided, that no person having any new office or place of profit under the Crown, created or erected since 25th October 1725, or to be created hereafter, nor any commissioner, subcommissioner, secretary or receiver of prizes, nor any comptroller of army-accounts, nor commissioner of transports of sick and wounded, of wine-licences, or of the navy employed in any of the out-ports, nor any governor or deputy-governor of any of the plantations, nor any person having any pension from the Crown during pleasure (extended by 1st Geo. I. c. 56, to any person having a pension for a definite term of years), shall be capable of *being elected, or of sitting or voting*, as a member of the House of Commons. By the same act, sect. 26, it is also provided, that if any member of the House of Commons accept a place of profit under the Crown, his election shall be void; but that he may be re-elected. And, by sect. 28, it is provided, that nothing in the act shall extend to any member of the House of Commons being an officer in the army or navy who shall receive any new commission.

By act 15th Geo. II. c. 22, it is provided, that no commissioner of the revenue in Ireland, nor commissioner of the navy or victualling offices, nor any deputies or clerks in any of the said offices, or in the offices of Lord High Treasurer, or of commissioners of the Treasury, or of the auditor of receipt of Exchequer, or of the tellers of Exchequer, or of the chancellor of Exchequer, or of the paymaster of the Army or Navy, or of the principal Secretaries of State, or of the commissioners of salt, or stamps, or appeals, or wine-licences, or hackney coaches, or hawkers and pedlars, nor any person

having any office in Minorca or Gibraltar, except officers of regiments there, shall be capable of *being elected, or of sitting or voting*, as a member of the House of Commons.

By act 22d Geo. III. c. 45, sect. 1, it is provided, that any person who shall hold any contract, agreement, or commission, with, under, or from the Commissioners of the Treasury, or of the Navy, or Victualling Office, or with the Master-General or Board of Ordnance, or with any persons whatsoever, on account of the public service, shall be incapable of *being elected, or of sitting or voting*, as a member of the House of Commons. By sect. 3, this act is provided not to extend to any incorporated trading company, or any company 'now 'existing or established, and consisting of more than ten 'members,' where the contract is for the general behoof of such incorporation or company.

By the act 5th Will. and Mary, c. 7, sect. 57, it is provided, that no member of the House of Commons shall be concerned in the farming, collecting, or managing any sums granted by that act, or to be hereafter granted by any other act, except Commissioners of the Treasury, and Officers and Commissioners of the Excise or Customs, &c. But these exceptions are modified by subsequent statutes. Thus, by act 11th and 12th Will. III. c. 2, sect. 150, it is provided, that no member of the House of Commons shall be capable of being a commissioner or farmer of the Excise, on beer, ale, and other liquors, or of being a commissioner for determining appeals for said duty, or controlling or auditing the account of said duty, or of holding any office, place or employment touching the farming, collecting, or managing the said duty of Excise. And, by sect. 151, if any member of the House of Commons shall take any office or employment touching the farming, &c. of the said duty, or, &c., he is declared incapable of *sitting, voting, or acting*, as a member of the House of Commons. And, by acts 12th and 13th Will. III. c. 10, sect. 89, it is provided, that 'no member of the House

'of Commons' 'shall be capable of being a commissioner or 'farmer of the customs,' or of holding any office, place or employment touching the farming, collecting or managing the customs. And by sect. 90 it is provided, that if any member of the House of Commons shall take any office, place or employment touching the farming, collecting or managing the customs, such person is declared incapable of *sitting, voting, or acting*, as a member of the House of Commons[1].

[1] By the act 41st Geo. III. c. 52, persons holding a variety of offices are declared incapable of being elected members of the House of Commons; and in the English books on Election Law (see Male on Elections, and Hammond on Parliamentary Proceedings), these offices appear to be regarded as amounting to a disqualification, in whatever part of the United Kingdom of Great Britain and Ireland they are exercised. The act is certainly entitled, 'An Act for declaring what persons *shall be disabled from sitting and voting in the House of Commons of the United Kingdom of Great Britain and Ireland*; and also for carrying into effect part of the fourth article of the Union of *Great Britain* and *Ireland*, by providing in what cases persons holding offices or places of profit under the Crown of *Ireland*, shall be incapable of being Members of the House of Commons of the Parliament of the said United Kingdom;' but on looking at the act itself, it bears, that no person who shall hold 'any of the offices, employments or places of profit *herein after mentioned, in or for that part of the United Kingdom called Ireland*, shall be capable, &c. *that is to say*,' and then follows the list of the offices. These words certainly import that the offices shall be situated in Ireland; and, although there are exceptions of some offices which no longer exist, separately at least, in Ireland, yet most of them appear to have there existed at the date of the act. Perhaps, however, the act may have been differently interpreted in practice. The offices mentioned are those of Commissioners of Customs, Excise, or Stamps; persons concerned in farming, collecting or managing duties granted to the King; except Commissioners of the Treasury, and their Secretary; agents for regiments; Commissioners for determining appeals concerning Custom, Excise, or Stamps, or for controlling or auditing the accounts of those duties, except the Auditor-General of the Exchequer; deputies or clerks in the offices of the Lord High Treasurer, or Commissioners of the Treasury, except the Secretary of the Treasury, or of the Auditor of Receipt, or Tellers, or Chancellor of Exchequer, except the Secretary of the Chancellor of the Exchequer, or of the Commissioners of Stamps or Appeals; and some others.

It will be observed, that there is a difference between the phraseology of the two last mentioned acts of William, and that of nearly all the preceding statutes. The acts of William only declare that no *member* shall accept the offices, and that, if he does, he shall not *sit or vote*; whilst the other acts state the offices as disqualifications *from being elected*. This difference gave rise to a question in the House of Commons, whether a person, who, at the time of election, had an office disqualifying by act 12th and 13th Will. III., but who had surrendered it before taking his seat in the House, was entitled to take his seat, and the House resolved that he had a right to take his seat [1].

But, in a subsequent case, where a person held an office in the customs, and no surrender had taken place at the time of election, the House resolved, 'That, having an office, &c. *at 'the time of election*, he is incapable of claiming to sit for the 'said burgh [2].' Sir John Simeon, in his Treatise on the Election Laws [3], appears to approve of the former of those decisions. It may be observed, that, if the act 41st Geo. III. c. 52, is held to apply to offices in *all* parts of the United Kingdom [4], this question is superseded, because the offices mentioned in the acts of William are included in that of Geo. III., under the sanction that the holders of them shall not *be elected*.

In a committee of the House of Commons, it was objected, under the act 6th Anne, c. 7, to the election of a gentleman, in the year 1774, for a district of burghs, that he held the office of Clerk of the Pipe in Exchequer, which, it was insisted, was an office created or erected since the year 1705. It was answered, that the office was similar to that of Dictator of the Rolls, long known in the Exchequer of Scotland, before it was new-modelled after the Union; that, even if it

[1] Case of Sir Richard Allin; Douglas, i. p. 142.
[2] Case of Mr Ongley; Douglas, i. p. 142.
[3] P. 41.
[4] See note, p. 271.

were to be viewed as a new office, it was created, not by the Crown, but by Parliament; and that, in practice, this officer had been returned, and sat in Parliament. The committee resolved, that the office did not constitute a disqualification [1].

The House of Commons, in the year 1779, found that this statute did not apply to the commissioners appointed to treat with the Americans; and in the same year, a motion to incapacitate the Secretary of State for America was thrown out [2].

Irish Peers are, by the fourth article of Union with Ireland, capable of election to represent a county or burgh of Great Britain, under certain provisions. By that article, it is declared, 'That any person holding any peerage of Ire-'land now subsisting, or hereafter to be created, shall not 'thereby be disqualified from being elected to serve if he 'shall so think fit, or from serving or continuing to serve, if 'he shall so think fit, for any county, city, or borough of 'Great Britain, in the House of Commons of the United 'Kingdom, unless he shall have been previously elected as 'above, to sit in the House of Lords of the United King-'dom; but that so long as such peer of Ireland shall so con-'tinue to be a member of the House of Commons, he shall 'not be entitled to the privilege of peerage, nor be capable of 'being elected to serve as a peer on the part of Ireland, or of 'voting at any such election; and that he shall be liable to 'be sued, indicted, proceeded against, and tried as a com-'moner, for any offence with which he may be charged [3].'

[1] Wight, p. 297.
[2] Ib. p. 299.
[3] 39th and 40th Geo. III. c. 67.

## CHAPTER V.

### OF THE APPOINTMENT OF, AND MODE OF PROCEDURE AT, THE MEETING FOR ELECTING THE REPRESENTATIVE OF A COUNTY.

When a new Parliament has been summoned by royal proclamation, the Lord Chancellor immediately after sends his warrant to the Clerk of the Crown, to issue writs to the Sheriffs of the several counties, for the election of representatives of these counties[1]. When there is no Chancellor, the Lord Keeper, or Commissioners, of the Great Seal for the time, grant the warrant.

When a vacancy takes place during the sitting of Parliament, the warrant is given by the Speaker of the House of Commons, by order of the House. During a recess for more than twenty days, whether by prorogation or adjournment, the Speaker is authorized, by 10th Geo. III. c. 41, to grant warrants to issue writs for supplying vacancies which happen by death during such recess, provided the deaths be certified to him by a writing under the hands of two members of the House, and notice of such certificate be inserted in the London Gazette fourteen days before the warrant be issued; and provided the return of the writ, by virtue of which the deceased member was elected, has been brought into the office of the Clerk of the Crown fifteen days at least before the end of the session of Parliament, immediately preceding the death of such member. When the vacancy, however, takes place, in consequence of a member accepting an office during a recess, no new election can be made till the next meeting of

[1] For the form of the writ, see Appendix, No. 9.

Parliament, when the Speaker grants warrant to the Clerk of the Crown to issue a new writ [1].

Sheriffs have the privilege of appointing the day of election; but, by the act 1681, c. 21, it is provided, that the diet must be at least twelve days before the meeting of Parliament. With respect to the filling up a vacancy occurring during the sitting of Parliament, it is generally understood that the election in such a case must be within forty days from the date of the writ, although there is no enactment on the subject [2].

The act 1681 also directs, that the sheriff shall make publication of the diet of election at the head burgh of the shire upon a market-day, and at each parish-church on Sunday immediately thereafter [3]. If there was no divine service at the church on that day, the execution of the officer ought to bear that fact, and that a copy of the precept for intimation issued by the sheriff was affixed to the church-door.

By the act 33d Geo. III. c. 64, it is provided, that all notices to be given of the time and place of any election, shall be publicly 'given at the usual places, within the hours of 'eight of the clock in the forenoon, and four of the clock in 'the afternoon, from the 25th day of October to the 25th 'of March inclusive, and within the hours of eight of the 'clock in the forenoon, and six of the clock in the afternoon, 'from the 25th day of March to the 25th day of October in-'clusive, and not otherwise.'

By the act 35th Geo. III. c. 65, it is provided, that the sheriff depute, or substitute, shall, within six free days after receiving the writ, direct the notices required by law to be given as to the time and place of election; and that the day of election shall not be sooner than six days, nor later than

[1] Wight, p. 303. [2] Wight, p. 304.

[3] For the forms of the sheriff's precept for intimation, and of the execution of that precept, see Appendix, Nos. 10. & 11.

fifteen, after the day of publication at the church-doors; all under the penalty of L. 500 sterling for every contravention of these provisions.

The same act declares, that if the principal or high sheriff, or steward, or any person other than the sheriff, or steward depute, or substitute, shall 'presume in any respect 'to interfere, or take upon himself the execution of writs of 'election,' he shall forfeit L. 1000 sterling for every offence; and, on conviction in any suit, shall be incapable of ever bearing any office of trust under the King.

By the same act it is provided, that, with respect to Orkney and Zetland, publication at the town of Kirkwall, and at the twelve parish churches in the Island of Pomona, or the mainland of Orkney, shall be sufficient.

At the meeting of freeholders, held between mid-day and two afternoon of the day appointed for election, the sheriff produces and reads the writ, and produces executions of the different notices. Should these executions be informal, Spottiswood and Wight are of opinion that a new precept must be issued by the sheriff[1]; but, since their time, the act 35th Geo. III. has required that the notices shall be issued by the sheriff *within six days* of receiving the writ; and the question therefore arises, Whether, after having complied with this regulation, if it has turned out that the executions are defective, a new precept, ordering fresh notices, can be issued after the lapse of the six days? The acts 1681, and 12th Anne, c. 6, do not prescribe any time within which, after receiving the writ, the sheriff must appoint the notices to be made; and the writs merely order, generally, that 'immediatè, post debitam notitiam prius inde 'dandam,' he shall cause a member to be elected. The object of the act 35th Geo. III. seems merely to have been to take away this latitude, and to order the sheriff to direct the

[1] Spottiswood, p. 19, first edition; Wight, p. 305.

notices to be given within a limited time; and if the sheriff observes this rule, he thus far complies with the act; and it does not seem to have been the *intention* of the legislature to prescribe, that, in case the evidence of the *after steps of publication* should be informal, no new order for notice could be issued, if six free days are still allowed to elapse between the publication and the day of election. But it must be confessed, that the *letter* of the statute is against any new order for intimation, and, if the question were to arise, it would be attended with some difficulty [1]. Should it so happen, that six days have not elapsed between the publication of the new precept and the day of election, it seems quite clear that the election must be held as void.

The act 2d Geo. II. c. 24, relating to bribery, must next be read, in obedience to the directions of that act. The 38th section of 16th Geo. II. dispensing with the preceding act, in so far as it prescribes an oath to be taken by the sheriff, or other returning officer, is also read.

The sheriff-clerk then produces the book in which the roll of freeholders and the minutes of their proceedings are inserted, together with copies of the oaths of allegiance, abjuration and assurance, and of the trust-oath.

The commissioner last elected, if present, now takes the chair, and qualifies, by taking the oath of allegiance, and signing the assurance, and by taking the oath of abjuration, if required.

The commissioner last elected, or, in his absence, the sheriff-clerk, administers the oaths of allegiance and assurance to the freeholders; and likewise the oath of abjuration, if required; and then calls the roll for the election of preses and clerk. The rule, as to the casting vote, in case of equality of voices in electing these officers, is the same with that which

[1] The Wigton case, Douglas Election Cases, ii. p. 181, and Wight, p. 375, in some degree illustrates this question.

has been already explained with respect to Michaelmas meetings[1].

Before the act 37th Geo. III. c. 138, it was not competent to put the oath of possession to any freeholder before the election of preses and clerk, either at an election or at a Michaelmas meeting. By that act, however, the law is altered with respect to an election meeting; for it is provided, 'That 'if any person, at an election for a member to serve in Parlia-'ment for any county, shall offer to vote in the election of 'preses and clerk, it shall and may be lawful for any free-'holder to put the oath of trust and possession to him before 'giving his vote, in the same manner as is now practised, af-'ter the preses and clerk are chosen.'

By the act 16th Geo. II. c. 11, sect. 13, it is declared, that, at every election-meeting, if the commissioner last elected, or, in his absence, the sheriff-clerk, shall, in the choice of preses or clerk, receive the vote of any one who does not stand on the roll, he shall for every offence forfeit L. 300 sterling to every candidate for the office of preses or clerk respectively, for whom such person shall not have given his vote. A like penalty is incurred for not calling or refusing the vote of any person on the roll, to be recovered by that person, or his executors. These penalties are to be recovered by summary process before the Court of Session[2].

In a case where the commissioner last elected refused to receive the vote of a person who tendered it, being convinced, from a variety of circumstances, that the name on the roll was not applicable to the individual who claimed the vote, but to his father, who had borne the same name, the Court of Session refused to impose the statutory penalty[3]. In another instance, where the valuation of a person on the roll had been

[1] See p. 22.

[2] Sect. 43.

[3] Sir James Stewart's election, 1744; Wight, p. 310.

reduced, so as to leave him less than the legal amount, but no order had been pronounced striking him off the roll, the commissioner last elected, on this freeholder refusing to take the trust-oath, with the blank filled up with the names and valuation of the lands as originally claimed on, struck his name off an extract of the roll, the principal roll having been taken from him, and then proceeded to call the names of the other freeholders, in the choice of preses and clerk. In these circumstances the Court found the commissioner liable in one penalty of L. 300 [1].

Every freeholder who separates from the majority, and sets up a person as preses or clerk, other than him chosen by the majority, incurs a penalty of L. 50 to the candidate chosen by the majority; and any one who presumes to act as preses or clerk, when he has not been chosen by the majority, forfeits for every offence L. 200, to the candidate chosen by the majority [2].

The clerk chosen takes the oath of allegiance, and signs the assurance. The act 16th Geo. II. c. 11 [3], also requires that he shall take and subscribe an oath relative to bribery [4].

On the demand of either of the candidates, or of any two of the freeholders, every person, before voting for the mem-

[1] Frazer v. Gordon, 19th November 1768; Wight, p. 311.

[2] 16th Geo. II. c. 11, sect. 14.

[3] Sect. 37.

[4] The following is the tenor of this oath:—'I A. B. do solemnly swear, 'that I have not, directly or indirectly, by way of loan, or other device 'whatsoever, received any sums or sum of money, office, place, or employ-'ment, gratuity or reward, or any bond, bill, or note, or any promise of 'any sum or sums of money, office, place, employment, or gratuity what-'soever, by myself or any other, to my use or benefit, or advantage, to 'make any return at the present election of a member to serve in Parlia-'ment; and that I will return to the sheriff, or steward, the person elect-'ed by the majority of the freeholders, upon the roll made up at this elec-'tion, and who shall be present and vote at this meeting. So help me God.'

ber, must, by 2d Geo. II. c. 24, sect. 1. take an oath relative to bribery[1].

When the meeting has been constituted, the freeholders proceed to adjust the roll in the same manner as at a Michaelmas meeting. It is not, however, necessary at an election meeting, as it is at a Michaelmas head court, for a person claiming enrolment to lodge previously any claim; neither is it necessary that objections to one already enrolled should be previously lodged, in order to entitle the freeholders to strike him off the roll. It is, however, equally necessary at an election meeting, as at a Michaelmas head court, that the claimant should produce his charter and sasine. In one case a claimant had produced, at an election meeting, the retour of his special service, as heir of his grandfather, and his sasine following thereon, but had omitted to produce the precept from Chancery, which was the immediate warrant of his infeftment. He then attempted to remedy this defect, by production in the Court of Session, of an extract of the precept, and argued, that all that was necessary at an election meeting was to make every production called for by the freeholders. The Court, however, found that he had no right to be enrolled[2].

When a new roll has been made up, it is called by the preses, and the votes are received towards the election of a representative.

In the event of an equality of votes, in this or any other question subsequent to the election of the preses and clerk,

[1] The following is the tenor of this oath:—'I A. B. do swear (or, being 'one of the people called Quakers, I A. B. do solemnly affirm), I have not 'received, or had by myself, or any person whatsoever in trust for me, or 'for my use and benefit, directly or indirectly, any sum or sums of mo-'ney, office, place, or employment, gift, or reward, or any promise or se-'curity for any money, office, employment, or gift, in order to give my 'vote at this election, and that I have not before been polled at this elec-'tion.'

[2] Cranstoun v. Cunningham, 4th March 1813; Fac.

the former of these officers has the casting vote, besides his own vote as a freeholder [1].

If the preses shall, in the election of the member, receive the vote of any one not on the roll, he shall, for every such offence, forfeit L. 200, to every candidate for whom such person shall not have given his vote [2], to be recovered by him, or his executors, by summary process before the Court of Session [3]; and the preses incurs the like penalty for every offence, if he shall not call for or refuse the vote of any person whose name is on the roll, such person, or his executors, being entitled to recover such penalty by the like process [4].

If the person elected representative has not been present at the election, he must, by 16th Geo. II. c. 11, sect. 10, before he takes his seat in Parliament, take the trust-oath, before the Lord-Steward of his Majesty's household, or any person or persons authorised by him for that effect; and if he fails to do so his election is void.

[1] 16th Geo. II. c. 11, sect. 13.
[2] Ibid.
[3] Sect. 43.
[4] Sect. 13.

## CHAPTER VI.

### OF RETURNS BY CLERKS AND SHERIFFS.

By the act 7th Geo. II. c. 16, sect. 1, it is provided, that if the clerk of any meeting of freeholders shall wilfully return to the sheriff any person other than him duly elected, or if any person, pretending to be clerk, although not duly elected, shall presume to act as clerk, and wilfully to return any person not duly elected member, he shall for every such offence forfeit L. 500 to the candidate who has been duly elected.

By the act 16th Geo. II. c. 11, sect. 16, it is declared, that the clerk of the meeting shall return the name of the person elected to the sheriff of the county; and that if he shall refuse, or neglect to do so, or shall return any other person than him elected by the majority, he shall for every such offence forfeit the sum of L. 500 to the candidate chosen by the majority.

Under the above provisions of the act 7th Geo. II. c. 16, the following case occurred:—Mutual protests had been taken by the opposing parties at an election meeting, against votes in the opposite interest; and the commissioner last elected having called the roll for the election of preses and clerk, without regard to the protests of either party, the two parties had separated, and elected each a member. In these circumstances, the clerk of the minority was, by a judgment of the House of Lords, reversing a contrary decision of the Court of Session, found liable in the statutory penalty for making a false return to the sheriff, although he maintained that he conceived the member whom he had returned to have

been *duly* elected, and that therefore he had not *wilfully* made a false return [1].

Every sheriff, upon production to him of a copy of the freeholders' roll, made up at the last Michaelmas or election meeting, extracted and signed by the sheriff-clerk; and upon production of the original minutes of the election of preses and clerk, signed by the commissioner last elected, or in his absence by the sheriff-clerk, must, by the act 16th Geo. II. c. 11, sect. 17, annex to the writ the return made by the clerk elected by the majority; and if he neglect or refuse to do so, or annex the return by any other person pretending to be clerk, he forfeits for every such offence L. 500, to the person elected by the majority and returned by the clerk. The return is in the shape of an indenture between the sheriff and the clerk [2].

As the act has provided, that, besides the minutes of the election of preses and clerk, a copy of the roll of freeholders shall be produced to the sheriff, it was argued, in a question which arose, whether the statutory penalty had been incurred by the sheriff, that it was in the view of the legislature to bestow upon him some discretion in determining whether the clerk who makes the return to him has been truly elected by the majority of the freeholders contained in that roll. In the case alluded to, the commissioner last elected took upon himself to strike off an extract of the roll, a freeholder whose valuation had been reduced, but against whom no order of exclusion from the roll had been obtained. He then, after calling the roll from that extract,—giving the casting vote himself in the election of preses and clerk,—and signing the minutes of their election, was elected member by his own party. The other party separated and called the roll last made up from the sheriff-books; the sheriff-clerk signed the minutes of their election of

[1] Hume Campbell. Election, 1741; Wight, p. 319; and Craigie and Stewart's Appeal Cases, vol. i. p. 346.

[2] See App. No. 12.

preses and clerk; and another person was elected member. The clerks of both parties made returns to the sheriff, but with this difference, that the minutes produced by the former party, of an election of preses and clerk, were signed by the commissioner last elected, whilst those produced by the other party were only signed by their clerk, as sheriff-clerk, and by the freeholders in that interest. The sheriff annexed to the writ the return of the latter party; and, in answer to a protest taken by the other candidate, assigned as his reason, that having been present at the election, he made the return according to his conscience, and what he judged to be law. The Court of Session absolved him from the statutory penalty[1].

It is clear, however, that, with respect to that part of the proceedings of the meeting, which regards the actual election of the member, the sheriff has no discretion. The minutes of that election are not required to be laid before him. He acts merely ministerially, and must annex the person returned by the clerk, whether duly or unduly elected.

In a case from Berwickshire already mentioned[2], where the sheriff took upon himself to annex both the return made by the clerk chosen by the majority, and that of the clerk chosen by the minority, the House of Commons resolved that the sheriff had acted arbitrarily and illegally, and ordered him to be taken into the custody of the serjeant-at-arms[3].

[1] Gordon v. Rose, 19th November 1768; Wight, p. 322.

[2] Hume Campbell. Election, 1741.

[3] Wight, p. 321. In this case, however, both the Court of Session and the House of Lords assoilzied the sheriff from an action for penalties, under 7th Geo. II. c. 16, sect. 8; Craigie and Stewart's Appeal Cases, i. p. 346. The argument which proved successful appears to have been that the action was given by the act only to the person not returned, whereas here the person suing for the penalties had been returned as well as his opponent. The act 16th Geo. II. c. 11. sect. 17, under which such a question would now be tried, is differently expressed; and it would appear that a sheriff would incur the penalty, by making a double return.

By a subsequent act, the 25th Geo. III. c. 84 [1], it is provided, that any sheriff, or returning officer, who shall wilfully delay, neglect, or refuse to return any person, for a city or burgh, who ought to be returned, such person, if it shall be found by the Committee of the House of Commons that he ought to have been returned, may recover, in the Court of Session, from the sheriff, or other officer, double the damages he may sustain by such conduct; provided [2] the action be brought within a year from the alleged wrong, or within six months from the conclusion of the proceedings in the House of Commons.

By the act 6th Anne, c. 6, sect. 5, it is provided, that the sheriff shall return the writ into 'the court out of which the writ issued,' which is the Crown-Office in Chancery.

[1] Sect. 14. [2] Sect. 15.

## CHAPTER VII.

### OF BRIBERY [1].

By the English statute 7th William III. c. 4, it was provided, 'That no person or persons hereafter to be elected to serve 'in Parliament for any county, city, town, borough, port, or 'place, within the kingdom of England, dominion of Wales, 'or town of Berwick-upon-Tweed, after the teste of the writ 'of summons to Parliament, or after the teste or the issuing 'out, or ordering of the writ or writs of election upon the call-'ing or summoning of any Parliament hereafter, or after any 'such place becomes vacant hereafter in the time of this pre-'sent, or any other Parliament, shall or do hereafter, by him-'self or themselves, or by any other ways or means on his or 'their behalf, or at his or their charge, before his or their elec-'tion to serve in Parliament, for any county, city, town, borough, 'port, or place within (*as above*), directly or indirectly give, 'present, or allow, to any person or persons, having voice or 'vote in such election, any money, meat, drink, entertainment 'or provision, or make any present, gift, reward, or enter-'tainment, or shall at any time hereafter make any promise, 'agreement, obligation, or engagement, to give or allow any 'money, meat, drink, provision, present, reward, or enter-'tainment, to or for any such person or persons in particular, 'or to any such county, city, town, borough, port or place, 'in general, or to or for the use, advantage, benefit, employ-

[1] In this chapter it will be convenient to anticipate a little, and to include in it what relates to bribery, as well in borough elections as in county elections; with the exception of bribery in the election of magistrates, which shall be reserved till that kind of election is treated of.

'ment, profit, or preferment, of any such person or persons, 'place or places, in order to be elected, or for being elected, 'to serve in Parliament for such county, city, borough, town, 'or place.' And section 2, 'That every person and persons 'so giving, presenting, or allowing, making, promising, or en-'gaging, doing, acting, or proceeding, shall be, and are 'hereby declared and enacted to be, disabled and incapaci-'tated, upon such election, to serve in Parliament for such 'county, city, town, borough, port, or place; and that such 'person or persons shall be deemed and taken, and are hereby 'declared and enacted to be deemed and taken, no members 'in Parliament, and shall not act, sit, or have any vote or 'place in Parliament, but shall be, and are hereby declared 'and enacted to be, to all intents, constructions, and pur-'poses, as if they had been never returned or elected mem-'bers for the parliament.'

This statute, as having been passed before the Union, was of course not applicable to Scotland, at the time of its enactment. But, by 6th Anne, c. 7, sect. 30, it was declared, 'That every person disabled to be elected, or to sit or vote 'in the House of Commons, of any Parliament of England, 'shall be disabled to be elected, or to sit or vote in the House 'of Commons of any Parliament of Great Britain.' It follows, that the disqualification, by giving money or entertainment, introduced by the statute of William, must be applicable to Scottish as well as to English members.

The increase of this vice of bribery, notwithstanding the act of William, and the gross corruption which had prevailed at Beverly in Yorkshire, in the year 1707[1], caused the legislature to interpose, by a new statute, which, by its terms, was made applicable to Scotland.

This act, the 2d Geo. II. c. 24[2], provides, that if any person shall 'ask, receive, or take any money, or other reward,

[1] Simeon on Elections, p. 194, 2d edition. [2] Sect. 7.

'by way of gift, loan, or other device, or agree or contract 'for any money, gift, office, employment, or other reward 'whatsoever, to give his vote, or to refuse or forbear to give 'his vote in any such election; or if any person by himself, 'or any person employed by him, doth or shall, by any gift 'or reward, or by any promise, agreement, or security, for 'any gift or reward, corrupt or procure any person or per-'sons, to give his or their vote or votes, or to forbear to give 'his or their vote or votes in any such election, such person, 'so offending in any of the cases aforesaid, shall, for every 'such offence, forfeit the sum of five hundred pounds, of 'lawful money of Great Britain, to be recovered as before 'directed, together with full costs of suit; and every person 'offending in any of the cases aforesaid, from and after judg-'ment obtained against him in any such action of debt, bill, 'plaint, or information, or summary action or prosecution, 'or being any otherwise lawfully convicted thereof, shall for 'ever be disabled to vote in any election of any member or 'members to Parliament, and also shall for ever be disabled 'to hold, exercise, or enjoy any office or franchise to which 'he and they then shall, or at any time afterwards may be 'entitled, as a member of any city, borough, town corporate, 'or cinque port, as if such person was naturally dead.'

This act also prescribes an oath to be taken by every elector before voting[1], if demanded by either of the candidates, or any two of the electors.

The penalties inflicted by this statute may be recovered either by a summary action or complaint in the Court of Session, or by a prosecution in the Court of Justiciary, and the proceedings must be conducted according to the usual forms of that Court in which they are instituted, so that if they are brought in the Court of Session, the accused will not be entitled to insist that a list of witnesses and of writings to be

[1] See this oath, p. 280.

used against him, should have been exhibited with the complaint [1]. The time for commencing prosecution is limited to two years from the incurring of the penalty [2], and the process must be served on the accused within that period [3].

By the act 16th Geo. II. c. 11, sect. 36, it is declared, that the electors of commissioners or delegates, for any royal borough in Scotland, for choosing burgesses to Parliament, are, within the intent of the act 2d Geo. II, to be considered as electors of the member to serve in Parliament, and are liable to the provisions and forfeitures of that act. The act 16th Geo. II. however, substitutes another oath [4], to be taken by every voter at the election of a commissioner for choosing a member, if demanded by any one elector, instead of the oath of 2d Geo. II. An oath [5] is also prescribed for the clerk of each borough, at election of commissioners for choosing burgesses; and another oath [6] for the clerk of the presiding borough, at the meeting of the commissioners for choosing a burgess.

The statute 2d Geo. II. applies only to the case where the money or other reward is given to the voter, and not to the case where it is given to a third party, to induce him to procure the return of any member. With the view of meeting this latter case, the act 49th Geo. III. c. 118, was passed, by the first section of which it was enacted, that 'If any per-'son or persons shall, from and after the passing of this act, 'either by himself, herself, or themselves, or by any other 'person or persons, for or on his, her, or their behalf, give, 'or cause to be given, directly or indirectly, or promise or 'agree to give any sum of money, gift, or reward, to any

[1] Irwin v. Adam, July 1768; Wight. p. 275.

[2] Sect. 11. [3] 9th Geo. II. c. 38.

[4] See this oath *infra*, under Election of Delegates

[5] See this oath *infra*, under Election of Delegates.

[6] See this oath *infra*, under the Election of the Representative of a Borough.

'person or persons, upon any engagement, contract, or agree-
'ment, that such person or persons to whom, to whose use,
'or on whose behalf such gift or promise shall be made, shall,
'by himself, herself, or themselves, or by any other person
'or persons whatsoever, at his, her, or their solicitation, re-
'quest, or command, procure, or endeavour to procure, the
'return of any person to serve in Parliament, for any county,
'stewartry, city, town, borough, cinque port, or place, every
'person so having given, or promised to give, if not returned
'himself to Parliament for such county, stewartry, city, town,
'borough, cinque port, or place, shall for every such gift or
'promise, forfeit the sum of one thousand pounds, to be re-
'covered in such manner as is hereinafter provided, with re-
'spect to the sum of five hundred pounds, and every such
'person so returned, and so having given, or so having pro-
'mised to give, or knowing of and consenting to such gifts
'or promises, upon any such engagement, contract, or agree-
'ment, shall be, and is hereby declared and enacted to be dis-
'abled and incapacitated to serve in that Parliament, for
'such county, stewartry, city, town, borough, cinque port,
'or place, and that such person shall be deemed and taken,
'and is hereby declared and enacted to be deemed and taken,
'to be no member of Parliament, and enacted to be, to all
'intents, constructions, and purposes, as if he had never been
'returned or elected a member in Parliament; and any per-
'son or persons who shall receive or accept of, by himself,
'herself, or themselves, or by any other person or persons in
'trust for, or to the use or on the behalf of him, her, or
'them, any such sum of money, gift, or reward, or any such
'promise upon any such engagement, contract, or agreement,
'shall forfeit to his Majesty the value and amount of such
'sum of money, gift, or reward, over and above the sum of
'five hundred pounds, which said sum of five hundred
'pounds he, she, or they, shall forfeit to any person who
'shall sue for the same; and if the offence be committed in

'Scotland, then to be recovered with full costs of suit by 'summary action or complaint before the Court of Session, 'or by prosecution before the Court of Justiciary there.'

It is, however, provided, that nothing in this act shall be held to apply to money given for law expenses [1].

The clause quoted above applies to the case of 'money, 'gift, or reward,' being employed for the purpose of bribery. A subsequent clause[2] enacts nearly the same provisions, with respect to the case where 'any office, place, or emolument,' is the inducement employed. The principal difference seems to be, that the penalty of L. 1000, imposed by the first clause, is not repeated here; although the same provision is introduced relative to the incapacity to serve in Parliament, if the user of this kind of bribery is returned. A penalty of L. 1000 is, however, incurred by 'any person holding any office un-'der his Majesty, who shall give such office, appointment, or 'place,' upon any agreement that the receiver shall procure the return of any individual.

Process for any penalty under this act must be commenced and served within two years after the commission of the offence.

Independently of statute, bribery at elections, whether of members of Parliament, or of magistrates or delegates of boroughs, is a crime by the common law of Scotland, and punishable by the Court of Justiciary, unless, perhaps, it should now be held that the statutes, in so far as they reach, have *superseded* the common law on the subject. An objection that such practices were not criminal at common law, made to an indictment for alleged bribery, by a candidate for the representation in Parliament of a borough, at the election of magistrates for that borough, to which case, it will be observed, the statutes do not apply, was repelled by a unanimous judgment of the Court of Justiciary [3].

[1] Sect. 2. [2] Sect. 3.

[3] Macintosh, &c. v. Dempster, 1st August 1768; Maclaurin's Criminal Cases, No. 79. The indictment was, however, quashed, because in some parts

It is at common law that elections of magistrates have in various instances been set aside by the Court of Session, because such elections are not within the words of the statutes; and it was thought expedient to declare, by 16th Geo. II. the applicability of the act 2d Geo. II. even to the case of the election of delegates, which is one step nearer the election of the member, than the choice of magistrates is[1]. In one

the charge of actual bribery was too vague, and in others the attempts to bribe were not alleged to have been carried into effect, so that the private prosecutor, at whose instance the prosecution was brought, with concurrence of the Lord Advocate, was held to have no interest to insist in these parts of the charge.

[1] There is indeed a case reported by Elchies, Bur. Roy. No. 39, from the report of which it might be inferred, that a prosecution against bribery, in an election of magistrates, had been sustained under the acts. A complaint was presented under the acts 2d Geo. II. and 16th Geo. II. against an election of magistrates in Culross, concluding to have that election set aside on the score that bribes were given, as the report bears, 'to 'vote for such persons as would support Colonel Haldane,' one of the candidates for the parliamentary representation of the burgh; and concluding for the penalty of the act 2d Geo. II. It was objected that the election complained of was not that of a member to Parliament, and that it did not yet appear whether any of the respondents would be electors of delegates, to which cases the acts applied. The Court repelled this objection, and allowed a proof of the bribery, before answer, 'though it does not yet ap-'pear whether the respondents shall be electors of delegates, yet that may 'be cleared before advising the proof;' or, as it is expressed in Lord Elchies' notes, vol. ii. p. 83, 'hitherto it could not appear whether there 'was place for the fines of L. 500 libelled, till a new Parliament should be 'called.' From this report, it might be inferred, that the bribery complained of referred merely to the election of magistrates, the briber taking his chance, that if he once secured a council in his interests, the subsequent steps would be in his favour. But, on referring to the Session Papers in the Advocates' Library, it appears that the corrupt bargain farther extended to the choosing such a *delegate* as would vote for Colonel Haldane, which is a case within the acts. It is also stated in the complaint, that the bond for L. 400, mentioned in the report of the case, was lodged with a third party, till after the election of the member of Parliament, by which time, it would appear whether the town-council acted agreeably to the arrangement, and was to be delivered up, if the terms were kept.

case it was pleaded, although faintly, that there being no statute against giving money for procuring votes at a Michaelmas election in a borough, the Court of Session had no power to prohibit such a commerce; but the Judges unanimously sustained their jurisdiction in such a case, and rejected the votes of the briber and bribed [1].

In England it is held that bribery is a crime at common law, and punishable by indictment or information [2]; and convictions have been obtained in the courts of law, and sentences of imprisonment and heavy fines awarded, for which convictions there is no authority in the statutes. Thus Sir Manassah Lopez was sentenced [3] to pay a fine of L. 10,000 to the King, and to be imprisoned for two years, for repeated acts of bribery at the election for the borough of Barnstaple [4].

[1] Mackenzies v. Scot, 7th August 1759; Sel. Decis.

[2] See Douglas's Election Cases, vol. ii. p. 400; also Male on Elections, p. 339 and 345. For a variety of questions of nicety in the law of bribery in England, see Douglas, p. 410.

[3] 18th November 1816.

[4] See other examples, Male on Elections, p. 352.

# PART III.

## OF THE ELECTION OF THE REPRESENTATIVES OF THE ROYAL BOROUGHS OF SCOTLAND.

EVERY one of the fourteen classes into which the royal boroughs of Scotland, with the exception of Edinburgh, are divided, elects its representative to parliament by means of delegates sent from every borough of which the class consists. The election of those delegates is vested in the Magistrates and Town Council of the different boroughs. Hence the election of the representatives of the royal boroughs ultimately depends on that of the magistrates and council; and it becomes therefore necessary to enter into some inquiry with respect to the principles on which the election of magistrates and council is conducted. This subject will form the subject of the first chapter of this part.

### CHAPTER I.

#### OF THE ELECTION OF THE MAGISTRATES AND COUNCIL OF THE ROYAL BOROUGHS.

IN the Historical Essay annexed to this work, will be found some account of the Constitution of the Royal Boroughs of Scotland, and of the progressive changes which have taken place in the mode of electing their magistrates. The subject of this chapter shall be the order of procedure now observed at elections of magistrates, and the legal principles upon which they are conducted.

The first step at the meeting for election of magistrates on the day appointed by the set, is to read the act 2d Geo. II. c. 24, against bribery, as directed by the 9th section of that act. The electors then take the oaths to government. In one instance, a person had been chosen deacon of the Incorporation of Tailors, in a royal borough, in September 1790, but had not taken his seat, or acted in that capacity, till the 27th September 1791, at the election of magistrates; and when the oaths to government were tendered to him, he added the qualification, 'that he took them so far as was agree-'able to the word of God.' The result of the election depending on the vote of this person, a complaint was preferred, when, on the 24th December, he took the oaths in the Court of Session, without any reservation. In these circumstances, the Court repelled the objection to his vote, chiefly influenced by the consideration, that, as the enactments after the Union authorised the party at any time within three months *after his admission* into office, to take the requisite oaths, his actings in the mean time were to be considered as legal [1].

When the oaths have been taken, the electors go through the several steps of the election in terms of the set of the borough.

The magistrates and council have of course no right to proceed to election before the day fixed by the set or by the usage of the borough; and any election made contrary to this rule will be liable to reduction [2].

The principle is now fully established by a series of cases, that where the set of the borough does not specify any particular number as a quorum of the magistrates and council, a majority of the body must attend to constitute a legal as-

[1] Banks and others v. Jaffray and others, 6th June 1792; Fac.

[2] Upon this, amongst other grounds, the election was set aside in a case from Jedburgh in 1738; and the judgment was affirmed on appeal.—See Craigie and Stewart's Reports, vol. i. p. 207.

sembly, whether at the actual election of magistrates [1], or at a previous meeting immediately affecting the election. This latter point was decided in a case where the right of presiding at the election, and of giving a double vote in case of equality, depended on the validity of the meeting immediately preceding, as the president of that meeting, if legal, was entitled to preside at the election [2]. The same principle is held, although those who do not attend the meeting have wilfully absented themselves [3]. It seems, however, to be held, that such as wilfully absent themselves have no title to complain of the proceedings [4].

The employment of force or violence, so as to deprive a candidate of the support which he otherwise would have had, is a just ground of complaint, as being directly at variance with that freedom of choice which is the essence of an election. In a case in which four deacons had forcibly been kept from an election of magistrates for Inverkeithing, for which purpose a warrant of two justices of the peace, and the aid of constables, had even been obtained, the Court not only reduced the election of those who had employed the violence, but took into account the votes of the excluded persons, who, it appears, had given their suffrages at the foot of the stair of the council-room, and sustained the election of that party [5]. In a subsequent case, the Court reduced an election for the same borough, on the ground that it had been 'brought about by 'means of force, bribery and corruption,' on the part of the successful faction. They, however, refused to sustain the elec-

[1] Mason and others v. Magistrates of St Andrew's, Kilk. p. 107. Elch. v. Bur. Roy., No. 23. Tod, Davidson and others v. Tod and others, 17th June 1824; Shaw.

[2] Meiklejohn and others v. Masterton and others, 28th May 1805.

[3] Mason, *supra*; Tod, *supra*. [4] Mason, *supra*; Tod, *supra*.

[5] Cunningham and others v. Henderson and others, 31st July 1745, Elchies, Bur. Roy., No 22. Wight, p. 343. Falc. i. p. 60.

tion of the other party, against whom also bribery was established [1].

It is clear that the forcibly depriving the opposite party of a portion of his votes, must annul the election of the party using such violence, if these votes would have secured a majority to the losing party; and this was the case in the first mentioned of the above decisions. But what shall we say if it turns out that the gaining party would have had a majority, even if they had not excluded these votes? It rather appears that the same result ought to follow in this case also, where the violence is open and manifest, and of such a nature as to give any room to suppose that it may have influenced the minds even of those against whom it was not immediately directed. Thus, in the second mentioned of the above decisions, the species of violence used by one of the candidates for the magistracy, in addition to bribery, was the introduction of several press-gangs, which were employed in keeping in confinement some of the electors, and in terrifying others. On these facts, the Court, according to Lord Kames [2], 'were unanimously of opinion; 1*mo*, That bribery 'can have no further effect than to disqualify the bribers, and 'those who are bribed. 2*do*, That where force is used, as there 'are no means for ascertaining what influence it has upon the 'election, judges must either give it no effect at all, which 'can never be right, or give it a total effect, to reduce the 'election *funditus*.'

It has also been made a question whether the detaining of only one member of the opposite party ought to cast the election of the users of that violence, if the person so detained would not have had the effect of casting the balance. Mr

[1] Haldane and others v. Holburn and others, 4th August 1761. Fac. and Sel. Decis. p. 245; and Wight, p. 351. A petition against the part of this judgment relating to the election by the minority, was dismissed on a point of form.

[2] Sel. Decis. p. 245. See also Elchies' report of the Inverkeithing case in 1745, Burgh Royal, No. 22; and his notes on it in 1755.

Wight inclines to the negative of this question, observing, that force ought to operate so far as to disqualify those accessory to it, but that it may be doubted if it ought to be carried farther [1]. There is also a case decided in the House of Lords, which perhaps may be held to lead to the conclusion, that in such a situation the force ought to be entirely disregarded. On the eve of an election in the borough of Dunbarton, a councillor having been forcibly carried away, one of the other party was, by virtue of a justiciary warrant, committed to the castle of Dunbarton as concerned in this violence. On the day of election, eight persons chose one set of magistrates, and six persons chose another. The former of these elections was reduced by the Court of Session, on the ground, that the imprisoning the party in Dunbarton Castle 'was a contrivance of design, to disable him from being pre-'sent at the ensuing election,' and that those elected were accessory to this design. On an appeal to the House of Lords, this design was denied; and, it was farther pleaded, that even taking this person's vote into account, the appellants still had a majority of voters. The judgment of the Court of Session was reversed, and the election of the appellants confirmed; but it appears doubtful on what ground the House of Lords proceeded [2].

On the other hand, the following report by Lord Kilkerran of the opinion of the Court in a later instance, perhaps leads to a different conclusion from that to which Mr Wight inclines. 'It was the unanimous opinion,' says Lord Kilkerran [3], 'of the Court, although there was no occasion to give di-'rect judgment upon it, That, as the keeping away a member 'of a town council from the meeting by force, will void the 'whole proceedings, so keeping one away by fraudulent com-

[1] Wight, p. 344.

[2] Smollett and others v. Bunteim and others, 19th Feb. 1730; Craigie and Stewart's cases, i. p. 26.

[3] P. 591. Convener and Trades of Aberbrothock v. Magistrates and Council, 1st July 1740.

'bination, though without force, but with an apparent design 'to carry an election, will have the same effect.' But it does not distinctly appear from this statement what effect the single vote alluded to might have upon the balance of the election.

Threats, when of such a nature as to give just ground for fear, must be judged of in the same way as force, being equivalent to it [1].

The same result must attend the keeping a voter away by a fraudulent combination to deceive or intoxicate him [2].

With respect to the effect of bribery on the nomination of magistrates, questions have at various times occurred in the Court of Session; and such questions, it has been already stated, are to be viewed as arising at common law [3]. The statutes relating to bribery do not apply to the case of the appointment of magistrates.

Bribery in such elections has been reduced to two heads, those means of corruption of which a whole corporation are to derive the advantage, and those which are used for the benefit of individuals of that community [4]. The effect of the former kind is held to be much more fatal to an election than that of the latter, inasmuch as its operation is more extensive. In the following instances, elections of magistrates were set aside, on the ground of the former species of corruption.

In a complaint against the election, in the year 1765, of magistrates for Pittenweem, it was proved that a corrupt bargain had been entered into with one of the bailies in name of the town council, bearing, that they should receive L.1000 for payment of the debts of the town, the surplus to be divided amongst the members of the town council. In defence it was maintained, in the face of the evidence, that the bargain was only to hold if the town council were unanimous

[1] Wight, p. 345.

[2] See Lord Kilkerran's report of the Arbroath case, 1st July 17[illegible] *supra*, p. 299.

[3] See p. 292.

[4] Wight, p. 346.

and if the bribery oath were not put at the election of a commissioner, whereas the council were not unanimous, and the oath was put; and, farther, the town debt was not paid. To this defence, it was held a sufficient answer, that the treaty had operated as effectually as if it had been actually carried into execution; and that although it was given out that the bargain was at an end, in order to make way for the taking of the bribery oath, it was still understood by the magistrates and councillors that the town debt was to be paid, as soon as it could be done with safety. The election was therefore annulled [1].

In another case which was decided soon after, the brother of one of the candidates for the Haddington and Jedburgh district of boroughs, had, in 1766, granted one acceptance for L. 1250, for the use of the town of Jedburgh, and another for L. 250, for the use of the trades of the town; and both were made payable to two of the then magistrates, who granted an obligation that, if the borough should not give its vote, at the ensuing general election, for the brother of the granter of these acceptances, they should be returned. Soon after this, on getting advice of the illegality of the transaction, the acceptances and obligation were mutually delivered up. In these circumstances, the subsequent election of magistrates for Jedburgh, in the year 1767, was set aside by the Court of Session, although it was pleaded, in defence, that the transaction had no relation to the election of magistrates, but only to that of the member of Parliament, and although it had been done away when its illegality was discovered [2].

The like principle was followed in a case where a whole town council were corrupted by an engagement to pay the town

[1] Anstruther v. Alexander, &c. or Ramsay and others v. Martin and others, 24th, 26th, and 28th January 1767. Select Decis. and Wight, p. 346. Affirmed.

[2] Alexander and others v. Winterup and others, 11th March 1768; Wight, p. 349.

debts, although there was no evidence that those voted into the council knew of the bargain [1].

The almost invariable result of a bribe, of which the whole corporation is to derive the benefit, will therefore be a voidance of the whole election,—although, in one instance, where the candidate for the representation of a district of boroughs, besides giving various bribes to individuals of the magistracy of one of the boroughs, presented L. 100 Sterling to the town for building a steeple, the Court seem only to have 'rejected 'the votes of the candidate, and of those corrupted by him [2].'

On the other hand, the effect of the corrupting of individuals will depend on circumstances. If a majority have yielded to the temptation, the election will be reduced [3]. In a case where there was proof against four or five individuals only, and there still remained a quorum untainted, the Court refused to reduce [4]. Where, in an election of new councillors, the votes stood four to six, and one of the six acknowledged that he had been bribed by one of the persons elected, the Court only 'found bribery relevant to annul the votes of 'the bribers and bribed [5].'

In a case where the election by the majority was set aside on the grounds of force and bribery, the Court refused to sustain the election by the minority, because bribery was proved against the provost elected by the latter party [6].

It is not necessary, to constitute bribery, that the persons receiving money shall have made an actual promise of support at the time [7]; nor is it always essential that the giver

[1] Young v. Johnstone, 7th August 1767; Sel. Decis. p. 325.

[2] Mackenzies v. Scott, 7th Aug. 1769; Sel. Decis.

[3] West Anstruther, 1767; Sel. Decis. p. 324.

[4] Kilrenny, 1767; Sel. Decis. p. 324.

[5] Brechin, 14th Jan. 1727; Wight, p. 350.

[6] Haldane v. Holburn, 12th Mar. 1761; Sel. Decis.; Wight, p. 351. Wight adds, that two of the bailies elected by the minority had been bribed.

[7] See the case of Mackenzies v. Scot, 7th Aug. 1769; Sel. Decis.

shall have explained the purpose he had in view in bestowing any gratuity. This purpose may be inferred from circumstances. Thus if a person announce himself as candidate for a borough, and distribute various sums of money to the town at large, and to individuals in the magistracy, his object cannot be mistaken, and there is no need of evidence that he asked support in his election [1].

A bribe given to a wife ought not to disqualify the husband, if he is ignorant of the gift [2].

It is no sufficient defence against a complaint on the ground of bribery, to maintain that the complainers were themselves guilty of that offence, and so are barred, *personali exceptione*, from insisting in such a ground of reduction of the election [3]. If such a defence were to be sustained, there would be no means of setting aside an election in which all the parties concerned had had recourse to corrupt means, and thus the more vicious the proceedings were, the better chance they would have of being unchallengeable. In a case often already alluded to an election was reduced, although bribery was proved against the complainers; and although the Court refused, on that ground, to sustain the complainer's own election: but it does not appear that, in that instance, the bribery had been stated, *in limine*, in the shape of an objection to the title of the complainers [4].

Akin to force and bribery, in point of interference with the genuine spirit of an election, is a practice which has sometimes been followed, of entering into a written bond or agreement, whereby a certain number of those having a right to vote in the election of magistrates and council, bind themselves, sometimes under a penalty of money, or of being esteemed infamous, to stand by one another, and support any candidates whom the persons so bound, or the major part of them, shall resolve to elect. Such agreements are now invariably held to

[1] Mackenzies, *Sup.*

[2] See Wight, p. 361. [3] Wight, p. 352. [4] Haldane *Sup.*

be *contra bonos mores*, and illegal, and a sufficient ground for setting aside an election of magistrates which has been brought about by them. It has often been extremely difficult to ascertain the precise terms of the compact, because the parties, conscious of its improper nature, have frequently taken good care to cancel the written evidence of their crime. But, in such cases when the question has come into Court, the general scope of the bond has generally been, to a considerable extent, ascertained by admissions on the part of the defenders; and the Court have been in the habit of allowing a proof at large to both parties, in support of their respective allegations. The various aspects which such questions have assumed, will best appear from a brief account of the cases which have been reported on the subject.

In the year 1732, a bond of this nature was entered into by thirteen of the councillors of the burgh of Kinghorn, whereby they bound themselves, 'under the penalty of 500 'merks, and of being esteemed infamous and unfit for society, 'to act in concert with one another, and give their votes plum 'at the election of the magistrates of the said burgh, to be on 'Wednesday next, the 4th October, to such persons as the 'major part of them should think most worthy of the office 'of magistracy, till the next election at Michaelmas 1733, 'and then to vote with one another for such persons as they, 'or the major part of them, should think proper to succeed 'in the magistracy, and in the council, for the good benefit of 'the burgh.' At the election of magistrates, a separation of parties took place, and each faction made a choice of magistrates. Mutual actions of reduction were raised; and, in that at the instance of one of the parties, a defence was set up that the bond was sufficient to annul the election of their opponents. The Court at first found that the paction was '*contra* '*bonos mores*, unwarrantable and unlawful;' but afterwards decided that it was not sufficient, *per se*, to annul the election; and subsequently gave the same judgment with respect

used against him, should have been exhibited with the complaint [1]. The time for commencing prosecution is limited to two years from the incurring of the penalty [2], and the process must be served on the accused within that period [3].

By the act 16th Geo. II. c. 11, sect. 33, it is declared, that the electors of commissioners or delegates, for any royal borough in Scotland, for choosing burgesses to Parliament, are, within the intent of the act 2d Geo. II, to be considered as electors of the member to serve in Parliament, and are liable to the provisions and forfeitures of that act. The act 16th Geo. II. however, substitutes another oath [4], to be taken by every voter at the election of a commissioner for choosing a member, if demanded by any one elector, instead of the oath of 2d Geo. II. An oath [5] is also prescribed for the clerk of each borough, at election of commissioners for choosing burgesses; and another oath [6] for the clerk of the presiding borough, at the meeting of the commissioners for choosing a burgess.

The statute 2d Geo. II. applies only to the case where the money or other reward is given to the voter, and not to the case where it is given to a third party, to induce him to procure the return of any member. With the view of meeting this latter case, the act 49th Geo. III. c. 118, was passed, by the first section of which it was enacted, that 'If any per-'son or persons shall, from and after the passing of this act, 'either by himself, herself, or themselves, or by any other 'person or persons, for or on his, her, or their behalf, give, 'or cause to be given, directly or indirectly, or promise or 'agree to give any sum of money, gift, or reward, to any

[1] Irwin v. Adam, July 1768; Wight. p. 275.

[2] Sect. 11. [3] 9th Geo. II. c. 38.

[4] See this oath *infra*, under Election of Delegates

[5] See this oath *infra*, under Election of Delegates.

[6] See this oath *infra*, under the Election of the Representative of a Borough.

of the bond was farther proved by a writer in Stirling, and other witnesses. Thereafter a proof was led by both parties; and, when the Court were about to pronounce judgment upon it, the defenders, for the first time, bethought themselves of a plea in bar of the above proceedings,—that the election was unanimous, and that, therefore, a complaint was incompetent under the 16th of Geo. II., whilst the complainers were barred from challenging their own acts, on an allegation of their own guilt. The Court, however, repelled the objection to the title of the complainers; found that the bonds were 'illegal, 'unwarrantable, and *contra bonos mores*;' and reduced the election at Michaelmas 1773[1].

The last case which occurred, originated in a complaint against the election at Michaelmas 1821, of magistrates and councillors of the borough of Lanark. It was alleged that nine members of the council, being a majority of the electors, subscribed, previous to the election, an agreement, containing the following words, or others of the same meaning:—'We, 'the undersigned, agree to stand by one another in forming a 'new council, in the ensuing election for this burgh; and, in 'case of any difference of opinion, the minority of us are 'bound to fall in with the majority;' that, in point of fact, a majority of the subscribers had fixed upon the new members of the magistracy and council; and that this bond was in existence a considerable time after the date of the election. The defenders denied that they had subscribed the writing mentioned, or any bond whatever; but admitted that some of the persons named had subscribed a memorandum relative to the propriety of excluding certain individuals who could not be re-elected with advantage to the community. That writing, it was stated, had been destroyed ten or twelve days before the election, and all were at liberty to act as they thought fit.

[1] Paterson and others v. Magistrates and Town Council of Stirling, 1st Mar. 1775; Fac.

The Court were unanimously of opinion, that there was no material distinction between this case and that of Stirling, and that the allegations of the complainers were relevant; and they granted a diligence for recovery of the writing. From the examination of some of the defenders, it appeared that a writing relative to the election had been purposely destroyed shortly before the election. A remit was afterwards made to the Jury-Court, to have the matters of fact determined; but a doubt having in that Court occurred, whether the contents of the writing should not first have been ascertained by a process of proving of the tenor, the cause was retransmitted; when it was maintained by the complainers that such a process was only necessary when the deed might be enforced in a court of justice, but could not apply to an unlawful document. The Court found that a proving the tenor was not necessary, and granted a proof on commission, instead of sending the cause back to the Jury-Court [1].

Town-servants, pensioners, and beidmen, are excluded from voting in borough elections, as being liable to influence [2]. Accordingly, it was found that town-officers and pensioners of a borough could not vote in the election of a deacon [3]. In a subsequent case, a person who was town-officer and trades-officer, and another who was gaoler, all of these situations being removeable at the pleasure of the magistrates,

[1] Hutcheson and others, v. Tod and others, 17th May 1823; Fac.

[2] Act of Convention 1689, c. 22, which, although calculated for a particular period, is held declaratory of the common law; Wight, p. 345.

[3] Hutton and others v. Knox and others, 23d July 1774; Hailes, p. 588. From the report of this case, it appears that the House of Lords had previously pronounced a different judgment, with respect to the bellman of Haddington; but the Lord President, in this case of Hutton, held that decision of the House of Lords to be at variance with the consuetudinary law, as recognized by the Act of Convention at the Revolution. From the report of the Haddington case, by Messrs Steuart and Craigie, vol. i. p. 171 note, it appears doubtful whether the House of Lords really did sustain the bellman's vote. See also Wight, p. 345.

were found incapable of voting in the election of a deacon of weavers [1]. Mere poverty, however, will not constitute a disqualification, if the voter is not the object of public charity, as a partaker of the kirk-session allowance, or other public charitable fund. In one instance it was found, that the circumstances of having got a certificate of poverty and inability to pay road-money; of having, in consequence, been exempted from such payment; and of not having paid cess or house-tax, did not constitute a disqualification from voting in making out a leet by an incorporation, from which leet a certain number of councillors were to be selected by the magistrates [2]. In this case, it was laid down by Lord President Blair, 'That, 'so far from mere poverty creating a disqualification of this 'sort, even insolvency, the culpable non-payment of just 'debts, had not that effect; a man might vote though he 'was worth much less than nothing; nay actually under cap-'tion at the moment of election.' Neither is the circumstance of being indebted to the particular borough in which the vote is given, held to create such a degree of dependence as to amount to a disqualification. In a case where an act of the Town Council of Rutherglen had excluded all persons indebted to the town by bond, tack-duty, or otherwise, a counter act, rescinding the former, was sustained by the Court, when brought under reduction, as the former was thought at variance with the common law rights of the burgesses [3].

Honorary burgesses are excluded from voting [4]; but, in a case where it was objected that a majority of voters held merely honorary burgess and guild tickets, the Court were unanimously of opinion that, as the burgess-tickets had been granted as an inducement to enter the volunteer corps of the

[1] High v. Main, 6th Aug. 1789; Fac.

[2] Fleming and others v. Gray and others, 6th July 1810; Fac.

[3] Fleming and others v. Urie and others, 9th May 1776; Tait, p. 404. Sup. to Mor., and *infra*, p. 327. *et seq.* note.

[4] Act of Convention 1689, c. 22.

town, although without payment of the ordinary dues, they conferred the full right of burgesses [1].

Minors cannot vote in borough elections. This has been found with respect to the elections of deacons [2]; and, in a case from Rutherglen, with respect to the forming of leets by trades' incorporations, for the subsequent choice of councillors [3]; and the same principle applies with respect to other stages of borough elections. It is equally incompetent for a minor to be an office-bearer or councillor; and, where a minor had been elected into one of these situations, the Court were unanimously of opinion that the town council might suspend him [4].

To prevent double elections, it was provided by the act 7. Geo. II. c. 16, that no magistrate nor councillor should 'separate from the majority of the magistrates and council-'lors who have been such for the preceding year,' &c. 'and 'if, contrary to the direction of this act, any number of ma-'gistrates or councillors shall, in opposition to the majority, 'take upon them to make a distinct and separate election of 'magistrates or councillors, their act and election shall be '*ipso facto* void; and every magistrate or councillor who 'concurred therein, shall forfeit and lose the sum of L. 100 'Sterling, to be recovered by the magistrates and councillors 'from whom they separated, in manner hereinafter directed.'

In a case which originated under this act, eleven out of twenty-five councillors proceeded to an election on an unusual day, when six councillors were out of town, and the remaining eight withdrew from them. These eight subsequently, in

[1] Mason v. Magistrates of Montrose, 15th November 1821: Fac. and Shaw. See p. 330. for another question arising out of this case relative to the burgess-ticket of the person elected provost.

[2] Rogers and others, members of the Town Council of Selkirk v. Henderson and others, 3d February 1761; Fac. Hutton and others v. Knox and others, 23d July 1771; Hailes, p. 588. Ogilvy v. Magistrates of Edinburgh, 6th February 1810; Fac.

[3] 3d July 1747; Elchies, vol. ii. p. 78.

[4] Jaffray v. Magistrates of Stirling, 21st July 1741; Kilk. p. 321.

conjunction with the six, after due notice to the whole, proceeded to elect. In these circumstances, it was found that the clause of the 7th Geo. II. did not apply, so as either to void the new election made by the fourteen, or to subject the eight who withdrew to the penalties of the act[1]. This judgment was, however, reversed on appeal; but as there were other points in the case, it is uncertain on what ground the reversal proceeded[2].

The provision of the act 7th Geo. II. was somewhat varied in the subsequent statute 16th Geo. II. c. 11; by the 22d section of which it was enacted, 'That at the annual election 'of magistrates and councillors, and in all the proceedings 'previous to the election of the magistrates and councillors 'for the succeeding year, it shall not be lawful for the mino-'rity of any meeting for election, either of magistrates or 'councillors, or deacons, or other persons, who, by the con-'stitution of the respective boroughs, may have votes in the 'election of magistrates or councillors, to separate from the 'majority of those having right to act by the constitution of 'the borough at such meetings, upon any pretext whatsoever; 'nor to make any separate election of magistrates, councillors, 'or electors; but the minority shall, in all cases, submit to 'the election made by the majority in all the parts of elec-'tion; and if any person elected by the minority of any such 'meeting shall presume to vote in the election of magistrates 'or councillors, or in leeting the magistrates or councillors, or 'in any other step of the election, he shall forfeit the sum of 'L. 100 Sterling to any one of the majority of such meeting, 'to be recovered by him in the manner hereafter directed.'

And by the 23d section of this statute, it was farther enacted, 'that no person elected to be a magistrate or councillor by 'a minority of those having right to vote in elections of the

[1] Magistrates of Jedburgh competing, 1st February 1738. Elchies Burgh Royal, No. 9. See also Nos. 13 and 16.

[2] Craigie and Stewart's Appeal Cases, vol. i. p. 207.

'magistrates and councillors, shall, upon any pretext whatsoever, presume to act as magistrate or councillor; and if any 'person shall, notwithstanding, presume to act as magistrate 'or councillor, he shall, for every such offence, forfeit the sum 'of L. 100 Sterling to the magistrates or councillors elected 'by the majority, or to any of them who shall sue for the 'same, to be recovered by him or them in the manner here-'inafter directed.'

Subsequently to this act, the following question arose:—A town-council being equally divided, it fell upon the person who last presided at the meeting to take the chair at the annual election, and give the casting vote. One person had presided at a meeting on the 10th July; but the opposite party called a meeting on the 28th September, at which another individual presided, and which was not attended by the other faction. On the day of annual election, both parties met separately, and chose magistrates. The party which had the chair on the 10th July, brought a complaint against the others under the statutes. It was decided, in the first place, that the meeting of 28th September was not legal, as not having been attended by a majority of councillors; and on this ground the election made by the respondents was reduced. On the question of penalties, however, the majority of the Court held, that the true construction of the statutes was, that the apparent, and not the legal, majority was meant; that the minutes shewed that a meeting had been held on the 28th September, the legality of which the council were neither bound nor able to determine; that, therefore, the apparent majority on the 29th was with the party which had met on the 28th; and that even if the proper construction of the statutes was different, there seemed no reason in such cases to keep the *bona fides* of the parties out of view. On these grounds, the Court found that no penalties had been incurred [1].

[1] Meiklejohn and others v. Martin and others, 26th November 1812; Fac.

The mere circumstance of separating and leaving the place of meeting, does not render the party so acting liable to the penalties, unless they are a minority. The statutes apply only to the case of a minority separating from a majority; and, therefore, if the party leaving the other is truly a majority of the meeting, the case does not fall under the statutes. This was decided in relation to the act 7th Geo. II., in a case determined before the statute 16th Geo. II. was passed [1].

It has been already mentioned, that the act 1469, c. 30, declares, that 'it is thought expedient, that na officiares nor 'council be continued, after the king's lawes of buroughs, fur-'ther than *ane zeir*, (one year)." The statute 1503, c. 80, 'also ordains, that all officiares, provestes, bailies, and others 'havand office of jurisdiction within burrowes, *be changed* '*zeirly*.' In an action of declarator brought about the year 1680 by certain bailies and burgesses of Stirling, against the provost and other magistrates of the town, to have it found, that the defenders had violated these statutes, by continuing themselves in the magistracy, it was alleged in defence, 'that 'the statutes founded on were in desuetude, and that the 'several buroughs in the kingdom had by prescription their 'different customs settled, that neither justice nor policie 'would allow to be altered;' but the Court 'repelled the de-'fence of desuetude and prescription, and found the statutes 'founded on not concerning private right, but the public good 'of the kingdom; to stand in vigour;' and ordained, that the major part of the council at least, should be annually changed, and that no person should continue to be provost, bailie, or other officers, more than two years [2]. This judgment, it will be observed, was inconsistent with itself, in so far as regarded the office-bearers, because if the statutes were in force, in all respects, then it was essential that an *annual*,

[1] Perth election, 11th February 1731; Elchies, Burgh Royal, No. 16.; and Craigie and Stewart's Reports, vol. i. p. 312.

[2] Jack v. Town of Stirling, 27th January 1681; Stair,

and not a *biennial*, change should have taken place in the magistracy. In an action of declarator brought near a century afterwards, to have it found that no one could hold the office of provost of Kinghorn for above two years at once, a very general practice to continue that office for a longer period, both in this and other boroughs, was alleged, and not denied by the pursuers; and the Court, on that ground, assoilzied the defenders [1]. There is no doubt that these acts, as well as some other statutes relating to residence, are in desuetude on particular points.

The subject of *residence* has given rise to much discussion, and in a great variety of shapes. It may first be enquired how far residence is necessary to entitle individuals to be elected to the various situations in the magistracy and council of boroughs.

The statute-book contains a series of enactments with respect to the necessity of residence in those to be elected magistrates of boroughs. The statute 1487, c. 108, ordains the act concerning the choosing of officers in boroughs [2] to be observed in time to come, 'so that the election of officiars micht 'be of the best and worthiest *indwellers* of the town.' The act 1535, c. 26, provides, that 'na man in time cumming be 'chosen provest, baillies, or aldermen into burgh, bot they 'that ar honest and substantious burgesses, merchandes, and 'indwellers of the said burgh, under the paine of tinsel of 'their freedome, quha does in the contrair.' The act 1609, c. 8, also on the narrative 'that the course intended by his 'Majesty for discharging noblemen and gentlemen to be elect-'ed provosts and magistrates of boroughs' had not taken proper effect, ordained, 'that na man shall, in any time comming, 'be capable of provestrie, or other magistracie, within any

[1] Gilchrist and others against Provost, &c. of Kinghorn, 5th March 1771; Fac.

[2] 1469, c. 30, appointing the old council to choose the new, &c. already noticed.

'burgh of this realme, nor to be elected to any of the saids 'offices within a burgh, but marchants and actual traffickers 'inhabiting within the said burghs allanerlie, and na others.'

The quality of residence is thus laid down in distinct terms by this series of acts, as essential with respect to those to be elected provost and bailies of a borough; but in so far as regards the former of these offices, a different rule has come to be well established by usage, sanctioned by decisions of the House of Lords, and of the Court of Session.

The first case in which this question appears to have occurred, was one from the town of Dumbarton, where a gentleman who, it was alleged, had property in that town, and resided there for some time every year, but who could not be viewed as a trafficking merchant or regular residenter, was elected provost. The Court of Session reduced the election, on the ground that he was not a resident merchant; but this judgment was reversed on appeal, although it was argued that a public act could not go into desuetude [1].

Proceeding on this judgment, the Court of Session, in a subsequent case from the borough of Wick, held that the public law was in disuse, and found that it was not necessary that the provost should be a residenter, although the charter of erection from the crown expressly required that he should be so, which charter, however, had been departed from by immemorial custom in the borough [2].

In a subsequent case in the year 1752 from Burntisland, where the set, as recorded in the year 1710, and long practice, admitted a non-resident provost, the Court confirmed that practice, notwithstanding a decreet of Session in the year 1681, that the town-council should consist of fourteen resident merchants and seven trades; the Court holding that

[1] Smollett and others v. Buntein and others, 19th February 1730; Craigie and Stewart's Appeal Cases, i. p. 26.

[2] Anderson and others, 19th Nov. 1748; Kilk. p. 110.

the provost should be supernumerary above the twenty-one members of the town-council [1].

With respect to bailies, however, the rule of the acts requiring residence in those to be elected to that office is still in force. In the case of Wick, it was decided, that only those who were residenters could be elected bailies [2]. A number of years afterwards, a case came from the borough of Anstruther Easter, where the bailies are chosen by a poll of the whole burgesses out of a leet of nine, furnished by the three old bailies; and the treasurer is chosen in the same way out of a leet of three, furnished by the old treasurer. It was objected and admitted, that a non-resident person had been put into the leet of nine; but this individual was not one of those actually elected bailies. On the ground of this objection, however, the Court reduced not only the election of bailies, but the whole election of magistrates and council for that year. The view which seemed to prevail with the Court was, that if one disqualified person may be admitted on the leet, so may a greater number; and thus no more than three qualified individuals may be left for election [3]. The judgment, however, was reversed on appeal [4]; but in so far as can be collected from the appeal cases, and from the general understanding of the law on the subject at that time, particularly as shown by a case decided in the House of Lords a few days afterwards, there seems no reason to suppose that the reversal was intended to affect the general rule,

[1] Trades of Burntisland *v.* the Magistrates, 15th December 1752; Elchies Burgh Royal, No. 37.

[2] Anderson, *supra*.

[3] Tennant and Gray *v.* Johnstone & others, 23d February 1785; Fac. and Hailes, p. 967.

[4] 28th April 1785. It is stated in the Fol. Dict. vol. iii. p. 101, and in Morison's Dict., that the reversal was *ex parte*; but there are appeal cases for both parties in the Advocate's Library. Appeal Cases 1785-7, No. 15.

that non-residence is a disqualification with respect to the office of a bailie. The appellants did not urge, in very strong terms, the negative of this rule; but they maintained, that, even if the general doctrine were conceded, it did not follow that no person could be put upon the leet who was not resident; and they pressed the hardship of disfranchising the borough, merely because a single error occurred in the leet, from which a part of the magistracy was selected. In a case from the borough of Nairn, decided a few days afterwards by the House of Lords, the necessity that the bailies and office-bearers should reside was conceded; and it was found that bailies and office-bearers, with the exception of the provost, must be elected from the resident burgesses; and this concession was made, and judgment pronounced, although it appeared that the practice in the borough in question had not been entirely uniform [1].

[1] Monro and others, appellants, *v.* Forbes and others, respondents, 3d May 1785. The following account of the circumstances of this case is taken from the appeal cases:—The royal borough of Nairn is of very ancient date. Its charter of erection does not exist; and there does not exist any written set of this borough. In the year 1783, an action of declarator was raised at the instance of 182 burgesses and inhabitants, concluding that it should be found and declared,—'1*mo*, That the provost, 'bailies, office-bearers, and whole remanent councillors of the said burgh 'of *Nairn*, shall, in all time coming, be annually elected, and chosen, 'agreeable to the original and antient usage of the said burgh, from 'amongst the real burgesses, landholders, and inhabitants, resident within 'in the royalty, paying scot and lot, and bearing and performing other 'public burdens and services within the same. 2*do*, That the common 'clerk of the said burgh shall, in all time coming, be a notary-public, legally admitted, and capable of exercising the office and duty of a common clerk of a royal burgh; and that such common clerk shall not be 'capable of enjoying the office of common clerk, and emoluments and perquisites thereof by himself, or his servants, and at the same time of 'holding and exercising the office and jurisdiction of one of the magistrates of the said burgh.'

The Magistrates and Town-Council, and several inhabitants and burgesses, were called as defenders to this action.

The action having come before Lord Swinton, Ordinary, a proof was

In the preceding case of Anstruther-Easter, however, it would appear that the Court thought, that, if an 'inveterate

led by the pursuers. This proof is too voluminous to enter into here; but its general import may be collected from the averments of both parties, with respect to the facts which they respectively alleged were established by it. The defenders (appellants) contended (appellants' case, p. 2,) that it was established, 'that residence was never required as a qua-'lification either to an office-bearer, or to a councillor, in this borough;' 'that there were at all times non-residents in the council received without 'objection; and there is not the least foundation in the usage for the idea 'of the respondents, that the majority of the council behoved to be resi-'dent.' On the other hand, the pursuers, (respondents' case, p. 6), upon the whole of the evidence, submitted, 'that they had traced and esta-'blished the constitution of the borough by the ancient usage, and proved 'beyond doubt, that, within the memory of man, no person was ever 'chosen into the magistracy, who did not reside within the borough, till '1771: That, with respect to the councillors, though instances of receiv-'ing one, two, or three non-residents, had occurred upon some political oc-'casions; yet a majority of *non-residents* was never attempted to be intro-'duced till very lately: That the conclusion of their libel respecting the 'town-clerk, required no evidence to support the proposition: That the 'town-clerk of a royal borough ought not to hold that office, and be a ma-'gistrate at the same time; and that the duties of that office could not 'be discharged by a person who is not qualified as a notary-public, it be-'ing a principal part of the clerk's business to give and complete the in-'feftments of the burgage lands and tenements, to which none are compe-'tent but notaries-public.'

The Court of Session pronounced the following interlocutor (10th July 1784): 'The Lords having advised the state of the process, writs pro-'duced, and testimonies of the witnesses adduced; and having heard par-'ties' procurators thereon, they find, That, by the constitution of the 'burgh of *Nairn*, the council thereof must consist of a provost, *three* bai-'lies, and dean of guild, a treasurer, and *nine* councillors: Find and de-'clare, That it is not necessary that the provost be a resident burgess; 'but find and declare, That the *three* bailies, the dean of guild, and the 'treasurer, must all be residing burgesses; and of the *nine* councillors, at 'least *six* must always be residing burgesses: And find and declare, That 'the town-clerk, or any person officiating as his depute, must be a notary 'public, and that he shall be incapable of being elected a member of the 'council of the said burgh, in any capacity, during his continuance in the 'office of town-clerk or deputy: Find, That the expence of the defence

'usage' to the contrary were established, residence ought not to be considered as indispensable in a bailie; and in a recent

'laid out by the defenders in this cause, must be paid by the defenders 'themselves, and cannot be laid on the funds of the said burgh.'

In a reclaiming petition against this interlocutor, the defenders abandoned a great part of their case. They stated, 'That, as to residence of 'the bailies, dean of guild, and treasurer, they never made any objection 'thereto, nor to the town-clerk being a notary-public, and declared in- 'capable of being elected a member of the council of the burgh: That, by 'the nature of the thing, and the general custom of burghs, the bailies 'being the judges ordinary within the burgh, for the daily administration 'of justice, and for the preservation of the public peace, ought to be con- 'stantly or habitually resident. The office of dean of guild likewise marks 'the residence of this officer within the burgh.'

They then prayed for an alteration of that part of the interlocutor relating to the councillors. The Court, however, adhered, 22d July 1784.

An appeal was brought from these interlocutors of 10th and 21st July, in so far as they fixed the number of magistrates, and required six councillors to be resident. The point of residence with respect to the office-bearers was thus abandoned.

In the reasons of appeal it was maintained, that, as there was no written set, so the usage varied with respect to the number of magistrates and councillors, and there was no conclusion in the summons warranting their finding as to the number of office-bearers and councillors; that if non-residence was a disqualification in a councillor, then *no* councillor liable to that objection should be admitted; if it was not a disqualification, then *all* should be eligible, although non-resident: that the Court had no power to fix on *any particular number* as required to reside; that there is no law requiring residence in a councillor; and that, by the evidence, councillors have been chosen from the burgesses at large, whether residing or not, indifferently.

The respondents (pursuers), in their 'Reasons,' contended, that, by the evidence, it appeared that the attempts to introduce into the council of the borough a majority of non-residents, were of very modern date; and that although it may have been found in particular cases that it is not necessary for *all* the councillors to be resident, it would require an express *set*, or a *very inveterate usage*, to warrant a judgment that all the councillors of a borough, or even a majority of them, might be non-resident.

Judgment was pronounced on 3d May 1785, introducing into the interlocutor of 10th July, certain variations, which cause the interlocutor of the Court of Session to stand thus:

instance from the Town of Edinburgh, the Court, whilst they admitted the general principle, that residence was necessary, held, by the narrowest majority, the averment relevant, that it was not required by the practice of the burgh; and they therefore allowed, before answer, the parties who averred that practice to give in a condescendence of the facts they offered to establish, and afterwards granted a proof of those facts[1].

'The Lords having advised the state of the process, writs produced, 'and testimonies of the witnesses adduced, and having heard parties' pro- 'curators thereon, they find that the bailies and office-bearers of the said 'borough of Nairn, in all time coming, ought to be elected and chosen 'from among the real and resident burgesses thereof, but they do not 'find that such residence is a necessary qualification of the persons to be 'elected provost, or other councillors of the said borough, except the 'magistrates aforesaid (*i. e.* the bailies and office-bearers), and find and 'declare, that the common clerk, or any person officiating as his deputy, 'must be a notary-public, and that he shall be incapable of holding the 'said office of common clerk, and, at the same time, of holding the office 'of one of the magistrates of the said borough: Find, That the expence 'of the defence laid out by the defenders in this cause, must be paid by 'the defenders themselves, and cannot be laid on the funds of the said 'burgh.'

[1] Mr Robert Anderson was elected one of the bailies of Edinburgh, at *Michaelmas 1817*. At this period he resided in Broughton Place, beyond the bounds of the royalty of Edinburgh. He held shares in the Commercial Banking Company, and in the Hercules Insurance Company, and was a director of the former of these concerns, for three years previous to December 1816, and again became a director in December 1817, but did not hold that situation at Michaelmas 1817. In a petition and complaint by Alexander Lawrie and others, against the whole Michaelmas election of magistrates and council in Edinburgh for the year 1817, it was, *inter alia*, objected to the election of Mr Anderson as bailie, that he neither resided nor carried on business within the royalty of the town, as was required by the statutes and decisions on that subject. The respondents stated in answer, that Mr Anderson was a partner of a private banking company, and had been till very lately, and now again had become, a director of that establishment; that a residence in Broughton Place was, on a fair construction of the law, sufficient; and 'that, by the practice of the burgh, 'residence within the royalty has never been required nor observed.' It

The statutes are equally applicable to the treasurer and dean of guild as to the bailies. In the preceding case of

was farther contended, that the statutes were in desuetude. Two of the Judges were of opinion that the facts already before the Court were sufficient to establish the objection to the election of Mr Anderson, and to annul the whole annual election. The other three Judges, however, thought, that farther inquiry ought to be made into the practice of the burgh, in choosing persons as bailies, who neither resided nor had a place of business within the royalty. The Court, therefore, on the 10th March 1818, 'appoint the respondents, before answer, to give in a pointed and 'articulate condescendence, in terms of the act of sederunt, of the facts 'which they aver and offer to prove relative to the practice of this burgh, 'in regard to the necessity of the bailies residing, or having a place of 'business, within the said burgh.'

In obedience to this interlocutor, the respondents lodged a condescendence, in which they averred, that, within the last hundred years, there had been fourteen instances in which persons had been chosen bailies, who neither resided nor had places of business within the burgh, and forty-five instances in which the persons elected had not resided within the burgh, but without averring, that, in those instances, they had not had places of business within the burgh. Thereafter the following issues, along with several others, upon different points, were transmitted for trial, to the Jury Court:

'VI. Whether, at the annual meeting for the election of magistrates, 'it has been the practice, for forty years or upwards, to elect as bailies of 'the city of Edinburgh, such persons only as actually reside, or have a 'place of business within the royalty, ancient or extended, where they 'actually transact business?

'VII. Whether there have been instances of persons having obtained 'the possession of a shop, cellar, house, or room, as a colourable place of 'residence or business, for the purpose of qualifying themselves to be 'elected as bailies of the said city?'

Upon these issues, the following verdict was returned: 'Find, upon 'the sixth issue, That, at the annual meeting for the election of magi-'strates, it has been the practice for forty years or upwards, to elect as 'bailies of the city of Edinburgh, such persons as actually reside, or have 'a place of business within the royalty, ancient or extended, where they 'actually transact business, with the exception of ten instances hereto 'annexed, of persons who were so elected, who did not actually reside, or 'had not a place of business where they actually transacted business with-'in the royalty, ancient or extended,' viz. The ten instances were then adjoined. 'Find, upon the seventh issue, That there have been instances

Wick, the Court, 'by consent of parties, found that the 'dean of guild and treasurer should be residenters.' In the case of Nairn, the necessity of the residence of these magistrates was conceded in the House of Lords, and it was there found that they must be chosen from resident burgesses.

The acts, however, mention *officiars* or magistrates only Hence there is room for an implication, that it was not intended that residence should be essential in those to be elected councillors of a borough. Accordingly, the rule has been sanctioned by a long series of cases, that residence is not requisite in such persons, at least where it appears from the practice of the particular borough that that quality has not been deemed essential; and although at different times the Court have taken up the idea that a *majority* or two-thirds of the councillors should be residenters, or at least proprietors, it will be seen that this idea was corrected in the House of Lords, in one of the latest instances.

In the case of Wick, which was a declarator, and in which it does not appear that the set or practice of the borough required residence in the councillors, the Court of Session, after altering a judgment, which found that only residenters could be elected councillors, at last decided, although by the narrowest majority, 'that the *majority* of the councillors 'ought to be residenters, or proprietors, though not residing; 'but that, in making the majority, the bailies, dean of guild, 'and treasurer, ought to be numbered and included[1].' In the subsequent case of Forres, which was also a declarator, the Court, with reference to the set of the borough, which does not require residence in its councillors, and to the practice of

'of persons having obtained the possession of a shop, cellar, house or 'room, as a colourable place of residence or business, for the purpose of 'qualifying themselves to be elected as bailies of the city of Edinburgh.' Four instances since 1795 were then adjoined.

This verdict, in consequence of a compromise, never was applied. Lawrie and others *v.* Magistrates of Edinburgh, 1818 and 1819.

[1] Anderson and others, 13th June 1749; Kilk. p. 110.

the borough, found, 'that there is no necessity for the coun-'cillors of Forres to be resident burgesses [1].' In a complaint from the borough of Linlithgow, the set of which does not require residence in its councillors, against the election of three of the councillors chosen at the last election, it was maintained by the complainers, that these three persons had ceased to be residenters some years before their election; to which it was answered, that neither the public law, nor the constitution, nor usage of the borough, required residence in councillors, and that the three persons alluded to had been, on former occasions, and since their removing from the town, elected without challenge on the part of the complainers. The Court, partly moved by the specialties of the case, such as the possessory nature of the action, and conduct of the complainers, and partly on general grounds, dismissed the complaint [2]. In a complaint from the borough of Kilrenny, the set of which does not require residence in its councillors, it was averred, that the immemorial usage was to admit non-residenters as councillors; and the Court repelled an objection to an election of two councillors, that they were not residenters [3]. In a process of declarator already noticed from

[1] Dunbar and others v. Macleod and others, 7th January 1757; Fac.

[2] Andrew and others v. Gillies and others, 24th January 1775; Fac. and Hailes, p. 618.

[3] Anderson and others v. Affleck and others, 4th March 1785. The following is an outline of the circumstances of this case: In a complaint against an election of councillors for the borough of Kilrenny in September 1784, at the instance of certain persons then voted out of the council, it was objected to the election and votes of the electors, 1st, That two individuals, Sir John Anstruther and Robert Fall, elected councillors, were not burgesses or inhabitants of the borough. 2d, That Sir John, at the time of his election as councillor the preceding year, was a councillor in various other boroughs condescended on, and Robert Fall was, at the same time, provost or bailie of Dunbar, and a councillor in other boroughs. 3d, That Robert Fall was not elected a councillor at Michaelmas 1783, or any of the three preceding years, and therefore was not entitled to vote in certain elections of individuals between Michaelmas 1783 and Michaelmas 1784; and that, although he had been elected for the years preceding

Nairn, which has no written set, a voluminous proof was led, the import of which was said, by one party, to be, that, although a few instances of non-resident councillors had occurred, yet a majority of non-residenters was never attempted to be introduced till very lately; and, by the other party, that non-residenters were at all times received in council without objection; and the Court found, that, 'of the *nine* councillors,

1783, he as often forfeited by non-appearance and non-acceptance. *4th*, That the vote of Robert Lowthian was objectionable, because he had been elected a *councillor* in room of George Lowthian, who had resigned his office of *bailie*, which was incompetent, and contrary to the set of the borough, which required three bailies, a treasurer, and eleven councillors; and because it was not competent for the magistrates and councillors to receive the resignation of a bailie, who is elected by the burgesses at large. It was answered to the first objection, that it was well known that Sir John Anstruther and Mr Fall were burgesses, as they had been councillors six or seven years, although there were no records of the admission of burgesses since 1724; and that residence was not necessary, as the objection had often been repelled, the set of the borough did not require it, and immemorial custom was against it in this borough. To the second objection, that there was no law or expediency preventing one person from being councillor in two boroughs at once. To the third objection, that it was a mere verbal criticism, as, although the word *re-elect* may not be found in the minutes, yet the equivalent word *continue* is to be found, and the name of Mr Fall is in the list of councillors for the following year, at the respective elections. To the fourth objection, that the election of Affleck did not take place at the annual election, or at any previous meeting; and therefore could not be challenged by summary complaint.

The Court 'sustain the objection to the vote of Robert Lowthian, as 'improperly chosen on the 6th day of August 1784, when there was no 'vacancy of a councillor; and, therefore, that he could give no vote at 'the election of councillors on the 16th day of *September* 1784, until he 'was re-elected that day; but find, that, without his vote, there was a le-'gal election of councillors on that day; repel all the objections made to 'the whole of the election on the 16th of *September* 1784; dismiss the pe-'tition and complaint; assoilzie the respondents, and decern; and find the 'complainers (appellants) liable in full costs of suit; and ordain an account 'thereof to be given in.'

From this judgment an appeal was taken to the House of Lords, but the case was compromised. It is from the statement of proceedings in the Court of Session given in the appeal cases, that the account of this case is taken.

'at least *six* must always be residing burgesses[1];' but, on appeal, the House of Lords found generally, that it was not necessary that the councillors should be chosen from residing burgesses[2].

It appears to be held, with respect to those individuals elected to fill those offices of the borough which must be held by residenters of the town, that the proper exercise of the ordinary calling of those individuals at a place of business within the borough, will constitute residence, although the dwelling-house may be beyond its bounds.

In a very late case, from the burgh of *Selkirk*, the Court had under their view the question, how far *previous* residence is necessary, in order to be admitted a member of a craft. Certain persons who were sons of freemen, or had served an apprenticeship in Selkirk, had been in the habit of spending generally the greater part of the year in other places, and returning for longer or shorter periods to Selkirk; and two of them had resided constantly in Edinburgh for two or three years. These persons applied for admission to the Incorporation of Hammermen on the very day of the election of a deacon for that incorporation, and, on being admitted, gave their votes in that election. These votes were objected to on the ground of non-residence. The seal of cause did not contain any clause requiring residence, and seemed to contemplate the possibility of non-resident freemen, by providing, that every freeman who should not reside, should pay a certain sum quarterly. The Court, in the special circumstances of this case, repelled 'the objection of non-residence, as al-'leged, to the admission and votes' of the persons objected to. The judges seemed to think, that it would be very inexpedient to hold, that in no case could a person, qualified in other respects, be admitted to a craft, if he happened to

[1] 10th July 1784.

[2] Munro and others v. Forbes and others, 3d May 1785, *supra*, p. 316.

have resided out of the town for some time previous to his application; but, at the same time, they were unwilling that this case should be held as a precedent for other cases, unless in similar circumstances [1].

[1] Hope and others v. Magistrates of Selkirk, 2d June 1827; Shaw. The following are notes of what fell from the judges on this occasion.—*Lord Glenlee.* I incline to sustain the plea, that the objection is not good against one for the first time claiming admission. If the seal of cause had required residence, there might have been a difficulty. But it contemplates non-residence of freemen, and makes a distinction between resident and non-resident freemen. There is a reference to the possibility of freemen enjoying their privileges without residence. There might, indeed, be an abandonment for a long time, but that is not to apply to the case of a first application. I can't transgress till I am admitted. Every mason can hardly be bound to reside in such a town as Selkirk.—*Lord Pitmilly.* I concur in all that has been said.—*Lord Alloway.* This is a case of difficulty, but I go much into Lord Glenlee's view. Suppose a man has served an apprenticeship, and wishes to improve himself, and goes away from the borough, and then returns, it would be a strong measure to deny such a one admission when he asks it. But the difficulty is this: the old statutes require residence for corporate privileges. Those who ask those privileges must give their services to the borough; and there is a difficulty in allowing persons not resident to claim privileges. These statutes have not been relaxed, except with respect to the provost. I am not prepared to say, that there is any general rule making residence not necessary, in *applications for admission.* If persons come one day and go the next, this is not a compliance with the acts. In short, this is a case of difficulty.—*Lord Justice-Clerk.* This is a new point. The case of Dobson (1803, not reported) is the only similar one. The other cases were different, because there persons *already admitted* freemen came forward merely to vote, although *non-resident.* But, suppose persons qualified in all other respects, come forward, for the first time, to ask admission, in respect of their other qualifications; to lay down the rule, that if, at this time, they are non-resident, they cannot obtain what they ask, would go to narrow admission to thousands of corporations. It would amount to this, you must be a journeyman; you must continue in a state of bondage as a journeyman. I think the illustration of Lord Alloway, as to one going away to improve himself, excellent. The case of Dobson is the only one similar in its circumstances to the present, and seems a case where the objection was taken, but the person there had been twenty years absent, and was brought forward for a particular occasion. But is this to be considered as a deliberate judg-

In this case it was held, that where one has just been admitted a member of any incorporation, and an election comes on *immediately*, there can be no reason for denying him a right to vote in virtue of the same qualifications which were sufficient to gain him admission; for if his non-residence has not been of such a character as to debar him from the one privilege, neither ought it to deprive him of the other. But, if some time intervenes between the admission and the election, then there will be room for the inquiry, how far his residence in the interval has been such as to entitle him to vote; and this question may occur both with respect to the burgesses at large, in those boroughs where they have a voice in the election of magistrates or councillors; and with respect to the members of subordinate corporations. With respect to the former, it is reasonable that one who wishes to exercise the rights of his *status* should confer that general benefit on the community by his presence, which was expected from him when he was admitted. There is, indeed, reason to believe, that, by the most ancient constitution of the boroughs of Scotland, residence was not required to preserve corporate privileges; but at that period, burgess-ship appears to have consisted in the possession of burgh property; and its privileges appear to have been enjoyed by such proprietors, even when non-resident [1]. Such a rule would therefore not be appli-

ment, that *no* person who has, previous to application, been non-resident, can be admitted? If, then, the persons that he objected to were entitled to be admitted, they are not to be cut off from their votes. The question would be different as to *next* Michaelmas election. That would be a different case from their claiming votes, when they have only been admitted in the morning. In the borough of Selkirk there is no sufficient employment for masons.—'Repel objection of non-residence, as *alleged* in condescendences.'—*Lord Glenlee.* I would not like to do any thing to make this case a precedent.

See a case, afterwards mentioned, from Rutherglen in 1776, in which the Court approved of an act of council requiring a certain term of residence before admission as a burgess; Urie, *infra*, p. 327, *et seq.* note.

[1] See this subject in the annexed Historical Inquiry. See index.

cable to a period when the character of a burgess is acquired without reference to the possession of borough property. With respect to the subordinate corporations of a borough, the view in which their exclusive privileges are defensible is, that they are intended as establishments, not merely for the benefit of the individuals composing them, but for the advantage of the whole community, of which they form parts, by consisting of a certain number of persons duly qualified to exercise the particular trades for which they were instituted. There is, therefore, an implied contract with the community at large, that the members composing them shall fulfil the purposes for which those minor corporations are intended, which cannot be done unless those members reside.

One or two cases have occurred as to the necessity of residence in the burgesses at large, in order to entitle them to the privilege of voting in elections of magistrates and councillors, in those towns in which, by the constitutions, they have a voice in such elections.

This point occurred in a case from Wick, the charter of erection of which gave the right of voting 'liberis inhabitan-'tibus et burgensibus dicti burgi.' A declarator was brought to have it found, that none but residenters should have this privilege; and the Court found, 'that, in the election of 'provost and bailies, those only who are resident burgesses, 'or burgesses who are heritors having property in the burgh, 'and none other, are entitled to be electors[1].' In this case, besides actual residenters, heritors were found to have the right of voting, and thus property was made a compensation for the want of residence. But in a subsequent case from Rutherglen, the Court approved of an act of the town-council, requiring residence as an essential qualification in voting in the leeting or choice of office-bearers, although, in so far as

[1] Anderson and others, 19th November 1748; Kilk. p. 110.

respected the incorporated burgesses, it was substantially admitted that neither the set nor practice required residence [1].

[1] The circumstances of this case were as follows:

By the set of the burgh of Rutherglen it is provided, that 'ilk ane of the 'three deaconries, viz. of the smiths, weavers, and masons shall give in a 'list of six persons, and the fourth deaconrie of taylors a list of four per-'sons, and the remanent burgesses, inhabitants within the said burgh, and 'its territories, bearing scot and lot within the same, shall give in a list of 'eight persons to the provost and bailies of the said burgh, who shall 'chuse three out of the three several sixes, and two out of the four, and 'four out of the eight, which maketh up the number of fifteen persons, 'who are to be of the common council of the said burgh.'

In the year 1759, the magistrates and council passed an act, that 'no 'person otherwise having a right to vote in the election of magistrates, 'or other office-bearers of the borough, but standing in debt to the town, 'for any cause, be allowed to vote in the said election, unless upon pay-'ment to the town-treasurer of what is so indebted by them, at least forty-'eight hours before the said elections in which they shall claim to vote.'

Immediately before the Michaelmas election in the year 1774, this act of council was rescinded by another act of the magistrates and councillors.

On the 30th September 1775, a third act of council was passed, declaring that, 'in all time coming, no burgess or tradesman shall have any 'vote or voice whatever in the leeting or choice of the magistrates or 'other office-bearers within this burgh, unless they actually live and re-'side within the royalty of the burgh; nor shall it be lawful for any ma-'gistrate, in time coming, to enter any person a burgess of this burgh, 'unless, previous to his admission, he has, with his family, lived within 'the royalty four months at least; or if such person have no family, un-'less he has lived year and day within the royalty. And also, that the 'absence of any person from this burgh for the space of year and day to-'gether, shall have the effect to preclude him from being entitled to be 'entered a burgess, until he reside the foresaid periods in the events above 'mentioned; but, in the event of his having been a burgess formerly, 'four months residence with his family, or six months if none, shall again-'entitle him to all the privileges of a burgess.'

An action of reduction and declarator was brought by certain persons, then councillors of the borough, for themselves, and in the name and behalf of the other burgesses, concluding that the two last mentioned of these three acts of council should be set aside, and that it should be declared that any one should be admitted burgess, on paying the fees and taking the oath, and that every one so admitted should be entitled, after six weeks' residence, to vote and be voted upon.

Lord

With respect to the freemen of inferior incorporations, it has been decided, in a great variety of instances, that residence is necessary to entitle them to vote in their own private elections. Questions may, indeed, occur as to what shall be held

Lord Covington, Ordinary, made avizandum to the Court with the case on informations.

With respect to the act rescinding the previous act, which excluded town debtors from voting, the pursuers pleaded, that the principle, upon which the convention, in 1689, excluded town pensioners, applied, with still greater force, to town debtors, since they were still more immediately dependent on those who had the power of instantly enforcing the claims of the town against them.

With respect to the act requiring residence, it was argued, that, by the previous constitution of the borough, as established by usage, any one might be admitted a burgess on payment of the fees, and taking the burgess oath; but that no burgess could elect, or be elected, until he had resided six weeks, and thereby acquired a domicil; and that no unincorporated burgess could exercise his privileges unless actually resident at the time, whilst members of the several corporations had always been allowed to vote, although not actually resident at the time. It was maintained to be at variance with the good of the burgh to establish any farther restriction such as those in the act, which would deter others from settling in the burgh, and lessen the inducement of non-resident members to have any farther connection with it.

The defenders maintained, with respect to the act admitting the town debtors, that, although town-pensioners are disqualified as holding their pensions at the will of the council, the mere circumstance of being indebted to the town cannot constitute a legal incapacity.

As to the other act, under reduction, it was stated, that the set of the burgh clearly required residence, as to the unincorporated burgesses, to entitle them to vote; but it was admitted, that although there was no reason to suppose the intention different as to the members of corporations, yet that these were in the habit of voting although not resident. It was said to be highly inexpedient to admit all applicants for burgess-ship, although perfectly unknown; or to allow a residence of six weeks to confer the privilege of voting, because, in that way, strangers, who had no permanent intention of residence, would be introduced, to interfere in the elections. It was farther stated there was no connection between the requisites for domicil, and those for the exercise of burgess-ship, and that the period of six weeks had been fixed on by the pursuers in a manner quite arbitrary.

The Court assoilzied the defenders from the action.—Urie and others

as residence in particular cases; but the general principle that it is necessary to give freemen a right of voting, seems fixed. Thus it was held in two instances, the one from Inverkeithing and the other from Brechin, that non-residents could not vote in the election of a deacon [1]. Another case occurred, in which the Court sustained an act of an incorporation of Rutherglen, providing that residence should be necessary to vote in all their elections, although the set did not require it, and the practice was alleged to be contrary [2].

v. the Magistrates and a part of the Council of Rutherglen, July 1776; Session Papers, shortly reported by Tait, p. 404, Brown's Supt. to Mor. as to Town Debtors only.

[1] Case of Inverkeithing, 1761, Tait, p. 400; Brown's Sup. vol. v. 'Anderson had been duly elected a burgess of Inverkeithing and freeman of the 'Incorporation of Baxters. But having removed his residence to Dunfermline, anno 1732, and acted as freeman there, and afterwards returned to 'Inverkeithing, not with an honest view to reside there, but to give his 'vote at the election of a deacon of baxters, after which he returned to 'Dunfermline, and being objected to on account of non-residence, the 'Lords, 1761, sustained the objection.'

The following case came from Brechin. 'The Lords disallowed the 'votes of all those who were not residenters within the burgh, though 'several of them resided close by it in a village a few yards only from it 'without the royalty, but had been in use to practise within the borough 'without challenge.' Case of Brechin, 1774, Tait, p. 401. Brown's Supt. This case is thus reported, by Lord Hailes, in general terms. 'Non-residents, minors, members of the guildry, town-officers, pensioners of the 'borough, cannot be received to vote in the election of deacons.' Hutton and others v. Knox and others, 23d July 1774; Hailes, p. 588.

[2] This case was, in a great measure, a corollary from the case of Urie from the same borough already mentioned, p. 327, *et seq.* note.

On the 12th September 1775, a few days previous to the act of the town-council as to residence, the Corporation of Masons and Wrights of Rutherglen, following the example of the other corporations, passed an act, 'That no person, who resides without the territories of the borough, 'shall have a vote in any of their elections in time coming.'

Of this act, a reduction was brought by certain non-resident members of the corporation, and also by some other members. Lord Covington, Ordinary, at first decerned in terms of the libel; but the Court having afterwards pronounced judgment, sustaining the town-council act, his Lordship afterwards altered his interlocutor and assoilzied the defenders;

The abstract point as to the admissibility of non-residenters on this ground, amongst others, as the second interlocutor bears, 'That 'an act of the town-council, in many respects similar to this, excluding 'non-residenters from a voice in their elections, has received the appro- 'bation of the Court of Session.'

In a petition to the Court against this latter interlocutor, it was stated, that the set did not require residence in making up the corporation leets; and by the immemorial practice of the borough, non-resident members of the Corporation of Masons and Wrights vote equally with those who are resident,—a practice which it was said was peculiarly necessary in regard to that corporation, the members of it being generally scattered through different parts of the country, working to those who employ them, as there was only business for a very few within the burgh itself, of which practice a distinct offer of proof was made. It was farther argued, that those admitted before the date of the act of the corporation had acquired, by the constitution of the borough, a *jus quæsitum* to the privileges of the trade, whether resident or not, of which no act of the corporation could deprive them.

The Court, however, adhered to the interlocutor. Shaw and others, 19th June 1777; Session Papers.

The following opinions in this case, not before published, are from Lord Hailes's Notes.

'*Hailes.* The regulation sought to be reduced, in effect establishes 'what is the law as to burghs, from *leges burgorum* downwards. It has al- 'ways been understood that the members of a corporation, or company, 'must reside within the burgh. It is said that the set of Rutherglen is 'different, and that practice makes the constitution in burghs. I am yet 'to learn that the set says any thing on the subject. If it did, I should 'not much regard it unless *in possessorio*. Practice against law cannot 'make law; and so the Court has frequently found. At Linlithgow, it was 'the inveterate practice to receive the son of a freeman into his father's 'trade, and even the husband of the daughter of a freeman, and thus a 'butcher, the son or son-in-law of a tailor, was received as a tailor, with- 'out any farther inquiry. But the Court disregarded this, as it did the 'inveterate practice of Brechin, where a man could be of more companies 'than one, and the Court has never pronounced a different judgment. It 'is said that the Court found non-residence no objection as to the skinners 'of Edinburgh; but that decision is misunderstood. It was admitted, that 'the skinners resided in the neighbourhood of Edinburgh, and had a *forum* 'established in Edinburgh. It was also admitted, that they could not oc- 'cupy their trade in Edinburgh, because it was a nuisance, and because 'there was no water sufficient to supply them. The Court therefore

to vote in the election of a deacon, was again decided in the

'found that men who could not reside within burgh, were not bound 'to reside. A different judgment would have annihilated the company; 'but if one of those skinners had taken up his residence at Linlithgow, 'and another at Haddington, the Court would not have found that they 'could still be freemen skinners of Edinburgh. It is said that the masons 'and wrights of Rutherglen cannot find business there; if that is the 'case, it is the best reason imaginable for their settling in Glasgow, &c. 'where they can.'

'*Monboddo.* By the set and practice the pursuers had a right to vote. 'The question is, Whether they can be deprived of the right which they 'had acquired? I doubt both as to the expediency and the legality of al- 'tering the set of a burgh. But supposing the alteration both expedient 'and legal, I cannot think that any member can be deprived of his free- 'hold by such an act. The regulations in Brechin were properly appeal- 'ed to, where the line between past and future was well drawn.

'*Braxfield.* It does not appear that the set allowed non-residence. Al- 'though it has expressly excluded non-resident *burgesses*, it does not fol- 'low that the *trades* were left at liberty to reside or not to reside. The set 'is silent as to the members of corporations, because it was not supposed 'that members of a corporation could be non-resident, and yet vote. The 'act, brought under challenge, deprives no man of his right, for it is de- 'claratory of common law, and is founded on reason, and the nature of 'the thing. It is absurd to say that a man, by once becoming a member 'of an incorporation, continues so for ever, although he should change 'his place of residence. A person, occasionally employed to work out of 'the burgh, does not change his residence, for his family remains where it 'did.'

'*Covington.* The Court did right in not allowing the regulation to take 'place, when made at an improper time; but if the regulation is right in 'itself, it may be supported in time coming. As to the distinction sought 'to be made between those who have been already admitted members, 'and those who may hereafter be admitted, it is without just ground, 'and in the former case from Rutherglen was disregarded.'

On the 19th June 1777, 'The Lords found that the act, concerning 'non-residents, was proper, and therefore assoilzied;' adhering to Lord Covington's interlocutor.

In another case from Rutherglen, one Lindsay, who appears to have been admitted a member of the Incorporation of Tailors of Rutherglen, and to have resided there for some years, had removed from that town, and afterwards brought his family back again to Rutherglen, and placed them in a house there, for which, as he alleged, he paid rent, but which,

negative in a case from Kinghorn [1]; and, indeed, it seems to have been so determined, as often as it has occurred.

The necessity of residence seems to apply even *a fortiori* to the person elected deacon; since, besides the general rule applicable to all the members of the trade, the duties of his office require his presence. The election of a person as deacon of a corporation of Edinburgh was set aside, because at the time of his appointment he was resident in Canongate, and a deacon there also [2].

Where, however, the nature of the particular trade of any subordinate corporation of a borough, cannot be carried on within the bounds of the town, and where, in conse-

as the other party stated, was merely the house of a relation. He then went to Glasgow, and worked with a master tailor. For the house in which he lived there he paid rent, but this was, as he alleged, because he had taken the house before his return to Rutherglen. He went every Saturday evening to his family, and remained till Monday morning; and, as he himself farther averred, was always at Rutherglen when he could get work. A reference was made to his oath of some of the disputed facts, and he was ordered to attend at the bar; but I have not found whether he was examined. The Court, however, decided, that his residence was not such as entitled him to the privileges of the incorporation of tailors of Rutherglen in leeting for councillors. Turnbull and others *v.* Reid, Lindsay, and others, 1779; Session Papers.

[1] Lamb *v.* High, 29th July 1789; Fac.

[2] Miller, a burgess of Edinburgh, and freeman glazier, had his residence at the head of the Canongate, without the limits of the royalty. He had for a course of years exercised all the duties, and enjoyed all the rights, of his trade in the way of ordinary business, and at elections. He was elected deacon in 1763, but, at this time, besides being resident in Canongate, he was deacon of a corporation, and enjoyed several other offices there. His election in Edinburgh was set aside, and his competitor, although elected with a smaller number of votes, preferred. Nicholson *v.* Miller, glazier, 1764; Tait, p. 401; Brown's Supt. I find that the Court, by their first interlocutor, although they set aside Miller's election, refused to sustain that of Nicholson, and that both parties petitioned against the judgment. From the acount given by Tait, this interlocutor appears to have been altered as to Nicholson. The magistrates had preferred Nicholson, without sending the leet back to the corporation. There was indeed, no time to do this before the regular day for receiving the deacons.

quence, any freeman of that body lives beyond those bounds at some place in the vicinity where the craft can be exercised, and disposes of his goods within the town, this is held to be such a residence as the case admits of, and to entitle to the privileges of the craft. This doctrine received the sanction of the Court in two questions relating to the skinners of Edinburgh, who require the vicinity of a run of water for the exercise of their trade of dressing leather.

The first of these was a declarator, brought by the skinners and furriers of Edinburgh, concluding, that the skinners, from the nature of their occupation, should be exempted from actual residence, and should be allowed to reside on the Water of Leith, and should, notwithstanding, enjoy the privileges of their craft in elections of deacons and other matters. At the same time, to soften the opposition to this action, they entered into an obligation to continue subject to the jurisdiction of the town of Edinburgh, and to be liable to the burgal taxations. The declarator was, however, opposed by the magistrates; but the Court decerned in terms of the libel [1].

[1] This case is detailed in the Session Papers, on both sides, in the case of Hunter Blair v. Phin, 31st January 1781. The following opinions, not before published, taken from Lord Hailes's notes, appear to have been those delivered in this case. It will be observed, however, from Lord Hailes's opinion, that he seems to have considered the action to have been brought at the instance of the magistrates. There may, perhaps, have been mutual declarators.—Magistrates of Edinburgh v. Corporation of Skinners, 9th December 1767.

'*Hailes.* The magistrates admit that there is not room for the skinners 'within the liberties, and that, if there were, they could not have water 'for exercising their trades otherwise than by a grant of a private pipe of 'water to each of them; this satisfies me that the skinners must be as-'soilzied from the declarator: neither acts of Parliament, nor seals of 'cause, nor Lord Ilay's decreet-arbitral, can require impossibilities.

'*Pitfour.* I agree in the general point, that freemen must reside within 'the liberties, but *here* there is a necessity that skinners reside without 'the liberties, if not for the *esse*, at least for the *bene esse*, of the corpora-'tion. Suppose that a machine were invented for the benefit of a trade,

In the second of these cases, a person had been elected deacon of the skinners, who resided and carried on business

'and that there were no place within the burgh where it could be erected, 'certainly it might be erected without the burgh. Here the case stands 'thus. There are eighteen non-residenters and fifteen residenters. It 'is said the residenters may carry on the business of the incorporation; 'that is, they who are *nominal* skinners shall do the whole business, but '*real* skinners shall be excluded. I cannot make a difference from the 'privilege of voting in a corporation, and the privilege of selling the work. 'The laws as to burghs have been liberally interpreted; hence, a provost 'and councillors may be persons not residing. If the skinners neither 'come within the town, nor bring their work within the town, they take 'no benefit from the corporation, but if they do either one or other, their 'persons may be attached and their goods may be seized, so that there 'will be no difficulty in levying the stent, or other public burdens.—(*N. B* 'This argument of Lord Pitfour was delivered last in order, he being re-'porter.)

'*Barjarg* proposed that there should be some criterion for distinguish-'ing skinners in the country from those belonging to the corporation, as 'that all skinners belonging to the corporation should have shops within 'the burgh.

'*Gardenstoun.* There can be no clearer proposition than that maintain-'ed by the magistrates, that a burgess must reside if he means to have 'privileges as a burgess. The question, whether the skinners are to be 'exempted from the general rule, is that before us. Although I am 'moved by the arguments of expediency, yet I think that no decision is 'good which proceeds upon expediency alone. The skinners may work 'their skins without the burgh, but their dwelling-place must be within 'the burgh.

'*Monboddo.* This is a question of some difficulty, not as to law, but as 'to derogating from the law, in respect of the nature of this trade, and 'the practice of those who exercise it. The privilege of burgess-ship is ter-'ritorial. *Burgensis est qui burgagium habet*, one who has a burgage tene-'ment. If non-residents in a burgh had the privileges of burgess-ship, 'great inconveniences would thence arise. The duties of watching and 'warding, &c. must be performed by residing burgesses, and these are the 'great duties attending on burgage holdings. The 154th act Parl. 12th 'James VI., goes so far as not to allow craftsmen to reside in the sub-'urbs; add to this, the acts of Convention. There is no exception as to 'Edinburgh. The same rule is established by acts of council, decisions 'in controverted elections, and decisions of this Court. Here the ques-'tion is as to this particular corporation; if the non-residing burgesses

at Canonmills, and an objection, founded on that circumstance, was repelled [1].

'cannot vote, they cannot sell as freemen. Skinners cannot exercise their 'trade in Edinburgh, as they can do at the Water of Leith. Many skinners 'do *de facto* reside without the burgh. I cannot deprive so many men of 'their privileges.

'*Coalstoun.* I am clear as to the general rule, and clear that there is no 'exception as to the town of Edinburgh, but I think that skinners are ex-'cepted; it is not merely more convenient for them to have their resi-'dence without the town; necessity obliges them to carry on their trade 'without the town. This necessity is increased by the deed of the Ma-'gistrates, who have drained the North Loch. Skinners residing without 'the town have acted as burgesses; it would be a strong step to forfeit 'them of their birthright. It will not be quite so easy to levy stent from 'them; yet still that is not inextricable. As the skinners have agreed to 'fix a *forum*, the magistrates may bring an action for payment against 'them before the town's court.

'*Justice-Clerk.* The only argument for the skinners is a strong argu-'ment from conveniency. Were I sitting as a member of the legislature, 'I could give redress to the skinners, but as a judge I have no power. 'Even if I saw a necessity for the skinners residing without the burgh, 'my difficulty would not be obviated as to want of power. The skinners 'may find water within the royalty; they may carry on their works at 'the Water of Leith, though they themselves reside in Edinburgh.

'*Kennet.* Of the opinion last delivered. Could wish it were otherwise, 'but we cannot, as judges, alter the law.

'*Kames.* The question is, Whether do skinners reside without the town 'from conveniency or from necessity? The offer of giving them pipes of 'water is not seriously made. This would be a common nuisance. Scar-'city of water often occurs in Edinburgh; what would become of the skin-'ners then? If they have not a constant supply of water, there is an end 'put to their trade; they cannot stop their trade, and resume it at plea-'sure. It is unreasonable to demand that artisans should reside in a place 'different from that where their trade is carried on.

'*Auchinlock.* The acts of Parliament upon which the magistrates found 'are rational, but their spirit must be attended to. The acts are for the 'encouraging of trade and manufactures in the different places appro-'priated

[1] The judgment of the Court was, 'Find that residence is not neces-'sary for a person to be chosen deacon of the skinners; and therefore re-'pel the objection,' &c. Lawrie v. Magistrates of Edinburgh, 6th June 1815; Session Papers.

In another case, also relating to the waulkers of Edinburgh, the same principle seems to have contributed to a considerable extent to the judgment of the Court. A member of that craft, who resided at the village of Colinton, where he had the benefit of water, and sent his goods for sale to Edinburgh, where he had a warehouse, was elected deacon of the corporation, and his election was sustained by the Court. According to the report of the case, the decision was, in some measure, founded on the *bona fides* resulting from the practice in regard to that trade, and on the summary nature of the process, it being a complaint and not a declarator, which it was thought would have been necessary to overturn such a practice [1]. Independently of specialties, the principle of the decision was a just one, and in perfect conformity with the other cases of the skinners.

It has been found, that the eldest son of a Scottish peer may be provost of a royal borough [2].

'priated for them. In this view, I do not relish the defence of the ma-'gistrates. The work, it is acknowledged, is as well carried on, and as 'much for the benefit of the trade, at the Water of Leith. It cannot be so 'well carried on at Edinburgh. By being removed from Edinburgh, a 'great nuisance is removed, so that the objection resolves into this, That 'the skinners do not sleep in town. The magistrates would confine the 'trade to the people who sleep in town, and work nowhere. An attempt 'is made to pervert an act for the benefit of trade into regulations for po-'litics. If a man goes to a distance, he can no longer serve the town, 'and is no longer to be considered as a burgess-freeman.'

On the 9th December 1767, the Lords found 'That all the skinners of 'the incorporation were entitled to the whole privileges of the trade, al-'though they resided without the liberties, and remitted to the Lord 'Ordinary to proceed accordingly.'

[1] Hunter Blair *v.* Phin, 31st January 1781; Fac.

[2] Birtwhistle *v.* Lord Daer, 23d February 1791; Fac.; Sup. to Wight, p. 156, and Session Papers. It may be proper to mention, that this judgment was pronounced before the case of Lord Daer *v.* Keith Stewart and others, 24th January 1792, where it was found, that the eldest son of a Scots peer can not be enrolled as a freeholder in a county.

In a case from the town of Linlithgow, it was decided, that a bailie of regality, who had been found guilty by the Court of Session of an illegal extortion of money, while he acted as a judge, and had, therefore, been declared incapable of exercising the office of a judge, in all time coming, was not disqualified from being a councillor [1].

It was found, in a case in the House of Lords, that the common or town clerk of a borough cannot at the same time be a magistrate of that borough [2].

In a late case a question occurred, how far a person was qualified to be provost of a burgh, under a set which required that that magistrate should be a resident guild-brother. The new set of Montrose, acquired from the Crown in 1817, provides, that the council shall consist of nineteen, including the provost and office-bearers, 'of which nineteen, fifteen shall 'be resident guild brethren, and four shall be resident 'craftsmen, including the deacon-convener for the time.' In a complaint, it was objected to the person who had been elected provost in 1820, that he was not a resident burgess or guild-brother, but had merely been presented by the magistrates a few years before, with an honorary burgess-ticket. It was explained, that the regular burgess-ticket, after reciting the burgher-oath of fidelity, bore, that the receiver of the ticket had taken that oath, and was then 'made 'burgess and guild-brother of this burgh;' whereas the ticket which had been conferred in this and various other instances, neither recited nor made any mention of this oath, but bore, that he was 'made burgess and guild-brother of 'this burgh.' It was admitted, that the person elected provost had not paid any dues at the time, but it was stated, that this was conformable to the practice in a variety of in-

[1] Bucknay *v.* Ferrier, 10th March 1753; Fac. and Session Papers.—See this case, mentioned *supra*, p. 259, note.

[2] Judgment of House of Lords in Monro and others *v.* Forbes and others, 3d May 1785; *supra*, p. 316.

stances, and that the individuals so admitted were equally liable to taxes, and were, in all other respects, the same as those who paid the regular dues. The Court dismissed the complaint, 'being satisfied that Dr Gibson (the person who 'had been elected provost) had for many years enjoyed all 'the privileges of a trading burgess in the importation and 'sale of medicines; that he constantly resided within the 'burgh; that he had been a member of the council for two 'previous years; and that he had lately paid the regular 'dues of admission [1].'

The next question which requires attention, relates to the manner in which the crown may legally restore the elective power to a burgh, when its election of magistrates has been reduced. When an election of magistrates and councillors has been reduced by the Court of Session, in consequence of any irregularity, or where the election has from any cause not taken place at the usual time, a new election cannot take place until the King has granted a warrant for that purpose; but as the corporation still exists, notwithstanding the lapse of its magistracy, it is understood that the borough may ask this warrant as a matter of right [2].

By the royal warrant, a poll election has sometimes been granted to the burgesses, or burgesses and inhabitants; at other times, the last magistrates and council are empowered to name the new office-bearers and councillors; and, in the cases of Perth and of Aberdeen in 1715-16, the former ma-

[1] Mason v. Magistrates of Montrose, 15th November 1821; Shaw and Session Papers.

[2] Wight, p. 357.—By the statute 11th Geo. I. c. 3, applicable to England only, it was provided, That where no election of the magistracy had been made at the usual time, or where the election was void, it should still be lawful for the 'members, or persons of the borough who have 'right to vote, to proceed to election.' This statute was enacted, because by the common law of England, corporations were dissolved if the head officer was not elected at the usual time.—Blackstone, i. p. 485.

gistrates alone were empowered to make the new nomination [1].

Some discussion took place on the Bench with respect to the legality of these respective courses, in a case from Montrose, respecting an alleged nullity in the election of magistrates, which took place in the year 1746, by virtue of a royal warrant, authorising the second of these modes of election, when the regular election had been prevented by the rebellion. It seemed to be admitted on all hands, that the last mentioned course which had been followed with respect to Perth could not be defended. With respect to the second course, it was observed by one of the judges, that the crown had no power to grant such a warrant, for that, by the lapse of the regular day, the right came to be vested in the burgesses to proceed by a poll election. Others of the judges, however, observed, that, by the act 1469, poll election was done away, and the right lodged in the council; that the crown only did an act of justice in restoring the burgh to its right; that it was too thin a distinction, that the crown could not restore the council, but only the town, to a poll election; and, that restoring the council was, in other words, restoring the burgh against their omission.

Mr Wight following out the former of these opinions observes [2], that originally all borough elections were by the poll, and although this mode was altered by the act 1469, c. 30, which appointed the old council to choose the new, yet when there is no subsisting magistracy and council, the burgesses at large ought to enjoy their ancient right.

Lord Bankton appears to be of opinion, that either mode may be adopted. 'By our old law,' says he [3], 'all the burgesses (called *the honest men of the burrow*), chused the

[1] See the instances of these different kinds of warrants in the Report of the Committee of the House of Commons 1821.

[2] P. 359. [3] Vol. i. p. 56.

'magistrates at the Michaelmas head-court[1]. At this day, 'if, by some interveening accident, the election of magistrates 'and town-council is frustrated at the stated times, the pro- 'viding the burrows with magistrates and other officers in the 'mean time, till the next election, falls to the king, in virtue 'of his prerogative: this is done either by the king's im- 'powering the former magistrates and town-council to make 'an election, upon the day mentioned in the warrant, in the 'same manner as if it was the regular day; or by his Majes- 'ty's commission to certain persons to oversee a poll election: 'in this case only the free burgesses vote, *i. e.* exclusive of 'the honorary ones.'

It would rather appear, that if this point were not influenced by the practice in such cases, it might most naturally be expected, that, as the act 1469 does not expressly exclude a poll election, in all possible cases, but merely provides that the old and new councils shall chuse the office-bearers; and as the condition on which this act hinges is no longer effectual, when a council no longer exists, the right should be given to these parties, who had it before that act deprived them of it. It may be observed, however, that, to adopt the argument of the supporters of the poll warrant, in its full extent, it would seem to follow that the burgesses ought to have it in their power to proceed with the election at once, without any necessity of going to the crown for authority, because if the right of election vests absolutely in the burgesses, when the day of election passes, or the new election is reduced, then their right ought immediately to come into operation. But by a practice in a multitude of instances, almost without a single exception, an application for a warrant to renew the magistracy in some shape or other, has been made to the throne,—a proceeding which, in its own nature, implies, that the king is the source from which the authority for the elec-

[1] Leges Burg. c. 77.

tion proceeds, and seems, therefore, to suppose a certain degree of discretion on the part of the crown, as to the mode of renewal. We are also met by the practice of more than a century, as to the mode of granting the warrant, during which time, although the considerable majority of instances are renewals by a poll-warrant, yet there are many examples of warrants to magistrates and council, which variable practice also seems to import a discretionary power; and there can be little doubt that if the legality of such warrants were again to be tried in a court of law, that practice ought to have great weight on the decision [1].

As the community of a borough requires to have its powers renewed by the crown, when the ordinary day of election passes without a valid election, so it is held that, if a subordinate corporation has neglected to exercise its privilege of election of a deacon, at the usual time, that body cannot afterwards proceed to election, without authority from the magistrates [2]. These inferior corporations are usually established by means of charters, or seals of cause, from the magistrates and council, containing powers or provisions as to the election of deacons. Attempts have been made to destroy the analogy between the two cases, on the ground that, when magistrates do not make a valid election, at the proper time, their powers are at an end, and the royal warrant can alone authorise a new election; whereas a corporation continues to exist, although no deacon is elected. But it must be remembered, that, although a magistracy is dissolved, the community of the borough still exists, although it cannot proceed to election without authority from the King; and that it is upon

[1] From the Union to 1818, there are upwards of twenty instances of poll-warrants, and about seven of the other description. See Report of Committee of House of Commons, 1821. In 1825, the elective powers of Pittenweem were restored by a warrant to the old magistrates and council.

[2] Donaldson *v.* Magistrates of Kinghorn, 29th July 1789; Fac.

this ground it has been maintained that a poll election is the legal course of proceeding in such cases.

In the course of certain proceedings relative to the Burgh of Montrose, a question arose regarding the power of the king to make alterations in the original set of the borough, as regulating the future elections, after the first poll election, which had been granted for restoring the magistrates. The set of this borough was recorded in the books of Convention, in the year 1706. This set was thought by many to be of too close a description; and an application having been made to the Convention, in the year 1815, to introduce certain changes, an act of Convention was passed, in July 1816, establishing certain alterations, and thereby rendering the mode of election of a more popular description. Not satisfied, however, with these changes, the parties concerned proceeded, in 1816, to an election of the office-bearers and magistrates by ballot; and, in consequence of this irregularity, the election was reduced by the Court of Session, and the borough for the time disfranchised.

An application was then made to the King in Council, praying for a warrant for election of magistrates and council, by a general poll of burgesses, heritors, and inhabitants, resident, and bearing a part of the burdens of the borough; and also for a farther change in the set, over and above the alteration recently introduced by the Convention. On the 17th November 1817, the Prince Regent, with advice of the Privy Council, ordered, 'that the guild-brethren, 'members of incorporate trades, and inhabitant burgesses, 'who resided in the borough, at and previous to Michaelmas '1816,' excluding honorary and non-resident burgesses, town servants, &c. should assemble on the 13th of October, then next, to elect magistrates and council; and the warrant also introduced still farther alterations in the set of the borough, than those which had been sanctioned by the Convention.

Under this warrant, the magistracy of the borough was renewed in 1818; and the subsequent election in 1819 was made agreeably to the provisions of the new set. After the election in 1820 a complaint was presented by an individual interested, alleging that certain irregularities had taken place; but the Court were satisfied that there was no foundation for these allegations. While, however, they dismissed the complaint, they declared, 'that, by entertaining this question, under the authority of the election statutes, and giving judgment on this petition and complaint, they do not consider themselves as giving any opinion upon, much less recognising the legality of, the late royal warrant, whereby the old sett of the burgh was changed [1].'

For the purpose of giving effect to the doubts thus plainly expressed by the Court, with respect to the legality of the alteration in the set by the royal warrant, Mill, a guild-brother, who had voted as such at the previous election under the new system, raised an action, calling the magistrates and officers of state as defenders, and concluding for reduction of the royal warrant. The magistrates objected that Mill was barred *personali exceptione*, by having taken the benefit of the new set; and that, as an individual burgess, he had no right to insist in the action, more especially as, by the old set, he had no voice in the election. The pursuer answered, that the plea of homologation was not applicable to public and political transactions, and had been repelled in similar circumstances, in the case of Lawrie *v.* the Magistrates of Edinburgh [2]; and that all the burgesses had an interest in the political constitution of a borough, and therefore possessed a right to challenge any wrong affecting it. An objection was also stated, that the members of the guildry, whose right would be affected by the decision, ought to have been called.

[1] Mason v. Magistrates of Montrose, 15th November 1821; Shaw.
[2] 6th June 1818; Fac.

A majority of the Court were of opinion, that the objection of homologation was not well founded, and that every burgess had a right to insist that the constitution of the burgh, as established by law, should be preserved. The objections to the pursuer's title were therefore repelled [1].

This judgment was, however, reversed on appeal. The appellants, in their case, brought forward all the objections to the title of the pursuer, which were urged in the Court below; but the reversal proceeded on the acquiescence of the pursuer in the new set [2]. The opportunity was thus lost of having the important point of law tried which was involved in the merits of the case.

Several questions have also occurred with respect to the validity of alterations by the conventions of boroughs, of the sets of particular boroughs. In one case, where a committee appointed by the Convention, in the year 1676, had confirmed a set of the borough of Inverness, or made a new one; and, in the year 1722, the Convention had ratified an act of the town-council, introducing an alteration into this set, the Court found, 'That the Convention of the Royal Boroughs 'had power, on just and reasonable considerations, to make 'alterations, upon due and regular application, in the sets of 'particular boroughs, formerly given them by the Convention [3].'

In another instance, the Court approved of an alteration of the set of the borough of Inverkeithing, by the Convention, whereby the five deacons of trades were admitted councillors *ex officio* [4].

In a subsequent case, an action was brought by certain

[1] Mill *v.* Magistrates of Montrose, 28th January 1824; Fac. and Shaw.

[2] This appears from notes of Lord Gifford's speech, which I have seen.

[3] The Trades and Magistrates of Inverness *v.* Duff of Drummuir, and others, Members of the Guildry, 11th February 1724.

[4] Burgesses of Inverkeithing *v.* Magistrates, 29th January 1745; Fol. Dict. iii. p. 100.

burgesses of the town of Wick, to have it declared, 'That 'in all time coming, the election of magistrates and council-'lors ought to proceed in conformity to the charter of erec-'tion of the borough in 1589;' and, particularly, that only actual residenters should be elected office-bearers. Lord Kilkerran, in reporting this case, states, that the Court took little notice of the first and general conclusion, and that it was not insisted in, after it was maintained in answer, *inter alia*, that 'Charters of erection are often receded from, in consist-'ence with the general scope of the erection, sometimes by 'long usage, sometimes by the act and deed of the conven-'tion, which has power by law to that effect [1].' This statement implies an approbation of this doctrine as to the Convention by the Court, or at least by the reporter. But the Court came to a different conclusion, in a subsequent case, in which they suspended a resolution of a majority of the town-council of Edinburgh, to apply to the Convention for dispensing with the form of leeting, in the election of deacons [2]. The ques-

[1] Anderson and others *v.* Sinclair and others, November 19, 1748, &c.; Kilk. p. 110.

[2] Dalrymple and others *v.* Stodart and others, 7th August 1778; Fac. The following note of the opinion of the Judges in this case, was taken by Sir Ilay Campbell:—

'*Gardenstone.* Wish to see the powers of Convention of burghs tried. 'Desirable that there should be a power somewhere, without going to Par-'liament.

'*Covington.* No power. Constitution of Burghs fixed by Articles of 'Union. If had, would be for cutting off extraordinary members. If 'competent, any member of council may apply. Suppose refuse to alter, 'this Court has controul by advocation and suspension. This brings '(would bring) the power ultimately to this Court. One of the grievances 'before the Union. If this part of constitution may be altered, whole 'may. Suspension proper. Suppose a resolution had been to apply to She-'riff.

'*Justice-Clerk.* Appears hard at first sight, that should not have power 'of chusing their own deacons, but reason was, that they became members 'of council. Right of extraordinary deacons limited to certain cases. 'But third reason of suspension, the most important one. If Convention

tion has been again stirred in two cases now in dependence. Actions have been brought at the instances of the officers of

'have legislative jurisdiction, nô matter whether act of council or not, but 'clear that no power. Many of the sets established by charter from the 'Crown, confirmed in Parliament. If power to alter in convention, this 'is sapping the foundation of constitution. Even the legislature itself 'does not interfere to alter the constitution of boroughs in England. So 'delicate a matter enters into the vitals of the constitution of Parliament. '*Servate terminos quos patres vestri posuere.*

'*Braxfield.* Whether Convention have power or not, have formed no 'opinion. Suspenders are cutting before the point, complaining before 'they are hurt. If Convention has no power, even a majority cannot 'procure alteration. If have power, minority may apply. Here only a 'resolution, why should a Court interfere. Suppose Sheriff; If Sheriff 'sustains himself, as a judge may complain. Not in a declarator of right 'here. In that case Convention ought to be called. If question arises in 'a particular case, will allow the Judge himself to say, in the first place, 'whether has jurisdiction or not. Will not suspend a citation. Suppose 'Convention refuse to make the alteration, this Court will not make it. A 'court of police will give redress, if they alter or encroach upon establish-'ed rights, but will not say to them you must do so and so. High ways. 'Suppose justices alter the road, this Court may correct this; but suppose 'refuse to make alteration, doubt if Court will controul this.

'*Elliock.* Extraordinary deacons had no vote. Cannot force the coun-'cil into this question, where majority was against it.

'*Kames.* Convention no parliamentary powers; but doubt of suspend-'ing this act of council. Nobody hurt here. Why should we hinder him 'from exposing himself.

'*Alva.* Will not give consultations to parties. Extraordinary deacons 'had a right to concur in this act.—'I'll stare away your very power to 'think.'

'*President.* 1*st*, Whether extraordinary deacons had a right, not in 'view of decreet-arbitral,—not determined by decreet-arbitral. Entitled 'to vote in a matter concerning constitution of burgh. Not in power of 'every individual to apply to royal burghs. But here an act of Coun-'cil of Edinburgh. Proper to consider here whether Convention has 'power or not. Will not allow them to go to incompetent court, and to 'proceed in foolish litigation. If can correct them in making improper 'alteration, may also correct in refusing. No room for distinctions. 'Very unconstitutional power; but difficulty from practice since Union. 'Inverness, &c. Solemnly determined that a jurisdiction there was given

State, for reducing certain alterations made by the Convention, in the sets of Dundee and of Brechin; and for declaring that the Convention has no power to alter the constitutions of boroughs. Against these actions defences have been lodged, denying the title of the pursuers to insist in the reductive conclusions, and stating, with respect to the declaratory conclusions, that the proper parties have not been called.

Besides the two modes of altering the sets of boroughs, by the Crown and by the Convention, the legality of which modes it has been seen has been called in question, there is a third method liable to much less doubt, viz. the operation of a uniform usage of forty years, in altering or modifying the set of borough. The efficacy of this mode of alteration was, in a very recent case, recognised by Lord Chancellor Eldon. Questions will, however, of course arise, as to the matter of fact, how far there has been, in any particular case, such a uniform usage, as will amount to a modification or alteration of the set. A case has very recently been remitted from the House of Lords, for the purpose of having an inquiry made, how far the set of a burgh had been altered by usage. In this case, the set of the burgh requires the three bailies of the burgh, at the election of the new bailies, to 'give in a leet of 'nine persons, whereof they themselves are always three,' out of which the burgesses are to choose the three new bailies; and, at the election for the year 1823, a leet of that kind was given in. A complaint was, however, lodged against that election, on the ground that, by long practice, the custom had been, for each bailie to give in a separate leet, including himself, and to elect one magistrate from each leet. A proof was led from the town-books, as to the practice since the Union,

'by Convention itself. But if set once fixed, the same by what authori-
'ty. For a hearing upon point of jurisdiction.

'*Braxfield.*—As to high roads, meant their jurisdiction upon act 1669,
'where no private right.

'*Stonefield.*—In an act exceeding their powers, they are only private
'persons, and majority cannot bind minority.'

and the Court, on advising it, dismissed the complaint, being of opinion, that no such invariable practice has been established as to alter the set [1]. Against this judgment an appeal to the House of Lords was entered, when the Lord-Chancellor expressed his opinion, that, in his view, a contrary usage for forty years might vary the set, although he did not wish to decide that point; and that the case ought to be remitted for farther inquiry, into the practice, and as to the effect of such practice on the set. The case was remitted accordingly [2].

[1] This appears, from the report of the case, to have been the ground of the ultimate decision. At a former advising, it was rested partly on the circumstance, that the persons chosen would have been elected, in whatever form the leet might have been made out; Gardiner v. Magistrates of Kilrenny, 9th March 1826; Shaw.

[2] 23d March 1827.

## CHAPTER II.

### OF REVIEW, BY THE COURT OF SESSION, OF ELECTIONS OF MAGISTRATES AND COUNCIL.

Previous to the dates of the statutes bestowing upon certain persons the right of summary action or complaint, to the Court of Session, regarding the election of Magistrates and Council, that Court enjoyed, at common law, a jurisdiction in regard to such elections. The collections of the decisions of the Court of Session afford examples of the exercise of this jurisdiction [1].

This right of superintendance was, however, modified by the statutes above mentioned. The act 7th Geo. II. c. 16, sect. 7, provided, that any magistrate or councillor might bring 'his action,' challenging an election, or any abuse which had taken place at it, within the space of eight weeks *only*, and the Court was required to decide the question *summarily*, and to allow the successful party the costs of suit. Afterwards the act 16th Geo. II. c. 11, was passed, the 24th

[1] It may be observed, however, that there appear not to be many examples in the Collections of Decisions, of processes brought before the act 7th Geo. II. in the Court of Session, relative to elections of magistrates and councillors. We have an example in Stair, vol. ii. p. 844, of a declarator, decided in 1681, relative to the Magistracy of Stirling continuing too long in office; and in Gosford, p. 326, of a declarator and reduction, in which the declarator only was insisted in. A few other examples of processes are mentioned, Fol. Dict. i. p. 117; See also Edgar, p. 29. There may, however, have been many instances not reported. In the collection of Lord Elchies' Session Papers in the Advocates' Library, we have an instance of a reduction of a borough election, about the year 1722; vol. ii. p. 471. Before the Union, the Privy Council of Scotland frequently judged in cases of borough elections See Wight, App. No. 39; and Report, 1821, App. B.

section of which provided, 'That it shall and may be lawful 'to, and for any constituent member, at any meeting for elec- 'tion of magistrates or councillors, or of any meeting pre- 'vious to that for the election of magistrates and councillors 'respectively, who shall apprehend any wrong to have been 'done by the majority of such meeting, to apply to the said 'Court of Session, by a summary complaint, for rectifying 'such abuse, or for making void the whole election made by 'the said majority, or for declaring and ascertaining the elec- 'tion made by the minority [1], so as such complaint be pre- 'sented to the said Court of Session, within two kalendar 'months after the annual election of the magistrates and 'councillors; and the said Court shall thereupon grant a 'warrant for summoning the magistrates and councillors 'elected by the majority, upon thirty days' notice [2], and 'shall hear and determine the said complaint summarily, 'without abiding the course of any roll, and shall allow to 'the party who shall prevail their full costs of suit.'

The question has given rise to much discussion what effect these enactments have had upon the common law respecting the right of challenging elections of magistrates and councillors. The first of these statutes, it will be observed, authorises any magistrate or councillor apprehending wrong to have been done, 'to bring *his action* before the Court of Session 'in Scotland, for rectifying such abuse, or for making void 'the whole election (if illegal) *only* within the space of eight 'weeks after such election is over.' It seems clear, that, so far as respects this act, no *form* of action was established dif-

[1] It is justly observed by Mr Wight, p. 337, that it would have been more accurate to have said, 'for declaring and ascertaining the persons voted for 'by the minority to be duly elected,' because the preceding sections of the statute prohibit, under severe penalties, and the sanction of nullity, any separate election by the minority.

[2] This notice is now restricted to fifteen days, by the 14th Geo. III. c. 81, sect. 1.

fering essentially from that process which was competent at common law. The object of the legislature seems to have been to limit the time within which the action should be brought, to provide for its speedy decision, and perhaps also to exclude the title to pursue, of certain parties who may have previously enjoyed such a title. The action was required to be brought '*only* within the space of eight weeks,' as at common law it was perhaps not even necessary to bring it within the year; because, by the challenge of a previous election, the subsequent one would fall from want of power in the electors. The Court was also, by an after part of the clause, required 'to hear and determine the cause *summarily*;' and the right of action was given to 'any magistrate or councillor of the borough.' It is evident, however, that none of these provisions altered the proper *form* of the old process. It was still an *action* in its technical sense, originating by summons, and called in common form; and, in practice, the old forms of action were adhered to[1]. But it is equally clear that the common law right was limited to this effect, that it was no longer competent for a magistrate or councillor to bring 'his action,' *i. e.* the old form of action for wrong done at the election, after the lapse of eight weeks[2].

[1] On looking into some of the cases decided after the passing of the act 7th Geo. II. but before the 16th Geo. II., as they appear in the Session Papers lodged in the Library of the Faculty of Advocates for Lord Elchies' decisions, it appears, that the process was sometimes a reduction, (See papers for No. 2. Burg. Roy.) sometimes a declarator (See vol. viii. p. 443, where the declarator concluded for declaring that the pursuer, and not another person, was duly elected councillor), and sometimes a reduction and declarator (vol. viii. p. 529.)

[2] It does not distinctly appear, so far as I know, that subsequently to the 7th, and prior to the 16th Geo. II., any decision was pronounced, leading necessarily to the conclusion, that the common law was *entirely* superseded by the former act, so as to preclude an action in circumstances not distinctly falling within the letter of the act. There is, indeed, a judgment mentioned by Elchies (Burgh Royal, No. 17,) finding, that the statute 7th Geo. II., *i. e.* the limitation of that statute, extended to 'processes or conclusions of *declarator* as well as of reduction;' or, as it is

If these observations appear well founded, the next question must relate to the effect of the act 16th Geo. II. upon the previous state of the law. The act 16th Geo. II. it appears, from the clause which has been quoted, provides, that 'it shall and 'may be lawful' for a constituent member of the election meeting, or any previous meeting, apprehending wrong to have been done by the majority, '*to apply* to the said Court 'of Session, *by a summary complaint*,' for rectifying the abuse, or for voiding the election of the majority, or declaring that of the minority, 'so as such complaint be presented 'within two kalendar months after the annual election,' and the Court are required 'to hear and determine the said com-'plaint *summarily*.' Here was evidently a totally new form of process made competent. There is, however, no *express* repeal of the previous act.

In the *first* place, it is now quite settled, that, after the lapse of the two months mentioned in the act of 16th Geo. II., it is incompetent to challenge an annual election of magistrates, not only by complaint, but also by reduction, in consequence of any wrong done at that election; but the point is probably not yet quite settled, whether a reduction is still competent within the period of eight weeks or two months, or whether a complaint is now the sole mode of challenging an annual election, on the ground of wrong done at it. The point as to the incompetency of a reduction after two months, has been determined in several cases.

Thus a complaint against an election at Anstruther-Easter having been cast, on the ground of an informality in the exe-

stated in the Notes, vol. 2d, 'to the conclusion of declarator as well as of 'reduction.' But these processes or conclusions were so intimately connected, that if the statute reached the one, it could hardly fail to reach the other. Indeed, a declarator sometimes concluded to find such a one elected, and such another *not* elected, which is, in effect, to reduce the election of the latter. I have not succeeded in finding the Session Papers in the above case. In so far as regards a general declaratory action as to future elections, it will be afterwards seen that such a process is competent even at present.

cution, and the two kalendar months having on that account expired, the minority brought an action of reduction of the election, at the distance of more than two kalendar months from its date. No objection to the competency was stated in the Court of Session, and the election was reduced. In the House of Lords, however, an objection to the competency of the action was stated, on account of the lapse of the statutory period; and the judgment of the Court of Session was there reversed, and the action dismissed, 'upon this single ground,' as Mr Wight states, 'that the mode of obtaining redress 'pointed out by the election statutes, was the only one that 'could be followed, these statutes being intended by the le-'gislature as a separate code in matters of that kind, and a 'line being thereby drawn, beyond which litigation should 'not be carried on in any mode or form [1].'

We have another account of this judgment of the House of Lords given in an information to the Court in the case, which decided that there now exists no common law right in literary property independent of statute [2]. The point of difference between the two accounts is, that, according to the latter, the successful argument was founded, not on *both* sta-

[1] Young and others v. Johnstone and others, decided in the House of Lords, 1767; Wight, p. 339. For a farther account of this case by Mr Wight, see respondents' case in Anstruther-Wester case.

[2] Hinton v. Donaldson, 28th July 1773, Fol. Dict. iii. 388. Sir Ilay Campbell was counsel for the successful party, and gives the following account of the case of Young, Inform. p. 55. It must be observed that he had quoted at length the clause of the act 16th Geo. II. immediately before. 'In a late case, Young and others of Anstruther-Easter, having 'allowed the two kalendar months to elapse, were cut out of their re-'medy of summary complaint upon the statute; but they brought an ac-'tion at *common law* for voiding the election. Proofs were adduced of the 'bribery and corruption. The pursuers prevailed in this Court, and the 'election was voided.

'An appeal, however, having been taken against this decree, the chief 'reason urged for a reversal, and for the first time stated from the bar of 'the House of Peers, not having been before attended to, was, That the 'Court had given judgment in an action which appeared incompetent, the

tutes, but on that of 16th Geo. II. exclusively, which, it was maintained, put an end to all the previous 'election laws' on the subject, *i. e.* as well the act 7th Geo. II. as the common law. But it is clear, from both reports, that the House of Lords were, at all events, of opinion, that a reduction beyond two months was incompetent.

A judgment to the same effect appears to have been pronounced by Lord Braxfield in a subsequent instance, and his judgment was affirmed in the House of Lords. An action of reduction and declarator was brought by certain burgesses of Anstruther-Wester, nearly twelve months after an annual election, concluding to have that election set aside on various grounds, and to have it declared that certain rules should be observed as to future elections. In defence, it was pled, '*first*, That the appellants were not constituent members of council, and therefore could bring no action to reduce any election, not having any interest in the same; and, *2dly*, That supposing it competent to them to bring the action, yet, as the same was not brought within two months of the election complained of, they were barred by the statutes of the 7th and 16th Geo. II. before mentioned.'

Lord Braxfield pronounced this judgment, (19th Feb. 1785).

'statute having limited the time, and pointed out the only mode for obtaining redress, which had been neglected.

'The *answer* made was, That the statute only authorised a new mode of action for redress of wrongs at annual elections, but that these wrongs were still actionable at common law; and that the remedies *ab ante* competent, could not be meant to be taken away by the statute: That where a statute only allowed a particular and new mode of redress, in a case which was before remediable at common law, the common-law remedy still remained entire.

'*Replied*, that the intendment of the legislature was to take into consideration all the election laws, and by that statute, so full and particular, to cut off at once, and put an end to all questions and disputes that might have arisen upon these laws.

'The House of Lords reversed the decree of the Court of Session.'

'Finds that the pursuers have no title to insist in the process 'of reduction; that the reduction is incompetent, and there- 'fore assoilzies the defenders from that conclusion of the libel, 'and decerns; reserving to the pursuers to insist in the de- 'claratory part of their libel, and to amend the same if they 'shall be so advised.'

This judgment was affirmed on appeal, with costs[1]. It will be observed, that both the objection to title, and that from the lapse of the two months, were pled; and that the interlocutor of Lord Braxfield, as given above, and as affirmed by the House of Lords, appears to sustain *both* objections.

The same principle was recognized in a late case, which was connected with a keen political contest for the representation of a district of boroughs. The election of magistrates for the burgh of Pittenweem, for 1823, having been reduced, as not made by a quorum of those having right to elect, a royal warrant was obtained on the 19th July 1825, ordering those who composed the magistrates and town-council on the day preceding the 16th of September 1823, to meet on the 13th September 1825, and to choose the usual number of councillors, after which those councillors were to choose the office-bearers according to the set of the borough; and the subsequent

[1] Robb and others, burgesses of Anstruther-Wester *v.* the Magistrates and Council, 25th April 1785. Supplement to Wight, p. 146, and Appeal Cases, Advocates' Library, 1785, No. 12. It may be mentioned, that, in the respondents' appeal case, Lord Braxfield's interlocutor is given somewhat differently from that in the text, which is taken from the appellants' case. In the respondents' case it is thus: 'Finds that the action 'of reduction was incompetent to the pursuers (appellants): That they had 'no right to carry on the same; and therefore assoilzies the defenders (re- 'spondents) so far as regarded the reasons of reduction, reserving to the 'pursuers (appellants) to insist in their declarator, and to amend their 'libel, if they shall be so advised.' It is manifest that the interlocutor could not have been in these *ipsissimis verbis*, from the frequent use of the *past* tense. The appellants, of course, were bound to give the interlocutor accurately from which they appealed; and the form in which *they* give it has much more the appearance of formality and correctness.

elections were ordered to be conformable to the set. The interim managers of the borough assumed the direction of the mode of executing this warrant, and declared that one person, namely, Sir William Rae, was not entitled to vote, on the ground, *inter alia*, that he had not qualified previous to the 16th September 1823. In this way there were eleven members of this party present on the 13th September 1825, and only ten of the party opposed to them. The latter party included a person named John Tod, who was provost previous to September 1823; but another named James Tod, who had assumed the chief management during the interregnum, took possession of the chair. This latter individual was then chosen preses by eleven votes to ten, the vote of Sir William Rae having been refused, but given under protest. Councillors were then chosen by either party, with the same number of voters on each side as in the choice of preses.

An action of reduction was then brought by James Tod and his party, concluding for having the election of the other party set aside. This action was dismissed, on the ground of certain defects in the execution of the summons. A new action of declarator and reduction was then raised at the distance of more than two kalendar months from the election. Defences were given in, stating, *inter alia*, that the action was incompetent on two grounds; 1*st*, That an annual election can only be challenged by complaint, and that within two kalendar months. 2*d*, That, supposing an action of reduction and declarator competent, that action must be brought within two kalendar months. The pursuers maintained, that the election sought to be reduced was not an annual meeting, or any previous meeting, to which meetings alone the statute 16th Geo. II. applied; that an action lay at common law, independent of the statute; that this was not truly the case of a minority complaining of a majority, because there were eleven voters on each side, and the casting vote truly lay with James Tod, the chief magistrate before 16th September

1823; and that the action complained of a violation of the royal warrant, by the unjustifiable assumption of the right of direction by the party of interim managers, which was therefore a different case from that in the view of the statute. It was answered, that the election challenged was truly an ordinary Michaelmas election, although under the royal authority; that proceedings for voiding an election must be brought within two months, and even within that period it is doubtful if a reduction is competent; that the defenders were *prima facie* the majority; and that the averment of the pursuers, that the royal warrant had been violated, amounted, when the facts were considered, to nothing more than that the set had been violated, which is the usual averment in such cases. The Court found the action incompetent, and dismissed it [1]; but, in pronouncing this decision, the judges were much divided in opinion. Two of their Lordships thought that a complaint was now the only mode of challenging an ordinary annual election, or one in the circumstances of the present case. One judge inclined to think that a reduction might be competent within the statutory period, but that neither a reduction nor a complaint were competent after that period. The remaining two judges held that the common law process of reduction still existed, even after the lapse of two months [2]. A majority of the Court, however, thus concurred in holding that the action of reduction which had been brought in this case after the lapse of two months from the election was incompetent.

This judgment was affirmed on appeal [3].

It is now therefore quite settled, that a reduction is not competent after the lapse of two months from an annual election, on account of any wrong done at that election. The election statutes, or perhaps the 16th Geo. II. alone, if that

[1] Tod and others *v.* Tod and others, 2d June 1826; Sess. Papers.

[2] See the opinions, Fac. Coll. 2d June 1826.

[3] 20th March 1827.

act shall be considered as having *virtually* repealed the 7th Geo. II., may be held to have superseded the common law on the subject.

It was thus also decided in the case of Pittenweem, that an election under a royal warrant, where that warrant has been granted to the former magistrates and council, is in the same situation as an ordinary annual election, with respect to the competent modes of bringing it under challenge,—a point which had, indeed, been also established in a previous case [1].

The question, however, still remains, whether a reduction is competent *within* two months, or rather within the period of eight weeks, mentioned in the act of 7th Geo. II.; since this act is not expressly repealed by the 16th Geo. II.; or whether a complaint is now the only shape in which the merits of an election can be tried, on the ground, that the act 16th Geo. II. was intended to supersede all the former law on the subject, both statutory and common. If the account of the case of Anstruther-Easter, as given in the question of literary property, were to be received as the accurate one, then it would follow that a reduction is incompetent, even within the statutory periods, because the argument, according to that account, was, that the statute of 16th Geo. II. had now become the sole code on the subject, to the exclusion of all the previous law. But we have seen, that, according to Mr Wight's statement of the grounds of the decision of the House of Lords in that case, it was not the 16th Geo. II. alone, but that act, in conjunction with the previous one of 7th Geo. II., which was held to form the election code; so that both acts must be held as in force, and a complaint competent under the one, and a reduction under the other. Mr Wight's own view of the point in dispute, is conformable to his account of this judgment of the House of Lords:—'An 'action of reduction,' says he, 'is still competent, as well as

[1] Couts and others v. Doig and others, 23d January 1747, Kilk. See this case, *infra*, under *Complaint*.

'a complaint; but it must be brought within the time limi-'ted by the statute [1].

The case of Wigton [2] also seems to support this view of the matter; or, at all events, nothing appears to have been decided in that case, which is hostile to this view. An action of reduction and declarator was brought by certain burgesses, within the space of eight weeks from an election of magistrates, concluding to have that election set aside, on various grounds [3], and also that certain rules should be observed in future. This action, however, appears not to have been brought under the statutes, but to have been instituted as at common law. The title of the pursuers was objected to, on the ground that burgesses never had, as was alleged, any right of reduction of an election at common law, and that no right of action was given by the statutes to the burgesses at large; but the competency of a reduction, if brought by the proper parties, was not objected to; on the contrary, in the information for the magistrates, the competency of a reduction within the statutory period was distinctly admitted [4]. The Court sustained the objection to the title [5], and acquitted the defenders from that conclusion by which it was sought to void the

[1] In the case of Wigton, we find the same sentiment thus stated by Mr Wight, in his information for the magistrates:—'This last recited act 'does not repeal the former; and, therefore, the persons who are autho-'rised to insist for redress of a supposed wrong, may do so, either by a 'summary complaint, or by an ordinary action; but then such ordinary 'action can only be maintained by those to whom the summary complaint 'is competent.' The idea which seems to run through Mr Wight's pleadings in the cases before the Court, about this period, is, that both statutes are still in force.

[2] Cowan and Macguffok *v.* Vans Agnew and others, magistrates of Wigton, 28th June 1782; Wight, p. 340; Fac. and Session Papers.

[3] The election was on the 28th September, and the action was brought on the 17th November.

[4] See the quotation in note [1].

[5] That the decision proceeded on the title, is manifest from the following notes of the opinion of the Judges taken by Lord Hailes:—'*Braxfield*

election. It is therefore plain, that the decision proceeded on the point of title, and not on the form of the action.

On the whole, it would appear that it may still be considered as an open question, whether a reduction could now be brought of an annual election, under the act 7th Geo. II [1].

It sometimes happens, where a complaint has been brought

'Reduction is not competent at the instance of a burgess; if it were, absurd consequences would follow. By the act 16th Geo. II., a constituent member of the meeting, and no other, is entitled to complain; and he must complain within eight weeks. If a burgess is entitled to complain, it must be at common law; and then there will be no limitation. Hence a constituent member, whose interest is most direct, will be limited; and he whose interest is more remote, will not be limited.'

'*Gardenstone.* I see no remedy; and yet it is strange that unanimity in acting wrong should preclude challenge.'

'*Hailes.* The evil is not great; for in boroughs there is seldom such an unanimity. There is generally to be found some one person or other willing to apply for redress of wrongs done. This observation is justified by experience; for the supposed defect in the law was never felt till (now); but indeed a remedy is not wanting, and that is a declarator, which will set matters to right in future; and this is sufficient, though no doubt there may be men more inclined to force on a poll election by reduction, than to reform abuses by declarator.'

'*Kennet.* It is said, that a remedy is wanting; but if every burgess had right to insist in a reduction, the remedy would be worse than the disease.'

'On the 25th June 1782, the Lords found, that the pursuers had no title to insist in the reduction; and therefore assoilzied.'

The same account of the judgment is given by Mr Wight, p. 340; and in the following short notandum on the Session Papers, in the case of Jedburgh, of Sir Ilay Campbell, who was counsel in the case:—'Late case of Wigton. Vans Agnew *v.* Cowan, &c. Statute strictly adhered to; and action cast, though within time, *because* not brought at instance of constituent members. There, election made on wrong day, a mere nullity; argued that could be maintained at any time, and by any person interested; but Court thought otherwise.'

[1] I have not seen any accurate notes of what fell from Lord Chancellor Eldon at the *final* moving of judgment in the late case of Pittenweem; but from such an account of his Lordship's observations as I have seen, they do not appear to exclude the competency of a reduction within the statutory period.

against an election in due time, that, before the decision of the question, another election is made the following year by the magistrates, whose right is *sub judice;* which second election has not been challenged within the statutory period. In these circumstances, the question arises, whether there is any longer an interest to insist in the first process; and this question has been held mainly to depend on the farther point, whether, as the second election has not been challenged within the statutory period, it can now be influenced by the reduction of the first. This question occurred in a case from St Andrew's [1], and another from Wick [2], about the same time. In the former of these, we are informed by Lord Kilkerran, that the Court thought it still competent to go on with the first complaint, on the ground, that 'though the election '1746 (the second election) could not now be quarrelled for 'any wrong done thereat; yet should the election 1745 be 'reduced, it was still competent to quarrel the election '1746 at common law, for want of power in the electors.' In the case of Wick also, the Court proceeded with the first complaint in the same circumstances.

In a subsequent case from Jedburgh, the Court, in the like situation, again repelled the objection to proceeding with the complaint against the first election [3].

In this last mentioned case, the view which seems to have,

[1] Mason and others v. Magistrates of St Andrew's, 19th February 1747; Kilk. p. 107.

[2] Anderson v. Sinclair, 28th February 1747; Falc. and Elch. No. 24, Bur. Roy.

[3] Marshall and Dick v. Carse, 4th December 1782; Fac. The following are Lord Hailes's notes of what fell from the Judges on this occasion:—'*Gardenstone.* The defence is indecent. A regular complaint is 'brought; and yet it is said that the Court cannot judge of it, because no 'consequences can follow from their judgment. I am not of *that* opinion. 'Great consequences must follow, if the election 1781 is void. The actings 'of the magistrates elected in 1781 must be void. We are not called to 'judge of the validity of the election 1782; but we must try the complaint 'before us as to the election 1781. In the complaint there is a conclusion 'for costs; and there is also another conclusion, which no subsequent

to a great extent, prevailed with the Court, was, that, when the first election should be reduced, the second would fall of course, in virtue of the maxim *resoluto jure dantis resolvitur*

'election can set aside; 'for such relief as the Court shall see cause to "give.' This may, and ought to be, a fine against the offenders. The 'bribe bargained for was great, and, at this season, the necessities of the 'poor are great.'

'*Braxfield.* By the statute 16th Geo. II., proceedings at common law 'were superseded, and proceedings must be according to the statute. 'Hence the judgment of the House of Peers, in the case of Anstruther, 'was right. The complainers *there* had the statutory remedy, which they 'did not use in a proper manner. But the question is, how that judg-'ment can apply to the present case. A complaint is regularly brought. 'Suppose the fact to be, that all the complainers are turned out at Mi-'chaelmas 1781, by dilatory defences, and appeals, the cause is hung up till 'after Michaelmas 1782; the complainers have no right by statute to 'complain of that election; and so, by the defenders' argument, he who 'protracts the determination of a cause, is sure to win it; if so, nothing 'but want of money can make a cause to be lost. *This* was not the 'meaning of the statute. That statute did not mean to abrogate the 'principles of the law of Scotland. It prescribes the form of actions; but 'it says nothing as to their consequences. It is an universal rule, that '*resoluto jure dantis, resolvitur jus accipientis;* and there was no need 'for the legislature to declare this principle. Another principle is, *pen-'dente lite nihil innovandum*, the defender cannot make the condition of the 'pursuer worse than it was. I should incline to think, that if the only 'question were as to costs, the cause could not proceed; for the costs have 'already been offered back; no good sign of the goodness of the cause.'

'*Monboddo.* If all the council had been corrupted, would it have been 'said that no action lay at common law?'

'*Hailes.* We must not suppose the defenders guilty, until they are 'proved to be guilty; so the question of inflicting penalties is premature. '(This alludes to Lord Gardenstone's hasty determination). It is obvious 'that the defenders have been lying in wait for the defence that they 'now make. Under various excuses, they put off their answers from day 'to day; but just as two months had elapsed after a new election, they 'lodged their answers; and objected that the complaint could not now be 'effectually heard and determined. If this is law, it is plain that he who 'has money enough, and art enough, to keep back a cause for a year, wins 'it, and may sit down and enjoy the fruits of his own wrong. At any 'rate, the question here cannot be limited to costs; for supposing that 'the defenders should be found guilty, there may be a fine imposed, as

*jus accipientis.* From this view, it might perhaps be inferred, that no new action would be necessary for the purpose of setting aside the second election on the reduction of the first; but that the second would fall *per se*, as being deprived of the whole foundation on which it rested; and that there would thus be immediately room for the intervention of a royal warrant. This, however, does not appear to be a just idea of the effect of the first reduction; and perhaps it was not intended by the Court that such an inference should be drawn. In the account of the case of St Andrew's by Lord Kilkerran, an action at common law is evidently regarded as

'well for the cause itself, as for the conduct of the cause; and there may 'be a notification of the judgment to the public at large. Besides the 'cause must go on; for if it is dismissed, the defence of those men who 'hardly pretend to innocence, must be defrayed out of the revenues of 'this unhappy borough.'

'*Eskgrove.* There is a doubt proposed to the *competency* of this complaint; 'as to the *relevancy* there is none. It is objected, that, by the intermediate Michaelmas election not complained of, *res devenit in alium casum.* 'Nothing is said against the complainers; but it is said, that the parties 'complained upon have frustrated the complaint. This is singular! the 'maxim, *pendente lite nihil innovandum*, is applicable to every case. If the '*first* election was brought about by bribery, so also was the *second.* Can 'the continuation of a wrong protect its authors? We are not to enquire 'at present what will be the consequences of reducing the first election. 'The principle *resoluto jure dantis*, &c. is not shaken; nor was it meant 'that it should be shaken, by any statute. The case of Anstruther, determined in the House of Lords, does not apply to this; for there a complaint was exhibited, and cast on informalities. Then an action was 'brought at common law, after the two months; but it still related 'to things that fell under the statute, and which might have been tried 'under the statute, had the complainers laid their complaint properly. 'Here the complainers sought their remedy in the right form, and no exception is taken against the complaint. It is only said, that the defenders have, by their *own* delays, rendered the complaint elusory, and won 'their cause without a hearing.

'*Justice-Clerk.* Much has been said prematurely. I am indifferent as to 'consequences. I must go on as the law directs.'

'On the 5th December 1782, the Lords repelled the preliminary objection, and allowed a proof of the complaint.'

necessary, although beyond the statutory period; and it is fixed law, that, where a person derives a title from one *non habente potestatem*, a reduction is necessary, and the nullity cannot be pled by way of exception[1]. It is true that judgment will go in the second action as a matter of course; but still the legal process seems necessary[2].

There is another common law process which is not struck at by the statutes, viz. an action for the purpose, not of setting aside any particular election, but of declaring that certain

[1] Stair, p. 622.

[2] There are several instances of complaints having been brought in due time against the second election, on the ground that the first was under challenge; as in a case from Pittenweem, of which the following abridged account is given in a note by Sir Ilay Campbell on one of his session papers:—'In case of Pittenweem, challenge on bribery at Michaelmas 'election 1765. Not finished till after new election 1766. Complaint pre-'ferred, 21st November 1766, to reduce new election made on 23d Septem-'ber, as being made by persons who, on account of the *vitium reale* attend-'ing their election, had no power or authority to appoint their successors. 'Court, 20th January 1767, in respect of the decreet of reduction pro-'nounced in the former complaint of the election of magistrates and coun-'cillors made at Michaelmas 1765, sustained the reasons of reduction of 'election 1766, and decerned accordingly.' See this case also 15th July 1774; Fac. Coll. Strictly speaking, there seems some inconsistence in admitting a complaint in such a case; for to concede that this case is one which admits of the form of complaint against the second election, is to weaken one principal ground on which the second election may be challenged after the usual time, viz. that it does not fall within the statutes. It is not, properly speaking, a *wrong* done, in the sense of the statutes, for magistrates to proceed to election, according to the usual form, whilst their own election is under challenge, but has not yet been set aside; and there is, therefore, room for the common law principle, by which, when the granter's right is resolved, that of the receiver's is resolved also. In the words of Lord Gardenstone, in one instance, the statutes only apply to the case of '*legal* magistrates who do wrong.' In the case of Wick, p. 362, a reduction was brought in due time, of the second election, by the same parties who had challenged the first, on the ground that the first was under challenge; but this reduction was cast on certain informalities, and so the question arose, as already stated, with respect to the power of proceeding with the original complaint.

rules, which it is alleged have been improperly neglected, shall be observed in elections for the future. This process has frequently been found to be competent to the burgesses at large, when they had a direct interest in the particular conclusions of the action; but it farther seems to be held, that this action is also competent to them, even where they have no peculiar interest of this description [1]. It may be proper to inquire a little into the nature of the interest, both direct and indirect, which burgesses may have in the elections of their magistrates; and into the practice of the Court in sustaining processes at their instance.

There is a direct interest vested in the whole or a part of he burgesses, in certain cases arising out of the constitution of the boroughs to which they belong. By the constitution of some boroughs, the burgesses have a direct right of election of magistrates or councillors from leets, as in Rutherglen, Anstruther-Easter, and Kilrenny. Many also elect deacons of incorporations, who *ex officio* are members of council. In all such cases, there is evidently a direct interest in the elections, to the extent of the right of electing, vested in the whole or a part of the burgesses; and this interest seems of itself, and independently of the general character of burgessship, to give rise to a sufficient title to insist in a common law process, of the nature above mentioned, in so far as the action may conclude for rendering effectual the particular right in which the pursuer has an interest. The burgesses, or some particular portion of them, have also a direct interest to make good their rights, as the body out of which certain office-bearers may, by the constitution of the burgh, be eligible. There are a variety of examples of actions, in which the pursuers had an interest of these descriptions; and these instances chiefly occur after the date of the statutes, the examples of actions at the instance of simple burgesses before the date of the statutes being very few. A case occurred in

[1] Mill v. Magistrates of Montrose, 28th January 1824; Shaw.

1673, in which an objection was stated to the title; but the question did not come to a decision. The action was a declarator and reduction, brought by certain 'merchants and 'tradesmen' of Edinburgh against Sir Andrew Ramsay, Lord Abbotshall, who had been elected provost. The declarator only was insisted in, and the conclusions were, that the magistrates should be yearly changed—that no person higher than a merchant should be elected provost—and that, therefore, Sir Andrew should be in future incapacitated. Besides a defence on the merits, objections were stated to the action, on account of alleged want of interest in the pursuers, and of the popular nature of the process [1]. The case was afterwards compromised [2]. The merchants seem to have had a direct interest in this case, in so far, at least, as regarded the declarator, because the provost and magistrates were eligible from among them by the set of James VI.; but the direct interest of the trades is not so apparent.

There is also an instance of a declarator, in the year 1681, brought, as Lord Stair's report bears, by certain 'bailies and 'burgesses of Stirling,' against the provost and other magistrates of the town, concluding, that they had done wrong in

[1] It was alleged for the Lord Abbotshall, &c. that this declarator could 'not be sustained, because the pursuers had no interest to insist therein; 'it being of its own nature a popular licence, and tending to sedition and 'scandal, thereby to bring magistrates into contempt with the inhabitants, 'so could not be the ground of an ordinary action; but in the case of de-'linquency of magistrates, the same ought to be represented to the king 'or his privy council, who, after trial, might take order, and determine 'thereuntil.'

[2] The Lords finding both parties willing to waive decision, 'seeing it 'might occasion great divisions in the town, who, for the most part, were 'all interested in the event of this plea,' desired them to name arbiters; and they named the Chancellor and the President of Session, who ordained an act to be passed in council, 'that no provost should continue 'in office above two years, but might be put on the leets after he had con-'tinued one year in office.' Johnstone, Kinloch, and others, merchants and tradesmen in Edinburgh, v. Sir Andrew Ramsay, Lord Abbotshall, 28th February 1673; Gosford, Sup. to Mor. v. i. p. 682.

perpetuating themselves in the magistracy, and had not observed the custom of the town, 'whereby the guildry did yearly offer seven persons to be of the new council, which the town was accustomed to accept.' No objection appears to have been stated to the title of any of the pursuers; and after a debate on the merits, the Court pronounced certain findings; and, amongst the rest, that a major part of the council, viz. '*seven merchants* and four tradesmen,' should be changed yearly. The guild-burgesses had an evident interest to insist in this action, and the finding concerned both them and the trades [1].

Since the date of the statutes, the right of burgesses to pursue a general declaratory action as to the future conduct of elections of magistrates, has been sanctioned both in the Court of Session and in the House of Lords, in a variety of instances, where there was an interest of that nature which has been described above. By the charter of erection of Wick, the right of election of magistrates is given 'liberis 'inhabitantibus et burgensibus,' and the office-bearers are required to be residenters. In 1716, a set was framed by the Convention, introducing considerable restrictions on the poll-right of election. An action was therefore brought by certain burgesses of Wick against the magistrates, in whose favour the restrictions were conceived, concluding that the elections ought in future to proceed according to the charter of erection; and, in particular, that none but resident burgesses should be elected magistrates or councillors. No objection was stated either to the title or shape of the action; and judgment was pronounced on the merits of the case [2].

A declarator was brought by certain burgesses of Forres, against the magistrates of that town, concluding that none

[1] Jack *v.* Town of Stirling, 27th January 1681; Stair.

[2] Anderson and others *v.* Sinclair, 1749; Kilk. p. 110 and 400; Kaimes's Rem. Decis. p. 192; and Falc. See the judgment on the merits, *supra*, p. 314, 315, 321.

should be capable of being elected councillors but resident burgesses. The interest here is manifest, with respect to such of the pursuers as were resident burgesses. No objection was stated either to the shape of the action or to the title of the pursuers; and the Court pronounced judgment, finding residence was not necessary [1].

In the year 1783, the total number of burgesses and inhabitants on the tax-roll of the borough of Nairn was 213. Of that number, 182 brought an action of declarator against the magistrates and council and remanent burgesses, proceeding on the narrative, that, by the common and statute law of the land, as well as by the usage of the boroughs in general, and of Nairn in particular, magistrates and councillors ought to be chosen from among resident burgesses, and concluding, *inter alia*, that this rule should be observed in future. No objection appears to have been stated to the title of the pursuers; and the Court of Session, and afterwards the House of Lords, pronounced judgments, finding, *inter alia*, that certain of the magistrates must be chosen from among resident burgesses [2].

About the same time, an action of reduction and declarator, which has been already noticed, was brought by certain burgesses of the town of Anstruther-Wester, more than two months from the annual election of 1783, concluding for reduction of that election on various grounds, and also that it should be found and declared, *inter alia*, that no persons should in future be capable of electing or being elected magistrates or councillors of the burgh, but resident and habile burgesses, being merchants or other tradesmen therein, and that persons who exercised the office of magistrate or councillor in any other borough should be ineligible. The title was

[1] Dunbar and others *v.* Macleod and others, 7th January 1757; Fac.

[2] Forbes and others *v.* Munro and others, decided in the Court of Session, 22d July 1784, and in the House of Lords, 3d May 1785. See this case at greater length, *supra*, p. 316.

objected to, on the ground that the acts 7th and 16th Geo. II. admitted only constituent members of certain meetings. Lord Braxfield found that the pursuers had no title to insist in the reduction, and acquitted the defenders from the reductive conclusions, 'reserving to the pursuers to insist in the declaratory 'part of their libel, and to amend the same, if they shall be 'so advised.' An appeal was taken directly from this interlocutor to the House of Lords, and it was there affirmed.[1]

From this series of cases, as well as upon principle, there can be no doubt of the right of burgesses to insist in such a prospective declaratory action, where their interest is of the description which appears in those cases.

But the farther question arises, whether, where there is no such direct interest, the burgesses still have a right to insist in this kind of action? There is a kind of indirect interest arising to burgesses in the election of magistrates, from more than one source. They have, for instance, a remote concern with

[1] Rob and others v. Thomson and others, decided by Lord Braxfield on the 19th February 1785, and by the House of Lords on the 25th April 1785. See Appeal Cases in Advocates' Library 1785, No. 12, and Sup. to Wight, p. 146, also *supra*, p. 355. The case of Wigton, also, seems to have been decided on a similar principle. The action was a reduction and declarator, and concluded for the voiding of an election, and also to have it declared that Michaelmas day should be the roll-day of election; that none but residenters should be magistrates and councillors; that no peer should be eligible to these situations; besides a variety of other declaratory conclusions. According to Mr Wight, p. 340, the Court refused to sustain the title of the pursuers to insist in the reduction, on the ground that the statutes gave the right only to constituent members of certain meetings, and assoilzied from the reductive conclusion, thereby leaving it to be inferred that the declaratory conclusions were competent to the burgesses; Cowan and others v. Magistrates of Wigton, 23d June 1782, Session Papers. The Faculty Report, however, states generally, that the action was dismissed as incompetent; but the other account seems more conformable to the cases mentioned in the text, at least with respect to some of the conclusions. See also Mr Wight's account of this decision in the first 'Reason' in the respondent's case on appeal, in the West Anstruther question, and Lord Hailes' Notes of the Case, *supra*, p. 360.

the general funds of the borough, which are under the controul of the magistrates; but as before the late act of 3d Geo. IV. c. 91, which gave burgesses a right of complaint against the accounts of magistrates, the Court refused to sustain their title to insist in an action of accounting against their civic rulers[1]; so neither can there exist any right of controul on this ground over the elections of those who have the charge of those funds. An indirect interest also arises from their general concern as burgesses in the mode of government of the borough itself. Every one of them may be said to have a right to insist that he shall be governed according to law; and, consequently, to maintain any action for correcting a practice which is contrary to law. We have a very old example of an action brought in 1590 at the instance of the Lord Advocate, and of a considerable number of persons, 'burgesses, and craftsmen of the burgh of Aber-'deen, and for themselves and remanent burgesses, craftsmen, 'and community of the said burgh,' against the magistrates and council, setting forth that the defenders had continued themselves in office, without lawful change, and concluding that the elections since 1560 should be declared void, and that the magistrates and council should not in future continue more than a year. So far as appears, no objection was stated to the title of any of the pursuers, and the Court pronounced a judgment on the 21st January 1591, by which 'they dis-'charged the action for declaring the election void from 1560 'to 1590, without giving any reason for the judgment; and 'ordered that, in all time coming, the elections should be in 'terms of the acts of Parliament[2].

In a late instance, the Court sustained the right of a burgess to insist in an action of reduction of a new set granted

[1] Case of Inverury, 14th December 1820; Fac. See also Erskine, b. i. tit. 1. sect. 23; and Gilchrist v. Magistrates of Kinghorn, 5th March 1771; Fac.

[2] See Report of the Committee of House of Commons 1793, p. 7–9.

by the crown to the borough of Montrose, although it was urged in defence that he had no greater individual interest in the old set which he sought to re-establish than in the new; but, on the contrary, that the latter was of a more popular nature than the former, and his private interest was therefore rather the reverse of what he sought to establish. The view which seems to have prevailed with the Court was, that 'every 'individual burgess has an interest and title to insist that the 'borough shall be governed according to law [1].' This judgment was reversed on appeal; but that reversal proceeded on another objection, which was made to the title of the pursuer, viz. that he had acquiesced in the new set, by availing himself of the privilege of voting under it, a privilege which he did not possess under the old [2].

The principle of this case, as decided in the Court of Session, seems to extend to all actions of a declaratory nature, having for their object the correction of practices contrary to law connected with the sets of boroughs.

This action, having a prospective operation as to future elections, occasionally assumes the shape of a reduction of some act of the town-council, which is thought to interfere with the privileges of the various persons interested in the elections; and the same persons appear to have a title to insist in such an action, as to pursue a declarator, having a similar object. An instance of this process of reduction occurred in a case from Rutherglen formerly noticed, where the action was insisted in by certain councillors, for themselves, and in behalf of the other burgesses, and concluded for reduction of an act of council, rescinding a previous act which excluded town debtors from voting, and of another act, introducing some strict rules as to residence [3]. The burgesses

[1] Mill v. Magistrates of Montrose, 28th Jan. 1824; Shaw and Fac.

[2] That this was the ground of the reversal appears from the speech of Lord Gifford at moving the reversal; of which speech I have seen notes.

[3] Urie and others v. Magistrates and a part of the Council of Rutherglen, July 1766; Session Papers. See *supra*, p. 328.

alone would have had a title to reduce the act as to residence, from the immediate concern which they had by the set in the elections, by preparing leets for the choice of councillors, and perhaps both acts, from their general interest as burgesses.

Having thus considered the nature of some of those processes which are competent at common law respecting borough elections, it remains to direct our attention to various particulars regarding the statutory remedy of complaint.

The complaint must, by the statute 16th Geo. II. sect. 24, 'be presented to the said Court of Session within two ka-'lendar months after the annual election of the magistrates 'and councillors.' This period is estimated from the last step of election, although the particular wrong complained of may have happened beyond the two months [1].

From the time of the year at which the annual borough elections take place, it can rarely happen that the Court of Session shall not sit before the lapse of the two months; but such a case occurred, in one instance, from the burgh of Pittenweem, and a question arose under it, attended with special circumstances.

In this case, the annual election was held on the 10th September, and the Court of Session did not meet till the 12th of November. The complaint, however, was lodged with one of the clerks of Court upon the 9th November, and, on the same day, which was the regular day for putting into the Judges' boxes those petitions which were to be moved in Court at their first diet, printed copies of the complaint were put into those boxes. In these circumstances, although it was urged that no complaint could be lodged in vacation time, that objection was overruled [2]. Mr Wight, however, adds,

[1] Wight, p. 337.

[2] Ramsay and others v. Martin and others, 14th December 1765, affirmed on appeal 7th February 1766; Wight, p. 338. The following note of the opinions of the Judges in this case was taken by Sir Ilay Campbell. 'Competency.—*Coalstoun.* Repel for two reasons. 1. *Non valens agere.* '2. Falls under not only meaning but express words of the act.—*Pit-*

that if the two months had expired before the 9th, no complaint could have been received.

In a subsequent case, from Selkirk, the Court, proceeding on the words of the statute, which require that the complaint shall be '*presented to the said Court of Session* within two 'kalendar months,' were of opinion, that, although a complaint was marked on the last day of the two months by the clerk of Court, in this form, 'Eo die *presented*,' and was on the same day marked by the collector of the fee-fund, and by one of the Judges' Clerks, and also put into the Judges' boxes, it was not sufficiently *presented* unless moved in Court on that day, and therefore dismissed the complaint [1]. There

'*four*. Dangerous to sustain the *non valentia*. Makes things extremely ar-'bitrary. For superseding till action comes on.—*Gardenstone*. Not a ques-'tion of prescription, but privilege. Cannot by equitable construction ex-'tend the privilege, statute our warrant.—*President*. Not a prescrip-'tion, but yet for repelling. Privilege intended for disability. Purview 'of the act, to give a privilege to the lieges; to give summar dispatch. 'One act of Parliament did not mean to alter the other. Suppose a per-'son coming with a complaint dies, a complaint delayed twenty-four 'hours. Done all that they could. Presenting to clerk stops days of re-'claiming. Days do not run in the vacation. *Justice-Clerk*. Day of elec-'tion is any Tuesday of September after first Tuesday. Had it in view to 'take this advantage.' '14th December 1765.—*Nisbet*. Deed 'of the town itself, for might have made it third Tuesday. Ought to 'stick tenaciously to the law in such cases.—*Barjarg*. Suppose any acci-'dent happens, action drowned.—*Kames*. Law means to give a benefit, 'circumscribed in two kalendar months. If not, complainer is understood 'to renounce. Supposed to be possible. Spirit of the law. Have brought 'my complaint *quamprimum*. Can I be forfeited of my privilege without 'my fault?—*President*. In case of claims, never cut out if two or three 'days after.—*Gardenstone*. No boundary to stop at.—*President*. What if 'not a quorum first day of the session?—*Coalstoun*. Distinction between 'a prescription and a privilege thin. *Non valens agere* implied in all the 'acts concerning prescription. *A fortiori* in a privilege. Words of act of 'Parliament.—*Barjarg*. Act relates to obligations.—*Kames*. Minority de-'duced.' 'Repel.'

[1] Henderson and others *v.* Lang and others, 3d July 1821; Fac. 'Shaw, and Session Papers.

is certainly a distinction between this case and the preceding, inasmuch as, in the preceding, the complainer did all that lay in his power to *present* his complaint in proper time, the Court not meeting till after the lapse of the period; but, indeed, if it is to be held that the statute imperatively requires *moving in Court* as presentment, it may be doubted whether the Court can dispense with that requisite, even under circumstances such as those in the case from Pittenweem.

In a case from St Andrew's, the annual election had been finished on the 8th October, but subsequently three of the councillors having refused to accept, a certain number of the council, without summoning the rest, chose three new councillors, who had not been, as the set required, of the old council. A complaint was presented on the 18th December against this proceeding. A majority of the Court thought that the wrong complained of did not fall under the act 16th Geo. II; but the ground on which the complaint was refused was, that more than two months had elapsed from the annual election [1].

The next point which requires consideration, regards the parties to whom the statutory complaint is competent. By the act, the right is given to 'any constituent member at any 'meeting for election of magistrates or councillors, or of any 'meeting previous to that for the election of magistrates and 'councillors respectively, who shall apprehend any wrong to 'have been done by the majority of such meeting [2].

It is only constituent members of the town-council who have the right of complaining under this clause, in so far as regards the election of magistrates, or of councillors who are not deacons. In so far as respects that election, the members of the subordinate corporations, even where their deacons are *ex officio* councillors, have no title to complain. These

[1] Glass v. Magistrates of St Andrew's, 27th February 1754; Elchies, Bur. Roy. No. 40.

[2] 16th Geo. II. c. 11. sect. 24.

principles follow from the case of Lawrie against the Magistrates of Edinburgh; but a farther conclusion might perhaps be drawn from that case, that, even in questions relating to the election of deacons who are *ex officio* councillors, it was not competent for members of the craft to appear as complainers under the statute: for, in that case, it was decided that constituent members of the meetings of incorporations for the election of deacons, although these deacons were *ex officio* members either of the ordinary or extraordinary council of Edinburgh, had no title to insist in a complaint either against an election of any of the magistrates or councillors, or against certain alleged wrongs in the leeting for deacons [1]. But whe-

[1] In the case of Lawrie v. the Magistrates of Edinburgh, the complainers were, 'Alexander Lawrie, present deacon of Bonnet-makers of Edin-'burgh; James Anderson, present deacon of the Incorporation of Cordi-'ners of Edinburgh; Alexander Henderson, late deacon of the Incorpo-'ration of Goldsmiths of Edinburgh; James Gibson, late deacon of the 'Incorporation of Bonnet-makers, all constituent members of the meetings 'for the annual election of deacons and magistrates for the city of Edin-'burgh, in the month of September last;' and forty-seven other persons, 'constituent members of various incorporations, in which meetings for 'elections of deacons were held during the course of the said month of 'September, and members of the Merchant Company,' &c. The election challenged commenced on the 10th September 1817. Alexander Lawrie was presented in council as deacon of his craft on the 17th September, and, as such, had the right of voting at the final meeting. James Anderson was in the like situation, with the additional circumstance that he was, on the same day, chosen one of the six council deacons. Alexander Henderson was one of the six council deacons of the preceding year, and, as such, was a member of all the election meetings till the 17th. James Gibson was an extraordinary deacon of the preceding year, and attended the meetings of 10th and 12th September, but, as the respondents alleged, merely ministerially, in relation to the leeting for deacons. By the set, however, he had a right of voting in various meetings previous to those for election. The alleged wrongs brought under review in this complaint related both to the election of magistrates and councillors, and also to the leeting for various deacons of the different incorporations. Thus it was maintained, that an unqualified person had been put on the leet for the deacon of the skinners, both in the craft and in the shortening by the town-council; and that the old deacons ought to have been continued by

ther or not such a judgment may be held to have been well founded in regard to the election of deacons, in the special circumstances of that case, it does not appear that it can be held to affect the title of an unsuccessful candidate for the office of a deacon *ex officio* a councillor, and of the other members of the craft, to complain under the statute of an alleged wrong done by the council at an annual election of magistrates, in relation to the ordinary election of a deacon, contested by rival candidates for that office. Such a case has been in several instances held to be one which may be made the subject of complaint under the statute [1]; and the question arises, to whom is the complaint competent. The contested election in the craft is subject to the review of the town-council, in the first instance; and any judgment on the subject thought to be erroneous may undoubtedly be brought before the Court of Session by complaint, by any constituent member of the town-council. But it may so happen that no member of that body is disposed to take such a step, as, for instance, in the case of a unanimous decision; and, in that case, if the privilege of complaint is denied to the candidate for the office of deacon, who has been rejected by the council, but who may truly have had the majority of good votes of his incorporation, that mode of redress is entirely prevented; and, indeed, although it is believed to be common to try such questions by common law processes, as by suspension, yet, strictly speaking, it may be argued that such common

the council on all the leets. No objections on those scores were, however, stated before the council. The Court pronounced judgment in these terms: 'Find that none of the complainers except Alexander Lawrie, 'James Anderson, Alexander Henderson, and James Gibson, have any 'title to insist in the complaints; and, in so far as regards the other com-'plainers, besides the said four persons, dismiss the complaints, and de-'cern.' They also subjected the other complainers in the expence of discussing their title. Lawrie and others *v.* Magistrates of Edinburgh, 6th June 1818. Session Papers.

[1] See *infra*, p. 384.

law remedies are incompetent, because such an election has been found to be within the statute. Accordingly there are several cases in which complaints have been brought under the statute, at the instance of unsuccessful candidates for the office of deacon, and of members of the incorporation, without any objection to title having been stated [1].

Where the burgesses at large have, by the constitution of a borough, a direct share in the election of magistrates and council, a complaint is competent to them, under the statute, against that election, as constituent members of the meeting. Of this we have an instance from the borough of Wick [2].

It is held not to be necessary that the constituent members who complain shall have been present at the meeting [3].

Whilst a complaint is depending in Court, it may sometimes happen that the political views and interests of the parties are entirely changed; and the defenders become as anxious as the pursuers formerly were, to forward the objects of the action. In such a case, however, it is held, that, when the complainers abandon the case, it is not competent for the respondents either to insist for farther discussion on the merits, or to sist them-

[1] In a case from Inverkeithing in 1777, mentioned by Mr Wight, p. 342, it appears from the Session Papers that the complaint was solely at the instance of the candidate who had been chosen deacon by his craft, but had not been received by the town-council. It is erroneously supposed by Mr Wight, p. 341, that this deacon was not *ex officio* a member of council; see *infra*, p. 384. In another case from Perth in 1780, mentioned *infra*, p. 385. the complaint was in the name of the candidate who had been unsuccessful both in his incorporation and before the town-council, and also in the names of a late bailie, and of fourteen members of the craft. No objection to *title* specially, appears to have been stated. In a very late case also from Selkirk, the complaint was at the instance of the candidate who had been chosen by the apparent majority of the craft, but who had been rejected by the town-council, and of several persons, office-bearers and freemen of the craft. No objection to the title was stated. Hope v. Magistrates of Selkirk, 31st January 1826; Shaw and Fac.

[2] Anderson v. Sinclair, 28th February 1747; Falc.

[3] Mason and others v. Magistrates of Montrose, 2d and 29th July 1747; Kilk., end of the report; see also Wight, p. 340.

selves as complainers; but they may ask that the complaint shall be, *de plano*, dismissed [1].

A complaint against an election of magistrates and councillors cannot be presented in the name of a person furth of the kingdom at the time when that complaint is presented, unless he has granted a regular written mandate to that effect [2].

Where an election has been made unanimously, but has afterwards been challenged by some of those parties who acquiesced in those very proceedings now made the grounds of challenge, they have usually been met with the objection, that their acquiescence constitutes a personal exception, and deprives them of any title to complain. Such an objection, however, has been, in numerous instances, repelled by the Court [3]. In a subsequent case, also, where a new set, which had been granted to the town of Montrose, by the Crown, was challenged as illegal, in an action of reduction at the instance of a person who had himself voted under that set, the Court repelled an objection to his title to pursue, founded on this acquiescence [4]. This case was, however, reversed on appeal, specially on the ground of the acquiescence [5]. Whether the principle recognized in this judgment of the House of Lords shall be held to be also applicable to the case of complaints under the act 16th Geo. II. appears to depend on the farther question, whether the 24th clause of that act confers a statu-

[1] Grant and others v. Dick and Cattenach, 9th February 1821; Fac.

[2] Arbukle v. Campbell Innes and others, 11th March 1826; affirmed on appeal.

[3] Patterson v. Magistrates of Stirling, 1st March 1775; Fac. Laurie and others v. Magistrates of Edinburgh, 6th June 1818; Fac. There are also many unreported cases to the same effect, as that of Harrower, from the burgh of Culross, June 2. 1812, and that of Montrose, in 1816–7, where an annual election was set aside, on the ground that it was conducted by ballot, although the complainers had themselves concurred in making use of this mode of voting.

[4] Mill v. Magistrates of Montrose, 28th January 1824; Fac.

[5] 28th June 1825.

tory right of challenging wrongs done at an election meeting, even although acquiesced in by the complainer. If this statutory right shall not be held to have been conferred, then the principle of the reversal must be held to apply to the case of complaints.

The next question is, What parties must be called in the complaint? The act provides that warrant shall be granted 'for summoning the magistrates and councillors elected by 'the majority, upon thirty days notice[1].' If any one of these magistrates or councillors has not been called, and does not appear either in the complaint as a pursuer, those circumstances will be fatal to the complaint. In a case where the name of one of the complainers was given as 'John Wilson, weaver, 'councillor,' and it was objected that there was no such person, but that there was one 'John Watson, weaver, council-'lor,' who had not been made a party to the action, either as complainer or defender, the objection was held to be fatal to the complaint, although it was stated that this person acknowledged himself to be the complainer really meant[2]. From this case it appears that such an error in the name of one who ought to be a party in the case, as truly makes it a different name, constitutes a fatal objection; and the same point was determined in a previous case, relating to a defender, where the complaint prayed for a warrant to cite 'Thomas Brown;' and although, before service, it was discovered that the true name was 'George Brown,' and both the citation and the messenger's execution mentioned the mistake, it was held that there was no warrant to cite *George* Brown, and the complaint was dismissed[3].

It is only those magistrates who continue in office at the time of the complaint who must be cited; and, if any one who was chosen at the general election, has since resigned, and his

[1] 16th Geo. II. c. 11. sect. 24.

[2] Gray and others v. Spens and others, 24th February 1804.

[3] Young and others v. Johnstone and others, Jan. 1766; Wight, p. 339.

place been supplied, it is not necessary that he should be called; for it cannot be supposed that the legislature intended that a party should be summoned, even after his interest in the election had entirely ceased [1].

Where a councillor is not resident within the burgh, but has not left Scotland, it is still requisite that he should be called [2].

As the statute has specified those parties who must be cited as defenders to a complaint, by prescribing that 'the magis-'trates and councillors elected by the majority' shall be summoned, it is held that, in a complaint involving the merits of the election of a deacon, it is not necessary to call the members of the craft [3].

Although the statute has directed that certain parties shall be called, yet, as objections on the score of citation, are, in their proper nature, of a dilatory description, and are usually stated in the very commencement of the litigation, it is held that, when issue has been joined on the merits of a complaint, and a judgment has been pronounced, it is too late to allege that a party who ought to have been cited, has not been called [4]; but, in a case where answers had been merely lodged to the complaint, it was held still to be competent to state an objection of this nature [5].

We have next to inquire as to what wrongs may be the subjects of complaint. The statute gives the right of complaint to any constituent member of the election meeting, or of any previous meeting, 'who shall apprehend any wrong to have been 'done by the majority of such meeting.' It is held that the wrongs here alluded to are those done at the *annual* election, or at the meetings *preparatory* to that election. If a va-

[1] Magistrates of Edinburgh v. Laurie, 27th January 1821; Fac.

[2] Campbell and others v. Henderson and others, 24th June 1814; Fac.

[3] Donaldson and others v. Magistrates of Kinghorn, 29th July 1789; Fac. Hope and others v. Magistrates of Selkirk, 31st Jan. 1826; Shaw; Fac.

[4] Magistrates of Edinburgh, *supra*.

[5] Gray v. Spens, *supra*.

cancy in the magistracy or council, by death or resignation, is filled up in the course of the year, and not at the annual election, such a case is not within the statute. Neither does the act apply to the election of a person in place of one who was chosen at the annual election, but has declined accepting[1]. Even although such intermediate elections should materially affect the annual election, the case will not be altered, if they are not truly *preparatory* to it, *i. e.* made in contemplation of it, and as a step towards it. In one instance, at a meeting held for the purpose of electing a delegate, only seven persons, not forming a quorum of the council, attended, and supplied a vacancy in the council, which had occurred by the death of one of them. The annual election was afterwards made in September by these eight; and a complaint was presented, contending that both elections were null, because seven were not a majority of the council, and therefore the additional person at the annual election had not been duly chosen; so that there had truly been a quorum at neither meeting; and that this objection might be stated, because it was an *ex facie* nullity affecting the annual election. The Court, however, held that wrongs at intermediate elections could not be challenged under the statute, and dismissed the complaint as incompetent[2]. A previous case occurred under the following circumstances. By the constitution of the burgh of Culross, the person who has presided at the last meeting of council, previous to the annual election, is entitled to preside in the choice of a preses for the election meeting. Subsequently to the usual notice for the annual meeting, eight of the council, being less than a majority, called a meeting for the 28th September, the very day before the annual election, and actually met on that day, to admit a councillor who had been

[1] Glass v. Magistrates of St Andrew's, 28th February 1764; Elch. and Fac. Col.

[2] Gray and others v. Magistrates of Anstruther Wester, 29th June 1819; Fac. Coll.

previously chosen. On the day following, these nine made an election of a council for the year; and, on the same day, another party of nine made a separate election. The latter party presented a complaint against the election of their opponents, contending that the meeting of the 28th was illegal, as not having been attended by a majority of the council, which consists of nineteen, and that the person who presided at the meeting of their own party, on the 29th, had presided at a meeting in July, which was the latest *legal* meeting before the annual election, and was therefore entitled to take the chair at that election. No objection was stated to the competency of the complaint, as respected any challenge of the meeting of the 28th; and the Court found that meeting to be illegal [1], and appointed memorials on the other points of the case. The principal circumstance of difference between this and the preceding case, independently of the fact that the competency was not objected to, was, that the meeting of the 28th had been called and held subsequently to the notice for the annual meeting.

Although the statute mentions only wrongs 'done by the majority' of the meeting, it has been, in many cases, decided, that elections which have been made *unanimously*, may, notwithstanding, be challenged, even by parties who concurred in the proceedings [2]. It may, however, be questioned, whether this principle has not now been shaken by the reversal of the House of Lords, in the case of Mill *v.* the Magistrates of Montrose, in so far as regards a challenge by a party who has been present at the election, and has acquiesced in it [3].

The wrong challenged under the statute must be a *posi-*

[1] Meiklejohn and others *v.* Masterton and others, 28th May 1805; note to preceding case of *Gray*, and Fac. Col. of date 28th May 1805; affirmed on appeal, 26th March 1810.

[2] Paterson *v.* Magistrates of Stirling, 1st March 1775; Fac. Laurie *v.* Magistrates of Edinburgh, 6th June 1818; Fac. There are also some unreported cases to a similar effect.

[3] See what has been said, *supra*, p. 379. as to the effect of this judgment.

*tive* illegal *act*, done by the magistrates and council. Hence if, by the set of a borough, councillors are elected for life, the mere allowing them to continue on the roll at the annual election, although they may have become disqualified, when no objection has been made to their continuance, is not a wrong against which a complaint can be presented under the statute [1].

Several questions have occurred involving the point, how far alleged wrongs, committed in the elections of deacons, may be made the subjects of complaint under the statute. In some boroughs these officers are members of the town council *ex officio*; whilst in others they are not so.

In the former case, as the election of the deacons truly forms a part of the annual election, which is the primary object to which the statute refers, and as the proceedings connected with the election of deacons are reviewed, in the first instance, by the town council, whose judgment on the subject, if erroneous, is clearly a wrong committed at the annual election, or a preparatory meeting, there can be no doubt as to the competency of a complaint; which has, accordingly, in many instances, been sustained [2]. Even although the whole proceedings in the election of deacons, both in the crafts and in the town council, should be subsequent to the meeting for the election of the magistrates, and other councillors for the year, those proceedings may be made the subject of complaint

[1] Angus and others *v.* Montgomery and Wishart, 18th January 1817; Fac.; affirmed on appeal, 2d May 1821; Shaw's App. Cases, vol. i. p. 13.

[2] The case of Inverkeithing, reported by Mr Wight, p. 342. was of this nature, although, from what he says (p. 341.), he seems to have thought that the councillors there were not members of council *ex officio*; but, by an amendment of the set of that burgh, in 1742, the deacons were admitted councillors, on certain conditions; and it appears from the Session Papers, that the complainer had claimed to be received as a member of council. In the case also of Laurie *v.* the Magistrates of Edinburgh, 8th June 1818, various proceedings, both in the crafts and in the town council, connected with the leeting for deacons, were made the subjects of complaint. See also the Perth case *infra*.

under the statute, if the deacons are *ex officio* councillors for that year [1]. Questions, however, of some nicety may occur as to whether the deacons are to be considered as members of council or not, as in the following instance from Dumbarton. By the set of that borough, the deacons are chosen in their crafts on the Friday before Michaelmas, and presented in council on the Friday after it. In the interval, the annual election of magistrates takes place at Michaelmas; and the deacons chosen the preceding year have a vote in electing the magistrates, those deacons chosen in the present year having no vote till the following year. A complaint was presented against the annual election of magistrates for 1818; and, in this complaint, the election of deacons for that year was also challenged on an allegation of bribery. The competency of the complaint was objected to, in so far as regarded the election of deacons, because, as was maintained, they were not constituent members of the town council, had no vote in the election of magistrates till the following year, and would not till

[1] In a case from Perth, the meeting for the election of magistrates and councillors was held on the 4th October. On the 6th, the trades met, conformably to the set, to choose their deacons. In the shoemakers' craft, the votes were divided between two candidates, Mill and Wilson, the latter of whom was declared chosen. On the 11th, both candidates claimed to be received as members of the town council. The council delayed the consideration of their respective claims. A complaint was now presented, under the statute, in the names of Mill, of one of the late bailies, and of fourteen others all members of the incorporation of shoemakers, praying that Wilson's election should be declared void, and that Mill should be declared duly chosen, on grounds which it is unnecessary to mention. The competency of the complaint was objected to, on the ground that the statute only gave the right of challenging wrongs at the annual election, or at a *previous* meeting, and that the annual election was on the 4th October, and previous to the election challenged. It was answered, That, as the deacons were *ex officio* councillors, their election was truly a part of the annual election of councillors. The respondents admitted that the deacons were, *ex officio*, entitled to a seat in council. The Court repelled the objection to the competency of the complaint. Mill and others *v.* Wilson and others, 16th February 1780; Session Papers.

then appear in council. In answer, the complainers averred that the deacons were constituent members of the town council, and were entitled to sit at a variety of meetings of council, and to interpose as parties to leases, and other acts of administration of the borough funds, and had important duties to perform in auditing accounts along with the council. The Court, by the narrowest majority, sustained the objection to the competency of the complaint, 'in respect that the deacons 'elected in the year 1818, were not qualified, and did not 'vote or act at the elections of magistrates and councillors 'that year[1].' It would rather seem that, if the averments of the complainers were well founded, the deacons were, to a certain extent at least, to be viewed as constituent members of the council for the year, the annual election of which was challenged; and that, therefore, on the authority of the preceding case of Perth, the complaint was competent as to the election of deacons, although they had no share in the election of that year.

Where the deacons are not *ex officio* councillors, it may be laid down as the general rule, that their election is not subject to review by complaint, because it has no connection with the annual election[2]. A concern, however, even although indirect, in the election for the current year, may cause an exception to this rule. Thus, in a case from Rutherglen, where the deacons, although not *ex officio* councillors, have a certain degree of influence on the annual election, by possessing casting votes in preparing leets, out of which the magistrates choose councillors, the Court appear to have considered this influence on the annual election as a sufficient reason for sustaining the competency of certain complaints respecting the elections of deacons[3].

[1] Colquhoun and others v. Dixon and others, 13th November 1819, Fac. Coll. and Session Papers.

[2] The case of Inverkeithing, it has been already shewn, was not contrary to this principle; see *supra*, p. 384. note.

[3] 19th June 1777; Wight, p. 342.

When a poll election is granted by the royal warrant, it is usual to direct the sheriff of the county, and those of the two adjoining counties, to attend and direct the election, and to form 'an authentic instrument thereupon,' to be reported to his Majesty in council, for confirmation. In such a case, it appears not to be competent for the Court of Session to interfere [1], as the election does not take effect till judged of by the Crown, and the ultimate decision is left with the King in council. But, in the case of Montrose, in 1746, where the right of election was given to the last magistrates and council, there was no appointment of superintendants, and no report was ordered to be made; and, as it was argued that the right of election had not been lost, but only renewed by the Crown, the Court sustained their jurisdiction to take cognizance of the merits of the election; and a complaint was held to be competent under the 16th Geo. II., because an election under the royal warrant was regarded as an annual election, *i. e.* as an election for the year, although not made on the anniversary day [2].

It seems settled, that, in the ordinary case, a person who has been called as a defender in a complaint against an election of magistrates, may be cited as a witness by the complainers [3]. It is, however, a necessary qualification of this rule, that one cannot be obliged to depone to what may infer turpitude against himself [4]. Thus on an allegation of unlawful

[1] See the case of Dysart, mentioned in that of Montrose; Kilk. p. 105.

[2] Case of Montrose, 1747; Kilk. p. 104. See also Pittenweem Case, p. 356.

[3] 'On the verbal report of an Ordinary on the witnesses, Whether, 'in the controverted election in the burgh of Inverkeithing, now depending, one that was a party could be adduced as a witness by the other 'party; it was observed that the question had, in election matters, been 'determined in the affirmative as often as it had occurred; and, accordingly, the objection was repelled;' Kilk. p. 599.

[4] Wight, p. 353. On this principle, in a Fortrose election, a party condescended upon as guilty of bribery, was found entitled to decline being examined as a witness. This case is noticed in the report of the case of Stewart Nicolson, 6th December 1770; Fac. Coll. The following opinions,

combination, it was found that each defender might be adduced as a witness against the other defenders, but could not be examined on his own entering into the combination, without referring *simpliciter* to oath [1]. But it is only the witness himself who can object to such an examination; and it will not be competent to the other defenders to object to the taking of such evidence [2].

delivered in this Fortrose case, are from Lord Hailes' Notes. There were several witnesses proposed to be examined; and it will be observed that a distinction was drawn between questions inferring turpitude against the witnesses, and those criminating others. It was found, however, that the party condescended on as guilty of the bribery, could not be examined at all. Such a one, indeed, could not be examined even as to others, without criminating himself. Sir Alexander Grant *v.* Colonel Hector Monro and others, 16th July 1767:

'*Gardenston.*—Were no man obliged to tell upon his neighbour, a candi-
'date might openly bribe the whole council board.

'*Pitfour.*—A man may be obliged to answer upon oath, although he has
'an interest; but it is difficult to separate between a witness and his asso-
'ciates.

'*Alemore.*—I would not allow persons guilty of bad practices to shelter
'themselves under a general objection; but the questions here are not
'fairly put; they tend to lead persons to accuse themselves.

'*Coalston.*—Here are two general questions; 1*st*, How far is one obliged
'to answer questions whence his own turpitude may be inferred? 2*dly*,
'Questions whence the turpitude of his own party may be inferred? I
'doubt as to both; in what relates to a man's self, he is not bound to an-
'swer, but his refusal to answer may serve as a circumstance to infer his
'guilt, as is the case in criminal questions.

'*President.*—It has been determined in the case of Perth, and since that
'time in the late elections in Fife, that questions as to facts not concern-
'ing the bribery of the witnesses themselves must be answered.

'The Lords found it competent to examine as to questions which may
'infer turpitude against others, but not as to questions which may infer tur-
'pitude against the witnesses themselves. Found that Colonel Monro can-
'not be examined. Found that Henry Davidson is not to answer any ques-
'tions as to facts that came to his knowledge, as agent, and remitted to
'the Ordinary to adjust the questions to be put to the witnesses.'

[1] Perth Election, 11th February 1741, Elch. Burg. Roy. No. 16., Notes, vol. ii. p. 74.

[2] Cowan *v.* Cowan and others, 10th July 1813; Fac. See also Nicolson, 6th December 1770; Fac.

Neither complainers nor defenders can cite any of their own party as witnesses; nor can the near relations of any individual complainer or defender give evidence for the party to which his relative belongs. Thus in a recriminative charge of bribery, made by the defenders in a complaint against the pursuers, the Court refused to allow the daughter of one of the defenders to be examined in support of this charge [1].

[1] Hunter v. Robb, 11th March 1766; Sel. Decis. Lord Kames concludes the report of this case, by stating, that, 'in matters of this kind, the rule 'seems to be, that either party may use, as witnesses, any of the other 'party, or of their relations; but that it is incompetent for either party to 'lead, as witnesses, any of their own party, or of their relations; reserv-'ing only to them to cross-interrogate such witnesses, when led by the 'other party.'

## CHAPTER III.

### OF THE MANNER OF ELECTING THE REPRESENTATIVES OF THE ROYAL BOROUGHS.

BEFORE the Union, the right of electing the representative or representatives of each burgh was vested directly in the Magistrates and Council, and this form still remains in the town of Edinburgh. The other Royal Burghs, however, were, at the Union, divided, as was formerly shewn, into several districts, each comprehending four or more burghs[1]; and every burgh of each district elects a delegate or commissioner; after which the several delegates of each district meet together, and elect the representative in Parliament for that district. The manner, therefore, of electing a representative for Edinburgh first merits attention; and afterwards, that of choosing a member for a district of burghs: under which latter head, the election of a delegate must first be considered, and then that of a representative by the delegates.

### SECTION 1.

### *Of the Manner of Electing a Representative for the City of Edinburgh.*

BY the act 6th Anne, c. 6, certain rules were laid down as to the steps to be followed before and subsequent to the election. By the 5th section of that statute, it was provided, that 'the 'sheriff of the shire of Edinburgh shall, on the receipt of the 'writ directed to him, forthwith direct his precept to the 'Lord Provost of Edinburgh, to cause a burgess to be elect-

[1] *Supra*, p. 5.—For a list of the burghs composing the several districts, see App. No. XIII.

'ed for that city; and, on receipt of such precept, the city 'of Edinburgh shall elect their member, and their common 'clerk shall certify his name to the sheriff of Edinburgh, 'who shall annex it to his writ, and return it with the same 'into the Court from whence the writ issued.'

It will be observed, that this clause does not specify in what manner the Lord Provost shall *cause* the election to take place, nor within what time he shall take steps for that purpose. In practice, however, within two days after receipt of the sheriff's precept, he issues a precept, in his own name, for summoning the Town Council; and an execution of this citation is duly returned by the proper officer.

At the election meeting, one of the town clerks is chosen clerk of the meeting; and, in practice, the Lord Provost administers to him the oath prescribed for returning officers by the act 2d Geo. II. c. 24, sect. 3 [1].

The 2d Geo. II. c. 24, relating to bribery, is read. After which the Magistrates and Council take the oaths to government.

The Lord Provost then produces the sheriff's precept, the precept summoning the council, and the execution of citation.

The oath of bribery prescribed by the 34th section of 16th Geo. II. c. 11, must be taken by every elector, if required by any other elector [2].

[1] For the form of this oath, see the act in Appendix. It may be observed, however, that, by the act 16th Geo. II. c. 11, sect. 38, the taking of this oath is dispensed with, in so far as regards returning officers in Scotland; and if *he is* not to be considered as a returning officer, the act 2d Geo. II. does not apply to him.

[2] This oath is as follows:

'I A. B. do solemnly swear, that I have not, directly or indirectly, by 'way of loan or other device whatsoever, received any sum or sums of 'money, office, place, employment, gratuity, or reward, or any bond, bill, 'or note, or any promise of any sum or sums of money, office, place, em-'ployment, or gratuity whatsoever, either by myself or any other, to my

The roll of the council is now called by the clerk, and the votes given for a parliamentary representative.

The minutes are reported to the sheriff by the clerk; and the return is made out in the shape of an indenture between the sheriff and the clerk of the meeting, and is annexed by the former to his writ[1].

In the celebrated contested election for the city of Edinburgh in the year 1780, in which Sir Laurence Dundas and Mr Miller were candidates, many questions connected with the conduct of the election, and with the previous steps, were involved. Of this contest, and of the argument before the committee of the House of Commons, a full account has been given by Mr Wight. The points which were involved in the merits of the election of Mr Miller, who was the candidate returned by the sheriff as duly elected, were the following:

1*st*, Whether, when the Provost delays issuing his precept for summoning the council, it is competent for the council itself to appoint a meeting for fixing the day of election?

2*d*, Whether, if this be competent, the extraordinary deacons have a right to vote in appointing that meeting?

3*d*, Whether, at the election-meeting, the extraordinary deacons have a right to vote?

4*th*, Whether, upon the supposition that they have that right, there must still be a quorum of the ordinary council present?

5*th*, Whether the election can proceed upon production of a copy, certified by the sheriff, of the precept addressed to the Lord Provost, but without production of the original?

'use, or benefit, or advantage, or to the use, benefit, or advantage of the 'city or borough of which I am magistrate, counsellor, or burgess, in or-'der to give my vote at this election. So help me God.'

[1] For a fuller account of the proceedings of the Edinburgh election-meeting, and the forms of some of the writs, see Bridges' Political State of Scotland in 1811, p. xcix. *et seq.*

The counsel for Mr Miller, before the committee, maintained the affirmative of these questions; except as to the fourth, the negative of which was insisted for. The committee resolved, that Mr Miller's election was void; but it does not appear on what particular grounds their decision rested; except that it is certain, that it did not proceed on the third question, because the committee resolved, conformably to the argument for Mr Miller, that the extraordinary deacons have a right to vote in the election of a representative for Edinburgh[1]. The other candidate, Sir Laurence Dundas, was declared duly elected; and the only point which appears to have been necessarily implied in this latter decision is, that it was not held essential to the validity of the election, that the Provost should issue his precept for summoning the Council within two days.

## SECTION 2.

### *Of the manner of Electing the Representative for a District of Boroughs.*

#### 1. *Of the Election of the Delegate or Commissioner.*

THE sheriff, upon receipt of the writ, must indorse upon the back the day he received it[2]; and forthwith, at least within four days, make out, and cause to be delivered to the residing chief Magistrate of each burgh within his jurisdiction, a precept, to elect a commissioner or delegate, for choosing a

[1] This resolution, Mr Wight says, was communicated to the agents for the parties, but was not reported to the House.

[2] The form of indorsation is this:—'At *(place and date.)* This writ 'was received by me A. B. Sheriff-depute *(or substitute)* of the shire of ' ', this day, between the hours of and ' '(Signed) A. B.'

burgess to serve in Parliament[1]; and, upon failure in any of these particulars, he, for every offence, forfeits L.100 sterling, to any magistrate of the burgh to which the precept has not been timeously delivered, who shall sue for the same. The act 6th Anne, c. 6, sect. 5, requires that the precepts shall command the chief magistrates to order the commissioners to meet at the presiding burgh on the 20th day after the teste of the writ, or, if that be a Sunday, on the following day, for the purpose of choosing a burgess.

The chief magistrate, upon receipt of the precept, must in like manner indorse upon the back of it the day he received it, and must within two days summon the council, by giving personal notice, or notice at the dwelling place of every resident councillor[2]. The chief magistrate, on failure in any of these particulars, incurs a penalty of L.100 sterling[3]. Although the magistrate must summon the council within two days after receiving the precept, it is not necessary that the meeting for fixing a day for choosing a commissioner shall be *held* within the two days[4]. Two free days must elapse between this meeting and that for choosing the commissioner[5].

In a case from the Wigton district of burghs, where one of the delegates had resigned on the very day for electing the member, and the council of the burgh which that delegate represented had forthwith elected a new delegate, it was argued that the sheriff's precept had been exhausted by the election of the first delegate, and that the statutory requisites had not been complied with. The committee of the House

[1] 16th Geo. II. c. 11, sect. 40. For the form of the Precept, see App. No. 14.

[2] Ib. sect. 41. [3] Ib. sect. 42.

[4] Aitken v. Chalmers, 17th June 1727; Fac.—*Note from Session Papers of Lord President Campbell.* 'The case does not seem to be within the 'clause founded on. A summons always implies some *inducia*.'

[5] 16th Geo. II. c. 11, sect. 42.

of Commons resolved, that the candidate who had the majority of votes of the other delegates, was duly elected [1].

At the meeting for appointing the day of election, the sheriff's precept is read, together with the chief magistrate's summons, and the execution of that summons; and the Council appoint a peremptory day for electing a commissioner, for choosing a burgess to serve in Parliament [2].

At the meeting for choosing the commissioner, the act 2d Geo. II. c. 24, against bribery, is read. The magistrates and councillors next qualify to government, by taking and subscribing the oath of allegiance, and subscribing the assurance, and by taking and subscribing the oath of abjuration, if required. Any of the magistrates, or, in their absence, any two of the councillors, must administer to the clerk the oath of bribery prescribed by 16th Geo. II. c. 11, sect. 35 [3]. Afterwards every elector must, if required by any other elector, take the oath required by the same act, sect. 34 [4].

After the preliminary proceedings are finished, the magistrates and council give their votes for electing the commissioner. The votes are marked by the clerk, and the result is declared by the preses; after which the clerk is ordered to make out a commission for the person chosen commissioner,

[1] Case of Wigton; Douglas, ii. p. 181; Wight, p. 375.

[2] 16th Geo. II. c. 11, sect. 41.

[3] This oath is as follows:

'I A. B. do solemnly swear, that I have not, directly or indirectly, by 'way of loan or other device whatsoever, received any sum or sums of 'money, office, place, employment, gratuity, or reward, or any bond, bill, 'or note, or any promise of any sum or sums of money, office, place, em'ployment, or gratuity whatsoever, either by myself or any other, to my 'use, or benefit, or advantage, to make out any commission for a com'missioner for choosing a burgess; and that I will duly make out a com'mission to the commissioner who shall be chosen by the majority of the 'Town Council assembled, and to no other person. So help me God.'

[4] See this oath *supra*, p. 391.

which must be signed by himself, and sealed with the common seal of the burgh [1].

If the common clerk of the burgh shall fail in these particulars, or if he shall make out and sign any commission for any other person not chosen by the majority, or shall affix the common seal thereto, he incurs, for every such offence, a penalty of L. 500 to the commissioner duly elected, and also shall suffer imprisonment for six months, and be disabled to hold the office of common clerk in future. The private party may, without the concourse of the Lord Advocate, insist for the fine by summary complaint in the Court of Session, but cannot insist for the sentence of imprisonment without that concourse [2].

If any person who is not the common clerk of the burgh, shall act as such at an election of a commissioner, and shall make out a commission to any other than the person chosen by the majority, and sign the same, or affix to it the common seal, he incurs the like fine of L. 500 to the person duly elected [3].

It is not requisite that the commissioner shall be a residenter, or trafficking merchant, within the burgh, or shall be in the possession of burgage-lands or houses holding of the burgh; and such qualifications need not be engrossed in his commission [4].

### 2. *Of the Election of the Representative by the Delegates.*

On the 30th day after the teste of the writ, or, if that be a Sunday, on the day following, the commissioners from the

[1] 16th Geo. II. c. 11, sect. 26. For the form of the Commission, see Appendix, No. XV.

[2] Syme v. Murray, 19th January 1810; Fac.

[3] 16th Geo. II. c. 11, sect. 27.

[4] 16th Geo. II. c. 11, sect. 29.

several burghs of the district assemble in the town-house of the presiding burgh. The different sheriff's precepts are then produced, and the bribery act of 2d Geo. II. is read; after which the commissioner from the presiding burgh administers the oaths to government to the common clerk of that burgh, who officiates as clerk to the meeting. This clerk then takes the oath prescribed by the act 16th Geo. II. c. 11[1], which is administered by the presiding commissioner. If he neglects or refuses this, he is disabled from acting as clerk, and the meeting must choose another[2].

The commissions of the several commissioners are now read; and any objections or protests respecting them ought to be entered in the minutes.

Such votes only can be allowed as are given by persons producing commissions regularly signed and sealed[3]; but if any person to whom no commission has been made out, shall insist that he was duly elected commissioner, he must be admitted to the meeting, and allowed, on taking the requisite oaths, to declare for whom he would have voted, had he got a commission; and the clerk must insert in the minutes his declaration as to the person for whom he would have voted, but must not receive or consider his vote as legal[4]. The office of the clerk is merely ministerial, and he must consider as legal the votes of all those producing com-

[1] Sect. 35. The form of the oath is as follows:

'I A. B. do solemnly swear, that I have not, directly or indirectly, by 'way of loan or other device whatsoever, received any sum or sums of 'money, office, place, employment, gratuity, or reward, or any bond, bill, 'or note, or any promise of any sum or sums of money, office, place, em-'ployment, or gratuity whatsoever, either by myself, or any other to my 'use, or benefit, or advantage, to make any return at this election of a 'member to serve in Parliament; and that I will return to the sheriff or 'steward the person elected by the major part of the commissioners as-'sembled, whose commissions are authenticated by the subscription of the 'common clerk and common seal of the respective boroughs of this dis-'trict. So help me God.'

[2] Ib. sect. 36. [3] Sect. 30. [4] Sect. 32.

missions, duly signed and sealed, without any power of determining that any other person had a better title to have obtained a commission.

The commissioners now take the oaths to government, and likewise the oath of bribery, introduced by 2d Geo. II. c. 24, if required by either of the candidates, or any two of the electors [1]. The commissioners then give their votes; the issue is declared; and the minutes are signed by the preses and clerk.

In case of equality of votes, it was provided by the act 1707, c. 8, that the presiding commissioner should have a casting vote, besides his own as commissioner; and that the commissioners from the different burghs should preside, in turns, in the order in which their boroughs were called in the roll of the Scottish Parliament. It was afterwards provided by the act 16th Geo. II. c. 11. sect. 28, that if the commissioner from the presiding borough should be absent, or refuse to vote, the commissioners from the borough which presided at the last election, should have the casting vote, and so backwards in rotation, till one present and willing to vote should be found. It was farther provided by the act 6th Anne, c. 6. sect. 5. that, in supplying a vacancy occurring during the sitting of Parliament, the borough which presided at the election of the former member, shall preside at the new election.

A question having afterwards occurred in practice, as to the effect of the voiding of an election of magistrates of a borough, on the rotation of boroughs, and having been the subject of a decision by a committee of the House of Commons, it was enacted by the statute 14th Geo. III. c. 81. sect. 2, conformably to that decision, that, at every election of a representative, when the election of magistrates of a borough, whose turn it was to preside at such election has been set aside, and not revived, the borough next in order

[1] For the form of this oath, see *supra*, p. 280.

shall be the preceding borough; and the other shall not again preside till its turn comes next round.

The obligations on the clerk, and subsequently on the sheriff, as to returning the person who has been elected members, are similar to those of these officers with respect to county elections, and are guarded by the like penalties [1]. The return is in the form of an indenture between the sheriff and the clerk of the election meeting [2].

[1] 16th Geo. II. c. 11. sect. 30, 31; 25th Geo. III. c. 84. See *supra*, as to counties, p. 282. *et seq.*

[2] See form in Appendix, No. XVI.

## CHAPTER IV.

### OF THE QUALIFICATIONS NECESSARY IN THE REPRESENTATIVES OF BOROUGHS.

From some of the earliest authentic evidence which we have connected with the representation of the boroughs, it would appear that they were frequently represented in Parliament by their aldermen or provosts [1]. We know, that, at an early period, it was common to elect persons not merchants or indwellers in the town, as magistrates of the different boroughs,—a practice which gave rise to various acts of the legislature, to counteract it; and hence those chief magistrates who sat in Parliament for the different boroughs may not always have been actually resident and trafficking burgesses. Sometimes, in these early periods, the representatives are designed simply burgesses of the different towns [2]; but, in general, they have no designation at all in the rolls of Parliament.

By the act 1587, c. 33, it was provided, That 'there shall 'be na confusion of persones of the three estaites: That is 'to say, na person sall take upon him the function, office, or 'place, of all the three estaites, or of twa of them; bot sall 'only occupy the place of that selfe estait, quhairin he com-

[1] In the Parliament which assembled at Edinburgh, in the year 1357, to arrange with respect to the ransom of David II., the persons who appeared for the boroughs are designed, 'Aldermanni, Mercatores, et Bur-'geuses.' Rymer's Fœdera, vol. vi. p. 44. From the Records of Parliament, also, which have been published by Mr Thomson, we find the 'al-'derman' or 'provost' frequently representing the different towns. See, for instance, vol. ii. p. 93, for the year 1469, and vol. ii. p. 239, for the year 1503.

[2] See Mr Thomson's Acts, vol. ii. p. 93, for the year 1469.

'monly professis himselfe to live, and quhairof he takis his 'stile.'

Sir George Mackenzie[1] explains the former part of this clause to mean, that the clergy were not to vote both as churchmen and as laymen in respect of their lands; and with respect to the latter portion of it, directing that each should occupy the place of that estate in which he usually lives, he inclines to think that it was designed to keep the barons from being chosen as representatives of boroughs, although they might be provosts or magistrates.

About the same period also, it would appear that the Convention of Boroughs had made various acts, requiring that the borough representatives should be actual trafficking merchants[2]. These different provisions had, however, been neglected; for, near a century afterwards, in the year 1674, a letter was addressed by Charles II. to the royal boroughs, requiring them to correct their practice on this subject, and, in the following year, the Convention following up the king's object, again made an enactment to enforce the necessity that the representatives of the boroughs should be actual residenters and trafficking merchants[3].

Subsequently, in the year 1681, a judgment of the Court of Session was pronounced, enforcing the penalty imposed by this act of convention for contravening its terms[4]; and, in the same year, resolutions were passed in Parliament, applying the rule as to the necessity of residency and actual merchandise, to several particular cases of election[5].

Still, however, it would appear that these regulations were evaded; for, we are informed by Spottiswoode, that, both be-

[1] Observations, p. 236.

[2] See the acts narrated in the Act of Convention, Wight's Appendix, No. 45.

[3] Wight's Appendix, No. 45.

[4] Case of Selkirk, 21st July 1681. Fountainhall.

[5] Mr Thomson's Acts, vol. viii. p. 237.

fore and after the Union, lawyers and learned gentlemen were chosen to represent boroughs in Parliament [1]. That author, however, farther observes, that these rules were so far observed in his time, that the member chosen was a burgess of one of the burghs of the district which he represented, although Forbes simply states [2], that the rules were not observed when he wrote.

In the Wigton case, in the year 1775, the committee of the House of Commons resolved, that a gentleman had been duly elected, although it was admitted that he was not, at the time of the election, a burgess of any of the four boroughs of which the district consisted, and although it was strongly argued that that circumstance constituted a disqualification [3]. At present, it is quite understood that any person, although not a burgess or residenter, may be chosen to represent a borough, provided he is not personally disqualified in any of the modes which have been already mentioned in relation to the qualification for representing a county. The writ and return, however, still retain the form of denominating the person elected a burgess.

[1] Election Law, p. 45, first edition published in 1710.

[2] Letter on Elections, p. 38. published also in 1710.

[3] Douglas, vol. ii. p. 181.

AN

# HISTORICAL INQUIRY

## CONCERNING THE MUNICIPAL CONSTITUTION OF TOWNS AND BOROUGHS.

By the law of Scotland, the election of the representatives of the Royal Burghs in Parliament is vested in the Magistrates and Town Council of the respective burghs, either directly or through the intervention of delegates chosen by these bodies. Hence the primary objects of inquiry with respect to the choice of those representatives, are the nature of the municipal establishments of the towns of Scotland, and the rules according to which the various members of the civic government are elected.

When the singular resemblance which may be discovered between the municipal establishments of different countries is considered, we can hardly avoid concluding that they have, to a greater or less extent, been copied from one another, and that they will, in a certain degree, mutually illustrate one another. In the towns of many countries are to be found, at different periods, a general corporation or community; subordinate corporate bodies, such as gilds and crafts; various ranks of magistrates, and a common council;—coincidences which can hardly be supposed to be accidental. A remarkable similarity may also be observed between an institution, well known in many English burghs at this day under the name of the Court Leet, and the ancient system of Scottish burgh government by Head Courts. It is therefore proposed, to give a short view of the history of municipal establishments in one or two of the principal countries of modern

Europe, in the hope that this inquiry may perhaps illustrate the history of the internal constitution of the burghs of Scotland.

## CHAPTER I.

### RISE AND PROGRESS OF THE GOVERNMENT OF TOWNS IN ITALY AND FRANCE.

It is well known, that, in the twelfth century, the Sovereigns of France adopted the method of granting charters of certain privileges, called Charters of *commune*, to various towns throughout their dominions. These charters appear to have been sometimes regarded as the origin of the right of these towns to elect their own magistrates, and of the other privileges which they conferred [1]. On the other hand, it has been maintained, that many cities of France enjoyed the right of electing their magistrates, and other privileges, from a period long prior to these grants of communes [2]; and this opinion has been carried so far as to hold, that a system of municipal government, similar to that which was established in the Gallic cities when under the Roman sway, had continued down with little variation to the time when this and other privileges were confirmed by the charters of the French monarchs. If this view could be held as established on firm grounds, it would lead to the interesting conclusion, that the form of municipal government at present existing in many of the cities of modern Europe, which is in some respects similar to that which we find in the French towns posterior to the

[1] Robertson's Charles V. i. p. 39. The learned and eloquent historian admits some exceptions to this rule; but states that they are so few, as not to diminish the general conclusion.—Note 16, *in fine*.

[2] See the Abbé Dubos, Histoire Critique de la Monarchie Françoise, as afterwards quoted.

grants of communes, might be traced, in a greater or less degree, to that system of internal constitution which was established in the towns of the Roman provinces, and which we know was to a certain extent modelled on that of Rome itself. In Scotland, a direct parallel has sometimes been drawn between the internal government of our burghs and the Roman constitution. Our Town Council has been said to correspond to the Senate, and our Magistrates to the Consuls and Prætors[1]. It is certainly by no means intended to adopt any such theory as fully established, or to maintain that there is conclusive evidence that this internal form of government existed in the French towns from so ancient a period as has been maintained; but still it may not be uninteresting to bring together such facts as tend to illustrate the subject, and such opinions and arguments as have been maintained in support of this view.

That the establishments of the Romans should be gradually extended to the towns throughout the territories to which the power of their arms had reached, is conformable both to what we might expect from the influence of a victorious nation, and to what we learn from their authors. When their conquests were first extended throughout Italy, it appears to have been their general policy, after taking possession of a city, to restore it to its freedom, and to take it into a state of alliance. Before the Social War, the greater number of the Italian cities seem to have been in this situation, but without possessing any of the rights of Roman citizens[2]; and were distinguished by the name of 'Fœderatæ civitates.' It appears that a form of government pervaded these cities, modelled in a great degree on the Roman. Capua is described by Livy, at the time when Hannibal marched thither with his

[1] See Kames' Remarkable Decisions, p. 182. The passage alluded to has been inserted by Lord Kames in the report referred to, from a paper in the case drawn by himself.

[2] Sigonius de Antiq. Jure Ital. lib. ii. c. 14.

army, as having a senate and magistracy [1]; and many of the other cities [2] of Italy were in a similar situation [3]. On the conclusion of the Social War, the inhabitants of the principal cities of Italy, without removing from their own towns, were admitted to either a total or partial participation in the rights of Roman citizens, but, at the same time, were allowed to retain their own laws and establishments; in which condition they were called 'Municipia.' The internal government possessed by these cities is well known to have borne a close resemblance to the Roman, and to have been nearly the same with that which the Romans established in the colonies which they sent from Rome itself. Both the municipia and the colonial cities had a senate, the members of which were called *Decuriones* [4], and a magistracy, who were sometimes called *Duumviri* [5], corresponding nearly to the Roman consuls; sometimes *Triumviri* and *Quatuorviri*, and at other times appear also to have comprehended censors and ediles [6]. These magistrates appear to have been elected by the citizens [7];

[1] Liv. lib. xxiii. c. 2.

[2] It may be mentioned, that the word *civitas*, which we translate sometimes by the word *city*, and sometimes by that of *state*, was generally applied to a state more or less extended, which consisted of a principal *town*, with a dependent territory; or, in the words of the Abbé Dubos (Hist. Crit. de la Monarch. Franç. liv. p. 508), 'un certain district gouverné par 'une ville capitale.' Such were the colonies, the *municipia*, and the *civitates*, into which the provinces came ultimately to be subdivided. The magistrates of these cities were at once the political governors of the state, considered as consisting of a district, and the civic rulers of the town.

[3] Sigonius, lib. ii. c. 14.

[4] 'Qui fuit senatus Romæ, idem in municipiis decurionum concilium.' —Sigonius, lib. ii. c. 8.

[5] 'Duumviratus magistratus erat prope consulatui aut prætura com-' par.'—Sigonius, lib. ii. c. 4.

[6] Sigonius, lib. ii. c. 4. & 8.

[7] Id. c. 8. in fine.

although in later times perhaps by the decurions[1], and, at one time at least, from among the decurions[2].

There appears to be sufficient evidence that the institutions, both of decurions and duumvirs, but particularly that of the former, continued to exist long after the period of the Republic, and prevailed to a greater or less extent throughout various provinces, both of the Western and Eastern Empires, during a large portion of the first ten centuries of the Christian era. The Theodosian code, published a little before the middle of the fifth century, contains a particular account of the office of decurions. A law of Majorian, Emperor of the West, who lived in the middle of the fifth century, mentions as existing in the cities, what is there called the *Lesser Senate*, composed of the curial orders[3]. The Justinian code, published towards the middle of the sixth century, contains a title in which the offices of decurions and of duumvirs are treated of at considerable length[4]; and it appears, both from this source and from the law of Majorian, that the decurions had been so harassed by some of the higher officers and judges of the emperors, that the office had come to be rather avoided when possible. From this circumstance, it will be observed, that the office is treated of, not merely as part of the old system of government, but as an existing institution. The decurions can be recognised in the codes and laws published from time to time by the Emperors of the East, down to so late a period as the time of Leo the Philosopher, who reigned in the close of the

[1] See Constitutions of Leo, 46 and 47, afterwards mentioned, p. 408.

[2] Pomponius, as quoted by Sigonius, lib. ii. c. 4.

[3] Laws of Majorian, as cited by l'Abbé Dubos, Hist. Crit. vol. i. p. 28. See this law *infra*, p. 409. Of the Curiæ, Ducange, *eo voce*, gives this account: 'Institutæ porro curiæ fuerunt in municipiis exemplo senatus Romanæ, 'κατα της βασιλευουσης πολεως μιμησιν, ut est in his Justiniani novella 38, 'unde et Senatus nomen iis inditum.'

[4] Lib. x. t. 38.

ninth and beginning of the tenth century, and who published several laws abolishing the authority of the decurions, or at least their power of appointing certain magistrates, on the ground that such a system was now useless, as all authority was centered in the emperor[1]. The picture given of this office in these laws, is that of a system of internal government established in the cities[2]; and although these laws may be considered as more immediately descriptive of the state of the territories at that time under the Eastern Emperor, they may be received as illustrative of the nature of those establishments, which, as is shewn by the evidence already referred to, extended, at one time at least, equally to the Western Empire. If we should suppose, that, at this late period, there was any remnant of this institution in the cities of the Western Empire, we cannot suppose that the law of a Constantinopolitan sovereign, whose authority had so long before ceased in the Western World, should have the effect of abolishing them.

There is also mention made, in the Theodosian and Justinian codes, of an executive and judicial officer in cities, possessing considerable power, and distinguished by the name of *Defensor civitatis*. This officer, although at first he appears to have had a duty of rather an indefinite description, namely, that of *protecting* the city and its other rulers,[3] seems afterwards to have been vested with more certain powers. He was authorised to judge in civil causes to the value of 300 aurei[4], and in the lighter criminal matters[5]. The higher criminals he was ordered to incarcerate, and send to the governor of

[1] Constitutiones Leonis, 46 et 47.

[2] 'Curiis autem privilegium ut quosdam magistratus constituerent, 'suaque autoritate civitates gubernarent;' Constit. 46. 'In aliis etiam 'civitatibus a decurionibus, ut vocabantur, *præfecti*, quidam non tamen 'quales hodie militares præfectura novit, sed excellentiores quidam, qui- 'que aliam curam demandatam haberent, præficiebantur.' Constit. 47. These præfecti were probably the duumviri, or some similar officers.

[3] See the Theodosian code, lib. i. tit. 11.

[4] Novellæ Just. coll. iii. tit. ii. c. iii. [5] Ib. c. vi.

the province [1]. This functionary was elected by the citizens generally [2], or at least by the more respectable part of them [3].

Although there is every reason to believe, that, besides the controul of the higher governors and judges appointed by the emperors, a system of internal government, by municipal officers, was, generally speaking, established throughout the provinces of the Roman empire, both during its vigour and its decline, yet we are of course not to suppose that the civic rulers were uncontrolled by those higher governors and judges. That they were not uncontrolled by them, is abundantly proved by the law of Majorian above cited [4], and by the constitutions of Justinian relating to the defensors [5].

There is reason to believe, that the municipal institutions formed on the model of Rome, were, during the middle ages, subverted to a greater extent in Italy, than in the more distant province of Gaul. This might proceed from the ravages of the successive torrents of barbarians who desolated the former country, and at different times formed kingdoms within its bounds. In Gaul, on the other hand, we know that it was the policy of the Franks, when they destroyed the Roman sway, to leave the people in possession of the Roman laws and customs [6]. We shall immediately see that there is some reason to believe that many cities of France

[1] Ib. c. vi.—According to Loyseau, Des Seignuries, p. 149, he had the power of electing the decurions; but this writer does not mention the authority on which he founds this opinion.

[2] Glosa. in l. hi potissimum Cod. Theod. lib. i. t. 11.

[3] 'Bonæ opinioni studentibus.' Novel. Just. coll. iii. t. 2. epil.

[4] 'Curiales servos esse reipublicæ ac viscera civitatum nemo ignorat, 'quorum cætum appellatum Minorem Senatum huc redegit, iniquitas ju-'dicum et exactorum plectenda venalitas, ut multi Patriæ desertores, et 'natalitium splendore neglecto, occultas latebras elegerint et habitationem 'juris alieni.'—*Lex Majoriani anni* 458; Abbé Dubos, tom. i. p. 28.

[5] Novel. Just. coll. iii. t. 2. c. 1.

[6] Abbé Dubos Hist. Crit. iii. p. 432.

never had been deprived of their particular rights; and that there is evidence, that, when the practice of granting communes was introduced by the French sovereigns, privileges already existing were sometimes confirmed.

But, in like manner as, under the Roman emperors, the municipal governors were controlled by the imperial officers, so, under the kingdoms which arose in France and in Italy on the ruins of the empire, the civic rulers, where these remained, were under the authority of officers appointed by the sovereigns [1]. It was the practice of all these monarchs, both in France [2] and in Italy [3], to send into the particular chief cities, governors called *Comites* [4].

The title of *Comes* was also well known under the Roman empire, as applied to the governor of a province [5], and with various other significations. It was very early adopted by the nations which succeeded to the Roman sway. Selden has given us an ancient form of a commission to the count of a city under the Gothic kings of Italy, in the end of the fifth century. It is taken by him from Cassiodorus, chancellor of Theodoric the Great; during whose reign, according to Selden [6], the Roman forms of government were imitated. This commission, after a prolix exordium in the inflated style of that age, proceeds thus: 'Propterea per illam indictionem, in 'illa civitate Comitivæ Honorem Secundi Ordinis tibi propitia 'divinitate largimur, ut et cives commissos æquitate regas, 'et publicarum ordinationum jussiones constanter adimpleas: 'quatenus tibi meliora præstemus, quando te probabiliter 'egisse præsentia, sentiemus [7].'

These counts, at a later period at least, exercised jurisdiction with the assistance of assessors, usually known by the

[1] Id. tom. iii. p. 497 *et seq.* liv. vi. ch. 11.
[2] Id. tom. i. p. 41; tom. iii. p. 497.
[3] Muratori Antiq. vol. iv. p. 4. Disser. 45.
[4] See also Spelman, p. 140.
[5] Code, lib. 12. tit. 13. [6] P. 302, 2d edit. [7] P. 317, 2d edit.

name of *Scabini*,—a title by some supposed to be the origin of the French echevin, or alderman, and which it is at all events certain was afterwards applied to a municipal office[1]. These assessors were chosen in France by the count, with the consent of the people[2]. Muratori is of opinion, that, in Italy, the assessors of the counts were named by the Lombard kings; and that the scabini, there chosen by the people, were a different class of judges[3]. But whatever weight may be due to that opinion, it does not seem applicable to France; and it is at all events certain, that Lotharius I., one of the descendants of Charlemagne, to whom Italy, and some of the western provinces of France, fell as his share of the Carlovingian empire, published a law directing his *missi* to elect scabini, or judges, with the consent of all the people[4].

The establishment of these counts or governors of cities probably had a great effect in putting an end in many places to the ancient municipal establishments; for we may suppose that they would view with jealousy the authority of any inferior magistrates.

In France, the counts, and other rulers of provinces, not only deprived the sovereign of a large portion of his prerogative, by throwing off his authority, and changing their temporary commands into independent and hereditary principalities, but wrested also from the people their former rights and

[1] Thus, we find the *Major et Scabini* of Dijon and of Beaune, Maddox firma Burgi, p. 183.

[2] Cum comite et populo eligantur et constituantur. Capitul. Car. Mag. c. 22, ann. 809, as cited in Hist. Ville de Paris, par Felibien Dissert. sur Hot. de Ville, p. 78. Totius populi consensu eligantur scabinii. Capit. Lud. Pii. c. 2, ann. 829, cited as above.

[3] Antiq. vol. i. p. 495 *et seq.* Disser. 10.

[4] Muratori, *supra*, p. 500. See also Spelman, *voce* Scabini, who says they were chosen in this way.

privileges, including, in many places, their ancient municipal establishments[1].

Even in Italy, the municipal establishments were never perhaps entirely subverted[2]. In proof of this supposition, reference may be made to the treaty which was concluded in the year 1180 between Frederic Barbarossa and the Italian cities, in which the emperor confirms to these towns a variety of privileges connected with internal government, which, the document bears, had been possessed by them from a remote period[3]. Still, however, some time before this treaty was concluded, the cities of that country were in a state of extreme subjection to the German emperors and the native nobles; and to such an extent had the oppression of these masters proceeded, that, about that period, there was a general struggle on the part of those cities, for the purpose of obtaining independent establishments. So successful were these endeavours, that, we are told by Otho, bishop of Frisingen[4], in the reign of Frederic Barbarossa, that the cities of Italy so much affected liberty, that they were now more under consuls than the emperors, and that they imitated the Roman municipal institutions[5]; to which cause, the application of

[1] Abbé Dubos Hist. Crit. tom. iii. p. 502, liv. vi. ch. 11.

[2] According to Mr Gibbon, 'In the Italian cities a municipal government had never been totally abolished;' c. 49, vol. ix. p. 205.

[3] 'Videlicet, ut in ipsa civitate omnia habeatis sicut hactenus habuistis, vel habetis. Extra vero omnes consuetudines sine contradictione nostra exerceatis, quas ab antiquo exercuistis vel exercetis, tam in foro, vel in nemoribus, et pascuis, et pontibus, aquis et molendinis, sicut ab antiquo habere consuevistis, vel habetis, in exercitu, in munitionibus civitatum, in jurisdictione, tam in causis criminalibus, quam in causis pecuniariis, intus et extra, et in cæteris, quæ ad commoditatem spectant civitatum.'—Lib. de Pace Constantiæ, in the Corpus Juris.

[4] Scrip. Ital. tom. vi. p. 707.

[5] 'Veruntamen barbaricæ (such is the expression of the bishop) depositio feritatis rancore, &c. Latini sermonis elegantiam suorumque retinent urbanitatem. In civitatis quoque dispositione ac reipublicæ con-

the title of consul to their chief magistrates has been attributed [1]. These consuls appear to have had great authority amongst them; and their influence was pled, by one of the states, as an excuse to Frederic for its rebellion [2], after the zealous endeavours of these cities had called down upon them the vengeance of that monarch. When the war which he waged against them had ravaged for a time the plains of Lombardy, the treaty already mentioned was concluded at Constance, by which, although many of the privileges of internal government were ratified, yet the emperor reserved to his own nuntios the right of nominating the consuls of the different states [3]. But this mark of dependence was not of long continuance, for new exertions were afterwards made, and, before the close of the thirteenth century, the greater part of the cities of Italy had become independent republics [4]. As one instance of the constitution then established in an Italian city, we may mention that of Sienna, in which, in the year 1288, a chief magistrate or *potestas* was appointed to be chosen, not by the people generally, but by various heads of different bodies, and to act by the advice of five judges; and several councils were instituted, one called the *Consilium ge-*

'servatione antiquorum adhuc Romanorum imitantur solertiam. Denique, 'libertatem tantopere affectant, ut potestatis insolentiam fugiendo, con-'sulum potius quam imperantium reguntur arbitrio.'—Vol. vi. p. 708.

'Ex principum ac de universis pene civitatibus consulum seu majorum 'conventu.'—p. 710.

[1] 'Itaque primo Romanæ reipublicæ adinstar consules adlecti fuerunt 'qui clavum imperii tenuerent.'—Mur. Antiq. Diss. 46. initio. The mode of election of these consuls is thus described by Otho, p. 708. 'Cumque tres inter eos ordines, id est, capitaneorum, valvassorum et 'plebis esse noscantur, ad reprimendam superbiam, non de uno sed de 'singulis, prædicti consules eliguntur, neve ad dominandi libidinem 'prorumpant, singulis pene annis variantur.' Otho, p. 708.

[2] 'Consulum majorumque civitatis, hæc est dispositio, illorum nutu 'hæc geruntur.'—Otho, p. 716.

[3] See the Lib. de Pac. Const. already quoted.

[4] Robertson's Charles V. vol. i. note 15, *in fine*.

*norale*, and another, consisting of certain chief citizens, and called the *Consilium novem dominorum* [1].

But it is in France that we have the best evidence of the existence of municipal establishments, and other privileges, in some of the cities of that country, from a very ancient period. It is, at all events, clear, that the *communes* which began to be granted by the French sovereigns in the 12th century, cannot be said to have been in every instance the sole origin of the internal government, and other immunities of these cities. On this subject, we ought not to be deceived by the change of names, as applied to these establishments; nor conclude, because magistrates bearing the name of mayor, or that of echevin, may not have existed at very remote periods, that, therefore, no similar office was then known. We have many instances even in our own country of the same functionaries having been at different periods distinguished by very different appellations. Thus, the denomination of Alderman, which was at one time well known in Scotland, is now quite extinct in this part of the island. Nor is it necessary to this view, that the municipal institutions should be shewn to have existed in France since the 11th century, in precisely the same form which they possessed in more ancient times, or during the vigour of the Roman empire. It is sufficient to enquire, if there is evidence of the existence from a remote period, of institutions of an analogous description, in respect of powers, and of the mode of nomination [2].

[1] Mur. Antiq. vol. iv. p. 85.

[2] The Abbé Dubos, in his critical history of the establishment of the French monarchy, has adopted this view of the ancient privileges of the towns of his country, and has illustrated the subject with much ingenuity and learning. His views may be seen from the following passage:—

'Il paroît que quelques-uns de ces Sénats ont subsisté non seulement 'sous les deux premieres races, mais encore sous la troisième, et que c'est 'à leur durée, que plusieurs villes ont dû l'avantage de jouïr toujours du 'Droit de Commune, quoiqu'elles fussent enclavées dans les domaines des 'grand Feudataires de la Couronne. C'est parceque ces villes avoient

According to the Abbé Dubos, several cities are to be found, such as Toulouse, Reims, and Boulogne, and many others, in possession, about the 12th century, of municipal establishments, without any trace of charters by which such privileges could have been granted by the successive sovereigns, or finding them included in any enumeration of towns to whom such immunities had been conceded [1]. When Charles IX. by a law called l'Edit de Moulins, deprived the municipal magistrates of the right of judging in civil matters, reserving to them a jurisdiction in criminal affairs and matters of police, several cities opposed the execution of this law; and the ground which was maintained by some of them was, that their privileges were older than the French monarchy itself [2]. In particular, this ground of opposition was strongly urged by the town of Reims. In a discourse composed by Nicolas Berjier, a literary character of eminence, the following view is given of the ancient establishment of that city. After maintaining, that it had possessed a senate from a very ancient period, he proceeds thus [3]:—'Or la forme 'de cet ancien gouvernment est demeurée entiere à la ville de 'Reims jusque aux tems que l'Etat des Romains étant 'dissipé, elle a recu la gloire d'être soumise à l'empire et 'domination de nos Rois, sous le regne desquels ce gouverne-'ment a changé de nom et non de forme, ayant été apellé 'Echevinage, nom qui se trouve plus d'une fois dans les Ca-'pitulaires de Charlemagne.'

'conservé leur Sénat, et que leur Sénat avoit conservé la portion d'auto-'rité, dont il jouïssoit dès le tems des Empereurs Romains, qu'on trouve 'que sous les Rois de la troisieme race, les villes dont j'entens parler, 'étoient déja en possession du Droit de Commune d'un tems immémorial. 'En effet, on voit que certainement elles en jouïssoient sous ces Princes, 'sans voir néanmoins qu'elles l'eussent jamais obtenu d'aucun Roi de la 'troisième race.' Hist. Crit. tom. iii. p. 501.

[1] Abbé Dubos. Hist. Crit. tom. iii. p. 504, liv. vi., ch. 11.

[2] Loyseau des Seign. c. 16, art. 82.

[3] Abbe Dubos, tom. iii. p. 513.

Berjier adduces, amongst other proofs, the testimony of an Englishman, John of Salisbury, who was on a visit to France in the 12th century. This person, in a letter, giving an account of a quarrel between the Archbishop and the citizens of Reims, relative to their municipal privileges, thus describes the grounds of accommodation proposed between them:—'Et primo quidem ei humilitatem exhibuerunt parati duo 'millia librarum, sicut multi testantur, conferre in ærarium 'ejus, dummodo eos jure tractaret, et legibus vivere patere-'tur, quibus civitas continuo usa est a temporibus Sancti 'Remigii, Francorum Apostoli [1].'

In a supplication also presented by the town of Dijon to Lewis XI., in the year 1477, we find them stating, that they had possessed a magistracy from a period of remote antiquity [2].

Evidence on this subject may be derived even from some of those very grants of *commune* themselves. Thus, a charter of Philip Augustus, to the town of Tournay, in the year 1187, evidently confirms to the citizens privileges and customs already existing [3]. The same observation applies to a charter granted by Lewis VIII. in the year 1211, to the city of Arras [4]. Indeed, this latter charter is not framed in the usual form of the grant of a commune; but is rather a simple confirmation of privileges already enjoyed.

[1] Hist. Crit. tom. iii. p. 514.

[2] 'Contenant que la ville est ville de communaute, et en icelle *de tout* '*tems et d'ancienneté* a maire et vingt echevins.' Madox firma burgi, 'p. 36.

[3] 'Burgensibus nostris Tornacensibus pacis institutionem et communiam 'dedimus et concessimus ad eosdem usus et consuetudines *quas dicti Bur-*'*genses tenuerant ante institutionem communiæ.* Hæ autem sunt consuetu-'dines;' and amongst the customs which follow, the election of magistrates is included.—Spicilegium Acherii, tom. xi. p. 345.

[4] 'Noverint universi presentes pariter et futuri *quod jura et consuetudines* '*civium Attrebatensium perpetuo inconcusse manere decrevimus*, videlicet,' &c. and then follows a long list of privileges, in the course of which mention is made of the mayor, scabini, and communia. Spicil. tom. xi. p. 362.

If the institutions confirmed by the monarchs of France shall be held, in some instances, to have previously existed, it may be inferred, that, as a uniform system of municipal government was established in France at that period, the institutions granted to those cities which did not possess them before, were modelled on the ancient establishments of other towns; and thus the connection is maintained between the ancient and the modern municipal government of France.

What may have been the precise mode of election of the magistracy in those cases in which it may have existed previous to the grants of the communes, it is, perhaps, not very easy to determine. The charter of Tournay, indeed, already mentioned, is so expressed as to lead to the conclusion, that the mode of election then confirmed, was the same as had existed previous to its date; for this form of election is said to be one of the customs or privileges formerly enjoyed and then ratified. The right of nomination, in this instance, was not enjoyed by any large body of the citizens, but was a self-elective system, vested in thirty jurats, who were to hold the office during life, and to fill up the vacancies occurring by death; and two of these were to be *præpositi*, but the mode of their election is not stated [1]. We find a self-elective system also granted in the charter to Arras before mentioned; and it may be observed, in this instance, that the *mode of election* was a *new* grant, and distinguished from the privileges ratified, as already enjoyed; although it appears from the detail of the previous immunities, that the *offices* themselves of mayor and scabini already existed. The form prescribed is, that the twelve old scabini should, every fourteen months, elect four new scabini, who should choose four others, and these

[1] 'In communia Tornac. debent haberi triginta jurati, de quibus duo 'erunt præpositi, et cum unus vel duo vel plures ex illis triginta decesse- 'rint, superstites jurati numerum de aliis suppleant supradictum.' Spicil. 'tom. xi. p. 349, No. 28.

four a like number; which twelve thus chosen, should continue in office for the next fourteen months [1].

Another example is afforded by the constitution of Rouen and of Falaise, which was enjoyed by them in common, and was established or ratified by Philip Augustus. This consisted, in the first place, of one hundred principal citizens, called *pares* or peers, chosen by the select body itself. Of this number, there was a head called *mair*, twelve echevins, and twelve councillors. The ordinary management of the town was in the hands of the mayor and echevins, who called such of the councillors to their aid as they thought fit. There were also stated meetings of council, consisting of the mayor and the whole echevins and councillors; and more rarely of the whole hundred peers [2]. In the election of the mayor of these towns, there was this peculiarity, that a list of three principal citizens was presented by the towns to the king, who named one of them as the chief magistrate. In the other examples which have been alluded to, we do not find any mention of the manner of electing the mayor or præpositi.

In some instances, we find a more extended form of election of the magistracy expressly sanctioned. Thus a right of

[1] 'Præterea concessimus burgensibus Attrebati scabinos novandos se 'singulis quatuordecim mensibus in quatuordecim menses: ita quod post 'singulos quatuordecim menses scabini qui eo tempore fuerint, eligent 'quatuor probos et legitimos viros civitatis, prius præstito sacramento quod 'magis legitimos bona fide eligent; et illi quatuor eligent alios quatuor 'viros probos et discretos per suum sacramentum, et iterum secundi qua-'tuor eligent alios quatuor per suum sacramentum similiter, et isti duo-'decim erunt scabini per quatuordecim menses, ita quod in scabinatu non 'poterunt esse simul consanguinei germani, nec proximiores, nec socer, 'nec gener. Quicunque autem major sit, non potest habere in scabinatu 'consanguineum germanum, nec propinquiorem, nec socrum, nec gene-'rum, quemadmodum dictum est de scabinis.' Spicil. tom. xi. p. 364, No. 43.

[2] Hist. de Paris, par Felibien, vol. i. p. ix., where the chartulary of Philip Aug. is cited; and Brady, p. 23.

naming consuls, who appear to have been the same as the echevins, or as the jurats, was given at an early period to the *community* of the town of Clairmont [1]; and we shall immediately see, that this expression *community* included a considerable body of the inhabitants. Indeed, if we are to believe Loyseau, who lived in the latter portion of the sixteenth century, the echevins, in his time, were usually elected in the general assembly of the town, or in a meeting of deputies from each quarter, according to the usages of each town; and the old functionaries had no voice in this nomination [2].

The nature of the grant of a commune seems to have been the formation, by royal authority, of a bond of mutual association amongst the inhabitants of a town, especially for the purposes of mutual defence; and in order to farther the general object of the union, certain rules were ratified by the royal charter, tending to the security of life and property [3]. In a charter granted by the Earl of Flanders in the year 1188, we find the expression of *amicitia* or fellowship employed, instead of that of commune, and in precisely the same acceptation [4]. This union appears to have been composed of the inhabitants generally, who were all required to

[1] 'Item concedimus quod sit in villa Claromontensi communitas seu 'universitas et consules, et quod communitas vel major pars possit facere 'vel constituere consules quos et quales sibi videbitur faciendi, quæ com- 'munitas et consules habeant potestatem plenariam quæ debent et possunt 'habere consules de consuetudine et jure.' A. D. 1220. Maddox, Firm. Burg. p. 35.

[2] 'En France il n'y a point d'autre ceremonie, sinon qu'en assemblie 'generale de la ville ou de certains deputez de chacun quartier, selon les 'formes particulieres de chacune ville, on elit les echevins sans nomination 'precedente de ceux qui sortent de charge.' Des Offices, liv. v. c. 7, art 42.

[3] See the examples of these charters in the Spicilegium Acherii, vol. xi. &c.; and also the general view of their provisions given by Principal Robertson, Charles V. vol. i. note 16.

[4] Charter granted burgensibus Ariæ. Spicil. xi. p. 352.

swear to its preservation [1]. By the *commune*, therefore, when applied to those to whom the grant was made, and the *homines communiæ*, are not to be understood the ruling part of the town merely, or any other select number, but that general body, who were partakers of the benefit of the union. In farther proof of this statement, many circumstances may be mentioned. The commune appears to be always granted to the burgesses generally, and not to any particular number [2]. We sometimes find the *tota communia* laid under an obligation to meet the king and his army when he was proceeding on any expedition [3], a provision which would have been of little benefit if the rulers only had been bound to join the sovereign. Occasionally the *homines de communia* are spoken of expressly in opposition to those in authority [4]. And at other times, we find even females included under the collective appellation [5].

Although it seems manifest, that the communes granted in some instances were merely ratifications of privileges already existing, yet the principle was early adopted by the French monarchs, that no town could erect itself into a commune without a royal grant. The town of Nevers having attempted to form itself into a commune in the time of Louis VII., that monarch put a stop to its endeavours, and compelled it

[1] Charter of Philip Augustus Urbi Suessionensi, 1181. Spicil. xi. p. 344, No. 15.

[2] 'Ludovicus burgensibus Suessionensibus communiam inter se habendam concessit.' Spicil. vol. xi. p. 340.

[3] 'Si vero versus Artesiam cum exercitu venerimus nos vel successores nostri, *tota communitas Tornaci* usque ad eandem locum, &c. *nobis occurrere debet*, &c.; et hoc servitium nobis faciendo *homines Tornaci* erunt quitti et liberi ab omnibus aliis consuetudinibus,' &c. Spicil. vol. xi. p. 351.

[4] 'Si homines de communia aliquando contra hostes suos exierint, nullus eorum loquetur cum hostibus suis, nisi de licentia eorum qui communiam custodiunt.' Spicil. vol. x. p. 643. Louis VIII. to Crispiacum 1223.

[5] 'Nec unquam licebit ab *aliquo* vel ab *aliqua* de communia manum mortuam exigere.' Spicil. vol. xi. p. 344.

to break up the association [1]. A more extended principle was afterwards sanctioned by a decree of the Parliament, which, whilst it suppressed, in the year 1318, the commune of the town of Chelles, on the same ground as in the case of Nevers, gave this declaration, that no town is entitled to have a mayor, jurats, and community, without the royal warrant; thus sanctioning the principle now adopted by the nations of modern Europe, that the crown is the fountain of magistracy and jurisdiction [2]. It is plain, however, that the adoption of this principle by the French monarchs, on principles of very obvious expediency, will not prove that, *as matter of history*, many French towns may not have possessed a magistracy before any grant of that privilege by the sovereign.

We have already had occasion to observe some of the various denominations under which the different municipal functionaries of the French towns were known. The chief magistrate was usually called mair [3] or mayeur, or in Latin major; and sometimes also, præpositus, or prevôt, as in the case of Paris [4]; and of Tournay, which had two præpositi [5]. The magistrates next in authority were usually called echevins [6], in Latin scabini or scavini. The jurats were either the same as the echevins [7], or, perhaps, sometimes included

[1] Hist. de Paris, par Fillbien, tom. i. p. xiii.

[2] Patet quod villæ non licet habere majorem et juratos, et communiam sine literis regis; Ib.

[3] 'Mair de ville; du Latin *major*, et non pas de l'Allemagne *meyer*.' Dict. Etym. de la Langue Française par Menage. 'Major,' says Spelman, 'simpliciter dicitur quod inter suos collegas, &c. magis eminet.' Glos. p. 381.

[4] See *infra*, 426. [5] See *supra*, p. 417.

[6] Echevin is derived by Loyseau, from the French verb echever *ouvrir*; but by the author of the Dict. Etym. de la Langue Franc. from the barbarous Latin word Scabinus; and this word again from the German, *soc-pono* judex, or *schoppen* judices.

[7] Loyseau des Offices, p. 469, No. 19.

also the councillors [1]. The other appellations occasionally applied to the echevins, were *consuls*, *gouverneurs*, *capitouls*, *pairs* [2], which last denomination was, however, sometimes of a more comprehensive nature [3]. There was also in several of the towns of France a town-council [4], composed of a certain number of individuals, holding their situations for life, and called sometimes *conseillers*, and sometimes *pairs*, and from whose number, according to Loyseau, the echevins and other principal officers were usually chosen [5].'

In order to maintain a certain degree of dependence of the magistracy on the sovereign, it was provided by an ordinance in the year 1559, that the mair elected by the towns, or at least by the chief cities, should be received by, and take the oaths before, the principal royal officer of justice of the town, or before the justice ordinary [6].

The first occasion on which the towns of France sent deputies to the states-general of the nation, is understood to have been in the year 1302, in the reign of Philip the Fair, being nearly two hundred years after the time when regular grants of communities were first made by the French monarchs.

We shall now proceed to give some account of the origin of those subordinate incorporations, known in towns under the denominations of Gilds and Crafts.

Associations of merchants and of artificers, similar to the societies distinguished in modern times by the names of gilds, crafts, and mysteries, were well known amongst the Romans under the denominations of the 'Collegium Mercatorum,' and 'the Collegia Opificum.' Those of the tradesmen, contrary to what holds in Scotland, appear to have been more ancient

[1] See constitution of Rouen. Brady, p. 23.
[2] Loyseau, *ubi sup.*
[3] Constitution of Rouen. *Ubi supra.*
[4] Conseil de Ville.
[5] Des Offices, p. 468, No. 12.
[6] Loyseau, des Offices, p. 469, No. 23.

than the mercantile college. Their origin is assigned by Plutarch to so remote a period as the reign of Numa Pompilius, who, according to that author, instituted no fewer than nine collegia of different kinds of artificers [1]. Whatever foundation there may be for this account of their institution, it is at all events certain, that mention is made of various of these colleges or societies by different Roman authors, and in the books of the civil law [2]. The collegium mercatorum was instituted in the 259th year of the city [3].

Besides the mercantile and mechanical associations, there were various other united bodies, as those of the augurs and priests [4].

The members of certain institutions of this description were called 'Sodales [5];' and a provision of a law of the Twelve Tables, relating to these associates has been preserved [6].

These associations had probably become very numerous and of various descriptions, so as at last to excite the jealousy

[1] According to Plutarch, the object of Numa in dividing the people into those societies was to destroy the distinction between the Roman and the Sabine population of Rome, an object which he hoped to accomplish by separating the whole people into small divisions, and so causing to be forgotten the twofold separation arising from the difference of the nations. The division was as follows:

—'ων δ' ἡ διανομὴ κατὰ τὰς τέχνας, αὐλητῶν, χρυσοχόων, τεκτόνων, βαφέων, σκυτοτόμων, σκυτοδεψέων, χαλκέων, κεραμέων. τὰς δὲ λοιπὰς τέχνας εἰς ταυτὸ συναγαγών, ἓν αὐτοῖς ἅπασιν ἀπέδειξε σύστημα. καινοπρεπὲς δὲ καὶ συνεδρους καὶ θεῶν τιμὰς ἀπέδους ἐκάστῳ γένει πρέπουσας ἔστι πρῶτον ἐκ τῆς πόλεως ἄπυλα τὸ λέγεσθαι καὶ νομίζεσθαι τοὺς μὲν Σαβίνους τοὺς δὲ Ῥωμαίους. καὶ τοὺς μὲν Τατίου τοὺς δὲ Ῥωμύλου πολίτας.'—Plutarchi Numa, c. 17.

[2] See Rossini's Antiquities, p. 603.

[3] Sigonius de Antiquo Jure, Civ. Rom. lib. ii. c. 10.

[4] Sigonius de Judiciis, lib. ii. c. 30.

[5] Sodales sunt qui ejusdem collegii sunt, quam Græci ἑταιρίαν vocant. Caius, l. 4. ff. De Collegiis.

[6] His autem potestatem facit lex, pactionem quam vellent sibi ferre, dum nequid ex publica lege corrumperent. L. 4. ff, De Collegiis. See, also, Rossini, p. 603.

of the government; and the consequence was, that laws were passed at different times for their suppression, with the exception of the more useful of the mechanical societies [1]. These, it is clear, still continued to exist, as we find them mentioned by Pliny, and in the Digest and Code [2].

In the Digest [3], it is laid down, that the power of establishing such bodies was not permitted to all persons, but was restrained by the laws, the decrees of the senate, and the imperial ordinances. In addition to the societies of a mechanical nature there noticed, we find mention made of a provincial association, called the 'Collegium Navicularіorum,' which must have been a mercantile body. There appear to have been in the province of Gaul several bodies of those naviculariі or nautæ, as they were often called [4]; and they deserve attention, because attempts have been made, as we shall presently see, by some of the historians of Paris, to deduce the modern system of municipal government of that city from one of these *naval* associations.

These collegia partook of the nature of corporate bodies, being capable of possessing common property and funds, and having a chief person or head, called in the digest, 'actor,' or 'syndicus,' who appears to have insisted in their law-suits [5]. At other times, we find the appellations of '*primates* profes-'sionum [6],' and of 'magistri [7],' applied to the chief persons of these associations.

Institutions of a similar nature to these collegia may probably be discovered in the greater number of the nations of modern Europe. In Rome, in modern times, we find mention made of collegia or universitates of various mercantile and mechanical bodies [8]. In France, according to Loyseau [9],

[1] Sigon. de Antiq. Jur. Civ. Rom. lib. ii. c. 12. [2] Rossini, p. 603.
[3] L. i. ff. quod cujuscunque universitatis.
[4] Hist. de Paris, par Filibien, tom. i. p. lxxxi.
[5] ff. eod. Tit. [6] L. unic. C. de Monopoliis.
[7] Sigonius, *ubi sup.* [8] See Madox, Fir. Burg. p. 32.
[9] Des Offices, liv. v. ch. vii. No. 74. &c.

there were two classes of these subordinate communities; the one class, consisting of the different bodies of the liberal arts, and the other, of the various associations of the mechanical arts. The latter class were corporate societies, the members of which were sworn upon their entry; from whence the trades to which they belonged were called *Metiers jurés*, and the towns in which they occurred, *Villes jurées*. In France, in ancient times, there were only certain towns of this description; but by a royal edict, in the year 1581, all the towns of that country were put on this footing. These trades' societies had officers, distinguished by the various denominations of *Jurés*, *Visiteurs*, and *Gardes de Métiers*. They were chosen either annually, or every two or three years, in the assembly of the masters of the trades, before the judge-ordinary of the town, who received their oath. They had no other salary than a portion of the fines and confiscations [1].

There appears to have existed in Paris an association, partaking very much of the nature of a mercantile gild; and the more worthy of remark, because its system of internal government seems to have been, to a considerable extent, identified with the municipal government of the town itself. The association got the name of *La Marchandise*, or *La Marchandise de l'Eau* [2], and sometimes of *La Confraërie des Marcheanz de l'Eau* [3]; and appears to have consisted of those person who had the privilege of the river Seine for mercantile purposes [4]. No one enjoyed the right of the river without being, as it was expressed, HANSE *de la merchandise de l'eau*,—*i. e.* made a member of the hanse, or association of the river merchants. According to some writers, this association existed at a period of the most remote antiquity, even so far back as the

[1] This account of these mechanical associations is that given by Loyseau (Des Offices, liv. v. ch. vii. No. 77. *et seq.*) who wrote in the end of the sixteenth century; whether they may be precisely on the same footing at present, I do not pretend to say.

[2] Hist. de Paris, tom. i. p. xxix.

[3] Ib. tom. i. p. xxxii.

[4] Ib. tom. i. p. xxvii.

reign of the Emperor Tiberius, and, at that time, formed one of those bodies of nautæ or navicularii which have been already noticed [1]. It has been conjectured, that the chief municipal government of Paris was always vested in this body, or in its principal members; and that, when the town was in the time of the Romans, under the controul of the officer called a *Defensor*, that magistrate was selected from this body [2]. Without determining what weight may be due to these suppositions, it is at least certain, that, in the course of time, the principal magistrate of Paris received the denomination of the *Prevôt des Marchands* [3], and some subordinate functionaries were occasionally called *Li Eschevins de la Marcheandise*, or *Li Jurez de la confraërie* [4]. These titles first occur in some police regulations, drawn up in the year 1258 [5]. There was, however, another functionary, called the *Prevôt de Paris*, whose office seems to have been of more ancient date than the *name* at least of the *prevôt des marchands* [6]; but if the former ever enjoyed the chief authority, he appears to have afterwards yielded to the higher controul of the latter.

[1] Hist. de Paris, tom. i. p. lxxix. According to the author of this History, p. lxxx, a stone was found in Paris, in the year 1711, with this inscription: 'TIB. CAESARE. AVG. IOVI OPTVM. MAXSVMO 'M. NAVTAE PARISIACI PVBLICE POSIERV-TN.'

[2] Ib. tom. i. p. lxxxix, and other passages.

[3] Loyseau des Seign. p. 150.

[4] Hist. de Paris, tom. i. p. xxxii.

[5] Ib.

[6] Ib. p. iv.

## CHAPTER II.

### RISE AND PROGRESS OF THE GOVERNMENT OF TOWNS IN ENGLAND.

During the time of the Romans, we learn that there existed in Britain twenty-eight cities, besides castles or fortified places [1]; and we may reasonably suppose, that the system of municipal government which was established in the different cities throughout the various provinces of the Roman empire, would extend also into Britain.

But there can be little doubt, that, if such institutions were established in this island at that period, these were subverted between the final departure of the Romans and the Norman conquest, during which interval successive nations introduced their own peculiar establishments. There is no evidence that any of those nations took any pains to maintain the Roman laws and customs, as was done by the Franks in the Gallic province.

During the Saxon period, we may therefore look for a new state of things in the towns; and those traces which are at the present day to be found of Roman municipal establishments, if such they are really to be considered, were principally, although perhaps not entirely [2], introduced by the Normans.

During the Saxon sway, there was a considerable number of towns, which, although certainly not then possessing the same extent or importance which they afterwards obtained, were probably not in so inferior a condition as has sometimes been represented. Of these, the principal were Lon-

[1] Gildas; Historia. See a list of the cities, Appendix to Bede's Hist. Eccles. Num. iii.

[2] See what is afterwards said as to the Mercantile Gild.

don, Winchester, and York [1], We may presume that the opulence which writers of the reign of Henry II. describe as then existing in London, including its 113 churches, 13 convents and 3 colleges or academies, had not entirely arisen since the Conquest [2]. The charter which the Conqueror granted to that city is undoubtedly not calculated to raise very high ideas of its importance [3]; but, on the one hand, we may remember, that he spoke as a victor to a subdued nation; and, on the other, that he confirms certain privileges, such as they are, which had existed in the time of the Confessor.

From this charter it appears, that London at that period was under the controul of an officer called the Portreve [4]; a functionary probably known in other towns during the Saxon period, especially those which were maritime [5].

[1] Littleton's Henry II. vol. ii. p. 317. Hume's Hist. App. i.

[2] See Littleton, vol. ii. p. 315, where Fitzstephen and Peter of Blois are cited.

[3] The following is the English translation of this charter from the Saxon, in which it was framed: 'William the king greets William the 'bishop and Godfrey the portreve, and all the burgesses within London, 'French and English, friendly; and I declare to you, that I will that you 'be all law-worthy, as ye were in King Edward's days; and I will, that 'each child be his father's heir, after his father's days; and I will not that 'any man command any wrong to be done to you. God you keep.'—Brady, p. 16.

[4] Portreve, from the Saxon *port*, a harbour or town in general, (See Merewethers' West Looe Case, p. xxxix.) and *reve*, or *greve*, præpositus. 'Dicebantur portgrefii non solum portuum custodes, sed per translationem 'oppidorum etiam urbiumque præfecti;' Spelman eo voce. 'Reve alias gre-'ve, Germanice grave, præpositus, præfectus. Hoc a Saxon *gerefa*, illud a '*refa*, quæ idem sunt; *gerefa* enim a *refa* provenit, atque ambo a *reafan* 'id est rapere, &c. quod mulctas regias et delinquentium facultates in fis-'cum raperent, &c. Est igitur Reve idem quod Ballivus, qui in villis et 'quæ dicimus manerlis, domini personam sustinet ejusque vice omnia dis-'ponet et moderatur.'...Spelman voce Reve. We have here the plain etymology of our Scottish word *grieve*.

[5] The *Tungreve* appears to have been properly merely a manorial officer, 'Tungrevius quasi Tungereve, i. e. villæ propositus, Villicus. Ho-

According to Blackstone, the elections of all the Saxon magistrates, whether sheriffs, portreves, or others, were by the people [1]. It must be mentioned, however, that the reve appears to have been frequently a king's officer [2], and that there is evidence that, in some instances at least, he was appointed by the king [3]; but possibly the town-reve may not have been in this situation.

In the boroughs and cities, there was an assembly called the Burgmote [4], at which the burgesses attended, and which was held at stated periods, and sometimes convoked on extraordinary occasions [5]. This court is classed along with the shiremote in the laws of Canute [6], and was of a similar nature. The latter court was attended by certain classes of the people, the bishop and the alderman presiding [7], but merely for the purpose of keeping order, and giving their opinion [8].

'dierno, vulgo, the bayliff of the manor.'...Spelman voce Graphio. *Tun* and *Ham*, and the Latin *villa*, signified originally in England *prædium*.... See Spelman.

[1] Vol. iv. p. 413; See also Spelman voce Folkmote.

[2] West Looe Case, p. xlii. *et seq.*

[3] Laws of Athelstan, as cited West Looe Case, p. xliii.

[4] 'Burgemotus, Sax. *Burgmote*, Curia Burgensis, conventus burgi vel 'civitatis; *burh* enim et *burg*, oppidum civitas; *mote* et *gemote* conventus. 'LL. Canuti, MS. cap. 44. 'Et habeatur in anno ter burgesmotus, et "schiremotus bis, nisi sæpius fit; et intersit episcopus et aldermannus, "et doceant ibi Dei rectum et sæculi.' Salicis Mallebergium,' Spelman voce Burgemotus. And again, voce Folkmote, 'Duo folkmotorum genera 'primum a civibus celebratum, quod burgemotus inde dicitur.' It may, perhaps, not be unworthy of notice, that this Saxon burgh court is ordered, by the law of Canute, to be held the same number of times in the year, as the ancient Scottish burgh-court, at which all the burgesses were bound to attend—Leges Burg. c. 43.

[5] See Scriven on Copyholds, ii. p. 804, where its ordinary meetings are said to have been held monthly. The laws of Canute, already quoted, (see note [4].), say three times a-year.

[6] See note [4].

[7] This alderman was not a city officer. See *infra*, p. 438.

[8] Hume's Hist. of Eng. App. i.

The port-reve, or other town-magistrate, had the same duty in the burgmote, and the right of calling extraordinary meetings by the sound of the motbell [1].

About the time of the Conquest, and subsequently to that period, some towns in England were held of the king, and others of the nobles or dignified churchmen; and were said to be possessed in dominico or demean of the sovereign or other superior [2]. The king, according to Madox, had a right of absolute property in his demean towns, and in all the profits of its fairs and markets [3]. The method, however, was adopted of letting out the town in firm to the burgesses, either for ever, or for a term of years, for a certain annual duty or firm [4]. Thus king John made a perpetual grant in fee-firm of the town of Yarmouth to the burgesses, for an annual reddendum of fifty-five pounds [5]. The town of Lyme, in like manner, was granted to the burgesses by Edward III. for a reddendum of thirty-two merks [6]. Dorchester was granted to the burgesses by the same king, for a reddendum of twenty pounds [7].

Occasional aids or talliages were also levied [8]. The payment of this talliage seems to have been regarded as the condition on which the privileges were granted by the sovereigns, and a refusal to contribute it, a sufficient warrant for with-

[1] Scriven on Copyholds, ii. p. 804.

[2] Brady, p. 39; Madox, p. 15. *et seq.*

[3] P. 14. [4] Madox, p. 1, and 18,; Brady, p. 35. D.

[5] 'Sciatis nos concessisse, et presenti carta nostra, confirmasse burgensibus nostris de Gernemua quod habeant burgum de Gernemua ad feodi firmam in perpetuum, et quod burgus ille sit liber burgus in perpetuum, et habeant socam et sacam tol, et theam, &c. reddend. inde annuatim quinquaginta et quinque libras numero,' &c.—Brady, App. No. 2.

[6] 'Sciatis nos concessisse, et hac carta nostra, confirmasse dilectis burgensibus nostris villæ nostræ de Lyme, in comitatu Dorsetæ, dictam villam de Lyme:—Reddendo inde nobis et hæredibus nostris per annum ad Scaccarium nostrum triginta et duas marcas.'...Madox, Firma, p. 44.

[7] Madox, p. 20. [8] Brady, p. 47. D.

drawing those immunities [1]. Fines were also paid by towns, at different times, to the kings, for ratifications of privileges [2].

There are some entries in Domesday-Book which appear to be not very consistent with the idea of a general state of independent jurisdiction in the towns at that period. In various burghs there are said to be burgesses, over whom the kings, both Saxon and Norman, or some lay or church superior had jurisdiction [3]; and in the same town there appear sometimes to have been burgesses both of the king and of subjects [4]. On the other hand, we sometimes find mention made of a very small number of burgesses in some particular town, in possession of their houses *with jurisdiction*.

Many charters are preserved, granted by the monarchs to different cities soon after the Conquest. The privileges conferred are generally immunity from certain duties; sometimes a mercantile gild [5], at other times a market [6]. Nearly all of them contain clauses relative to jurisdiction or magistracy; but these are not of any uniform style; and are often expressed in the barbarous language of the day. Thus the charter sometimes granted socan and sacan, infangenthef and utfangenthef, expressions importing a right of holding courts and exercising certain kinds of jurisdiction [7]; of which clauses, we

[1] Brady, 47. and the cases there cited.

[2] Stewart on Public Law, p. 320-1.

[3] See various examples of this; Brady, p. 9, 10, 11.

[4] 'In Norwico de 738 burgensibus Rex et comes habent socam sacam 'et consuetudinem, de 50 Stigandus habuit socam sacam et commendation-'em, de 22 Heroldus habuit socam sacam et commendationem, et unus 'eorum ita dominicus esset ut non potuit decedere vel homagium facere 'sine ejus licentia.'—Brady, p. 5. See an example of Church Jurisdiction over Burgesses, p. 13.

[5] The grants of the mercantile gild will be afterwards more fully considered.

[6] See the charters in Brady's Appendix.

[7] See these words explained by Spelman.

have examples in the charters of John to Yarmouth [1], and to Dunwich [2]. Sometimes, also, the privilege was granted of not litigating any where but within the burgh, except in particular cases, as in the crown pleas, and with respect to land without the town. Of this privilege we have instances in a charter of John to the burgh of Helleston [3], and of Henry III. to Norwich [4]. Sometimes the king's officers and justices are debarred from meddling with them, as in the charter of Henry III. to the burgh of Wallingford [5].

The charters of those times do not appear to have usually contained clauses expressly giving the right to the towns of nominating particular magistrates or judges. A few, however, are to be found of this description. The first is probably that of Henry I. to London, in which power is given to elect a vicecomes or sheriff, and a justiciary [6]; and the earliest which appear to be quoted by Brady or Madox, conferring the right of election of the ordinary civic magistrates, are that of Richard I. giving the right of election of a *præpositus* to the citizens of Lincoln [7]; that of the same king giving the right of electing ballivi and justiciarii to the burgesses of Colchester [8]; that of John giving the right of choosing *præpositi* to Norwich [9], and that of Henry III. giving a like right to the same town [10].

[1] Brady, App. No. 2. [2] Ib. No. 3. [3] Ib. No. 8.

[4] Madox, Firm. Burg. p. 43. [5] Brady, App. No. 4.

[6] Ita quod ipsi cives ponent vicecomitem qualem voluerint de seipsis, et justiciarium quemcunque, vel qualem voluerint de seipsis, ad custodienda placita coronæ meæ, et ad eadem placitanda, et nullus alius justiciarius erit super ipsos homines Londoniæ, et cives non placitabunt extra muros civitatis pro ullo placito. Brady, App. No. 17.—Notwithstanding this grant of Henry I. we find from Maddox's History of the Exchequer, p. 273, that London paid a fine of 100 merks, in the 5th of Stephen, for leave to choose a sheriff.

[7] 'Et cives Lincolniæ faciant præpositum quem voluerint de se per annum qui sit idoneus nobis et eis.' Brady, App. No. 20.

[8] Madox, p. 28. [9] Brady, App. No. 22. [10] Madox, p. 43.

In several of these charters, we find mention made of the assembly or court of the inhabitants under various denominations. In the charter of Henry I. to London, the court of the folkmote [1] is noticed as then existing in that city [2]; in that of Richard I. to Lincoln, the burgwarmote [3] is ordered to be held only once a week [4]; and in that of Henry III. to Wallingford, the burgesses are declared to be bound to answer only in their own portmote [5], and mention is made of the burgesses actually exercising jurisdiction.

These courts are all evidently of the same nature, and had continued down from the Saxon times. Analogous to them in its original character, appears to have been the *court leet*, which, although it has been conjectured to have had its origin in the Saxon period [6], was better known after the Conquest. It was appendant to a hundred or to a manor [7], and also was frequently held within boroughs [8].

Whether the origin of the court leet shall be traced to the Saxon times or not, there seems some reason to suppose that it had a different source from the ordinary *motes* of the Saxons. Considered as connected with a hundred or manor, it appears to be viewed as the result of royal grant to the lords of these

[1] From Saxon, *folk*, populus; and *mote* and *gemote*, conventus. 'Duo 'folkmotorum genera; primum a civibus celebratum, quod *burgemotus* inde 'dicitur, alterum a comitatensibus, quod ideo *schiremote* appellaverunt.' 'In pleno folcmoto, (*i. e.* the county folkmote), elegibantur heretochii et 'vicecomites. In eo, suffragio populi, electi sunt vicecomites'—'usque 'ad annum 9 Edouardi 2, hoc est gratiæ 1315.'—Spelman, Gloss.

[2] Brady, App. No. 17—'in hustengo, neque in folkesmote neque in 'aliis placitis infra civitatem.'

[3] From Saxon *burg*, burgus; *ware*, vir; and *mote* and *gemote*, conventus.—See Spelman, vocibus *burgwara*, burgensis; and burgemote.

[4] Brady, App. No. 20.

[5] Curia portus, Spelman; but as porte in Saxon seems to mean a town generally, see West Looe Case, p. xxxix, portmote may have as general an acceptation.

[6] Scriven on Copyholds, vol. ii. p. 807.

[7] Ibid. p. 813. [8] Ibid. p. 814.

territories [1]; and when occurring within burgh, we occasionally find traces of officers of manors, such as stewards, joined to city magistrates, which seem to mark that sometimes, at least, it was to be viewed either as the common court of the manor, and of the manorial borough, or as derived from the territorial judicatory [2]. The opinion of Brady is, that 'wherever the mayor, bailiffs, and burgesses, are chosen by the 'jury in a court baron or at the leet, they were towns in ancient demeans [3].' On the other hand, it has been conjectured, that where the powers of a leet court within borough are exercisable by the mayor, or other magisterial officer, the jurisdiction does not exist under a crown grant as an appendant franchise, but is a more immediate vestige of the Anglo-Saxon jurisprudence [4].

All classes of people, with very few exceptions, were bound to attendance at the court leet [5], and those who absented themselves were liable to amercements [6]. A jury, consisting of a certain number of those who owed suit, formed an important part of the institution; and, in later times at least, the principal duties of the court appear to have devolved upon it [7]. We shall afterwards see the important elective privileges which are vested in this court [8].

According to Spelman [9], the appellation of mayor, as applied to a magistrate, did not occur in England till after the Conquest, and the first city whose chief magistrate got that appellation was London. Richard I. is said to have appoint-

[1] Blackstone, iv. p. 273. Scriven, ii. p. 813, 814.

[2] West Looe case, p. 34.

[3] Page 82.

[4] Scriven, ii. p. 814.

[5] Scriven, p. 818. Blackstone, iv. p. 273.

[6] Case of the borough of West Looe, p. 34. The similarity of this institution, in these respects, to the courts which are proved by the records of Aberdeen to have been held in that burgh more than 400 years ago, and to the borough courts as described in the Leges Burgorum, is worthy of notice, and will be afterwards adverted to.

[7] Scriven, ii. p. 872.

[8] See p. 442.

[9] Gloss. *voce* Major.

ed a mayor for that city in the first year of his reign [1]; and the person so appointed is stated to have continued in office till the 8th year of John, who appointed another [2]. The latter king afterwards, in the 10th year of his reign, gave the citizens of London the right of choosing their own mayor [3]. In the second year of the reign of Richard I. during his absence in the Holy Land, the citizens of London obtained the grant of a community from the Earl of Mortain, the Archbishop of Rouen, and the other justices of the king [4].

According to Madox, the expressions *communa* or *community*, were not commonly, if at all, used in England before the Conquest [5]. He thinks it probable, that, after that period, they passed into England from Normandy. These terms are to be found employed in reference to towns in the time of Henry II., when several examples occur of persons being fined for endeavouring to set up *communæ* in towns without warrant [6]. The expression, as employed in these instances, may have meant either a general corporate body of the town, or perhaps some particular association or gild. But even after this period, the royal charters granted to towns did not contain express grants of communities, or other direct words of incorporation [7]; unless, indeed, a mercantile gild is held, as appears to have been done by Brady, to be the same with a community [8]; an opinion, however, which seems to be held by other writers to be ill-founded [9], and will be afterwards considered. The charters are conceived merely in the terms of grants of a variety of distinct privileges; although it is not meant to be said, that, *in point of law*, they may not have had the effect of incorporating the towns

[1] Nicolson's Eng. Hist. Library, Ed. 1714, p. 216. Brady, p. 21. Spelman, *voce* Major.

[2] Nicolson, *supra*. [3] Comyn's Digest, voce *London*.

[4] Brady, p. 21. [5] P. 35. [6] Madox, p. 35.

[7] See the charters of Richard I. and John, quoted in Brady's Appendix, and those of Henry III. Madox, p. 28.

[8] See Brady, p. 20. [9] Kidd, i. p. 64, 65.

to which they were conceded; and this effect has been held to follow the grant of a mercantile gild [1]. What other grants may have had this effect, may be left to English lawyers to determine.

In the time of Henry VI. and Edward IV. we find the first [2] examples of charters introducing the modern words of actual incorporation, and giving a certain name to the corporate body; and, it may be observed, that the usual style of these is to constitute the burgesses and magistrates, or the burgesses, inhabitants, and magistrates, as the corporate body [3].

It has been maintained, that the word community or commonalty, as applied to a town, means a select body of the more respectable citizens, and not the body of freemen at large [4]. That, in some instances, it is to be found bearing this limited sense, unquestionably cannot be denied [5]; but it may well be doubted whether this is the natural and proper meaning of the expression, or the constant sense in which it is employed. The word community, in its original import, appears to express the abstract idea of a body consisting of many members; and hence to limit it to the designation of any particular portion of this collective number, seems a perversion of its true import. Accordingly, we have seen that the whole body of the burgesses in England were originally erected into the community or corporate body; and instances, where

[1] See case quoted, I. Kidd, p. 64.

[2] See West Looe case, p. 236. Madox, p. 27.

[3] Thus the charter of Henry VI. to Southampton, grants, 'quod villa 'illa de uno majore duobus ballivis et burgensibus sit in perpetuum cor- 'porata, et successores sui majores, ballivi et burgenses villæ illius sic 'corporatæ, sint una communitas perpetua corporata in re et nomine,' &c. Madox, p. 28. See also the examples of New Windsor and Wenlock, p. 29.

[4] See Brady, p. 23, *et passim*. Wight, p. 27.

[5] See, for instance, the act of Parliament relating to Plymouth, quoted by Brady, p. 24. In Pryn's Brev. Parl. Rediviv. p. 32, it is stated, that commonalty has been sometimes so explained by committees of the House, *where custom had vested the elective privilege in select numbers.*

it is used in this extended sense, are furnished by Brady [1] himself, although a zealous advocate for the more limited meaning. These instances are entitled to the greater weight, because they were decisions of a committee of the House of Commons in the time of Charles I. of which Selden and Sir Edward Coke were members. In one of the questions, the point was, 'whether a *select* number, *or* the *commonalty*, were to choose' the representative of the burgh in parliament; and it was decided that the right of election was 'in the commonalty;' and the person who had 'the majority of voices of the *com-* 'monalty, and fourteen of the *select* number,' was duly elected. The other instances of the questions before this committee were very similar; and it is rather believed that English lawyers in general would not be satisfied with the mere assertion of Brady, that such men as those above named had mistaken the meaning of the word community [2]. Perhaps, however, no rule can be laid down which will be applicable to all cases.

The appellation of Mayor, after its introduction into England, always designated the chief magistrate of the city. That of Præpositus appears to have been used in a similar sense, but is often found in the plural number.

The designation of Ballivus [3] is often used along with that of mayor, and when so used, of course denotes an inferior

[1] P. 60, 61, 62.

[2] In the case of West Looe, p. 116, it seemed nearly admitted on all hands, that Brady's limited interpretation was erroneous.

[3] 'Gallis baillivus, vernacule baillif et baillie; a bailler tradere, commit-'tere quasi commissarius. Græce βαλειν et βαλλειν,' Spelman, Gloss. The French baillif has, however, also been derived through the Latin ballivus, from bajulus, a porter or carrier; Dict. Etym. de la Langue Fran. par Menage. This word bajulus was applied to various offices under the Roman empire, and in Italy under the German empire: 'Transfertur ba-'julus ad plures officiarios apud Italos ut baillivus apud Gallos.' Spelman in verb. Bajulus. 'Bajulus Græcis recentioribus βαιυλος μπαιυλος tutor, 'curator nutricius,' ib. Spelman states that the appellation Ballivus does not occur in England before the Conquest, applied to city magistrates.

magistrate. The appellation of Alderman [1] was applied during the Saxon period to a variety of dignified persons; and, among other meanings, it appears, in one sense, to have been synonimous with the comes or earl [2]. According to Spelman, the office of alderman, as a city magistrate, was not introduced into towns before the Norman period, and he doubts the authenticity of one of the laws of Edward the Confessor, in which aldermen are described as officers within cities and boroughs [3]. Madox [4] has conjectured that they were brought into towns from gilds, the governors of which, as we shall afterwards see, were designated by that appellation. In ancient times there were, in some English towns, districts called aldermanries, over each of which the alderman presided; and this is this case at this day in London and some other towns [5]. An alderman at the present day is usually one of the principal magistrates under the mayor, who is frequently chosen from amongst them, as in London [6]. In that city, the aldermen were originally changed annually; but by a charter of the 28th year of Edward III. it was provided, that they should not be changed without cause [7]; and by statute 17th Richard II. c. 11, it was enacted, that they should not be yearly elected, but should remain until removed for a reasonable cause. The office is now in general for life throughout the towns of England [8].

We find the appellations capital burgess, capital citizen, and jurat, used more or less frequently in England, in a sense similar to that of alderman [9]; although capital burgess is sometimes equivalent to common-councilman, and sometimes includes the mayor, aldermen, and common-councilmen [10].

[1] From the Saxon ealdor, *senior*; Spelman. See his account of the various significations of aldermen among the Saxons. Gloss. *so voce.*

[2] 'Eorla or erle, vox Danica et ab illis (quibus olim *ear* et *ar* honor) ad 'nos delata.' Spelman.

[3] Gloss. *voce* Alderman.

[4] Page 30.

[5] Kidd on Corporations, i. p. 322.

[6] Kidd, ib.

[7] Comyn's Digest. London, D.

[8] Kidd, i. p. 323.

[9] Kidd, i. p. 323.

[10] Ibid.

The assembly, called the common-council, as at present constituted in the English towns, besides including the common-councilmen properly so called, usually comprehends also the mayor and aldermen [1]. At one time, however, it appears to have been often viewed as a distinct body [2], although, perhaps, even then its meetings may not always have been quite exclusive of the other ranks. It seems to have been of later introduction than the other official ranks, and was, perhaps, a considerable time subsequently to the Conquest, copied after similar institutions in France. In one instance, we have evidence that it arose in virtue of an agreement, that a select body should, in future, exercise those elective rights which were before exercised by the burgesses [3]. It has been maintained, in general, that, where the charter is silent, all the corporation, who assemble, are called the common-council [4]. The office of common-councilman is, in general, for a year only [5].

We find a provision, sometimes contained in the charters to the English towns, that the præpositi, or the mayor, after their election, shall be presented for admission to some of the royal officers, as the Justiciary, or the Treasurer, and Barons of Exchequer [6]. This provision was introduced as an acknowledgment of a certain degree of dependence of the civic magistrate on the crown; and we have seen that a similar rule was established in France. It seems to have been held in England, that the mayor could not enter on his office till this form of presentation had taken place, and the oaths had been administered to him [7].

[1] Kidd, i. p. 324.

[2] See, for instance, the Dover Case, Glanvil's Reports, p. 64–5, and the Charter in the Appendix to Brady, No. 29.

[3] See the Dover Case, afterwards quoted, p. 440.

[4] Comyn's Digest, vol. iv. p. 363. [5] Comyn, Ibid.

[6] See the Charter of Henry III. to Gloucester, quoted p. 440, note [1]; and that of Henry VI. to London; Brady's App. No. 11.

[7] Maddox, p. 50.

The ancient charters of the kings, after the Conquest, throw no farther light on the mode of election of the magistrates, granted by them, than what may, perhaps, be presumed from the circumstance that the right of election is given by them to the citizens generally [1]; but whether these grants took effect in all cases *literally*, and whether any custom at that period universally prevailed of choosing the magistrates by a general poll of the burgesses, are perhaps points not completely determined. It is at all events certain, that in many towns elections, by some select bodies, came to be afterwards introduced. The origin of this method, in many instances, probably cannot now be determined; long established custom being the foundation on which it often rests. In other instances it probably arose out of royal grants. We have an instance in the case of Dover, of the Commons voluntarily, at a meeting in the year 1561, abandoning the right of election of parliamentary representatives and magistrates, which they had previously exercised in a body, and vesting this right thenceforward in a select number of thirty-seven, chosen by the mayor and jurates, and distinguished by the name of the common-council [2].

[1] See as to this *supra*, p. 432. In a charter of Henry III. to Gloucester, Maddox, p. 132, it is provided, 'Quod iidem burgenses nostri Glocestr. 'per commune consilium burgi elegant duos de legalioribus et discretiori-'bus burgensibus Glocestriæ, et præsentent illos capitali justiciario 'nostro apud Westm(onasterium), qui duo vel alter eorum bene et fide-'liter custodiant præposituram burgi, et non amoveantur, quamdiu se in 'balliva sua bene gesserint, nisi per commune consilium burgi. Volumus 'etiam quod in eodem burgo, *per commune consilium burgensium* Glocestriæ, 'elegantur quatuor de legalioribus et discretioribus burgi ad custodiendum 'placita coronæ, &c. et ad videndum quod præpositi illius burgi juste et 'legitime tractent tam pauperes quam divites.' These expressions do not seem to refer to any select council; and probably mean merely that these officers were to be chosen by the *advice* and *consent* of the burgesses. There seems no trace, in the early English charters, of a proper common council as a distinct rank.

[2] Glanville's Reports, p. 64.

London probably presents the earliest example of the elective privileges being vested in select bodies, although, for some time, the mode of election does not appear to have been uniform. In the 29th year of Edward I, the mayor was chosen by the former mayor and aldermen; and the sheriffs by the assent of twelve probi homines of each ward [1]. In the 20th of Edward III., the right of electing mayor and sheriffs was vested, by agreement, in the mayor, aldermen, and a select number of from twelve to six from each ward. A charter of Henry VI., proceeding on the narrative that the elections had been in use to be made by the mayor and aldermen, and the more respectable citizens specially summoned; but that some persons, who had no right to be present, were then in the habit of mingling in such meetings, declared that, in future, the election of mayor should be only by the aldermen and more respectable citizens specially summoned, and debarring all others from being present [2]. In the 15th year of Edward IV., the masters, wardens, and liveries [3] of the several companies were taken in; by whom, and by the mayor, aldermen, and common-council, the elections of mayor and sheriffs were afterwards made [4]. By the act 11th Geo. I. c. 18, the right of electing aldermen and common-councilmen was vested in the freemen of each ward paying scot and lot [5].

In many burghs the right of electing the mayor, or other chief municipal officer, is vested in the court leet, the general nature of which has been already explained. This pri-

[1] Brady, p. 22. [2] Brady's Append. No. 11.

[3] The liverymen of London, are a select body chosen out of the freemen of several of the companies, whose principal privilege is that of forming some of the electoral assemblies of the corporation. See Kidd, i. p. 321 and 329.

[4] Brady, p. 23.

[5] The expression *scot* and *lot*, in its original meaning, appears to have comprehended every charge and duty which fell on the inhabitants. See West Looe case, p. xxxiii. and Spelman, Gloss. in Verb. Scot.

vilege is sometimes vested in the jury of the court leet alone; whilst, at other times, the jury merely present in writing the candidate who may have the majority of votes, and have no controul over the poll [1]. At this court, also, the jury sometimes presented persons for admission to the freedom of the burgh, who were then sworn in [2].

In England, from a very ancient period, associations, of a mercantile or mechanical nature, have been distinguished by the appellation of Gilds: and afterwards, those of the latter kind often got the names of Mesteres, misteres, and crafts.

The word gild [3] appears to have been applied, among the Saxons, to societies of various descriptions. Thus the institution, called the friborgs or tithing, was called a gyldscipe or gildship, and its members gildones and cengildones [4]. There existed amongst the Saxons a variety of associations or gildscipes, partaking of the nature of friendly or benefit societies, and instituted for the various objects of lending pecuniary aid to those who required it; of burying the dead, and of sing-

[1] Scrivan, ii. p. 365 and 842. In the case alluded to, p. 342, that of the burgh of Holt in Denbighshire, the poll election, by the burgesses, was in virtue of a bye-law and continual custom since the making of that law down to 1819, when the practice was proved at the Shrewsbury Summer Assizes. See also Brady, p. 82, for the concern which the jury of the Court Baron has in choosing mayor, bailiffs, and burgesses. The Court Baron is another manorial tribunal, and is sometimes held in burghs. In the abstract of the municipal constitution of the English burghs, given in Male's Election Law, numerous instances will be seen of the elective rights of the Court leet.

[2] West Looe Case, p. xlvii. 152, 154.

[3] 'Inde nomen, quod ex conjectis pecuniis sodalitii impendio submi-'nistratur; nam ut supra diximus *geld* et *gild*, *pecunia*, *solutio*; *gildan*, *sol-'vere*, *tribuere*.' Spelman, Gloss. in Verb. Geldum. Words of similar import, such as gildonia, &c. were used on the Continent from a very ancient period (see Spelman), and were of German original. Gilda and gildhala were used in some of the charters granted to towns in France and the Netherlands. See Ducange in verb. Gild.

[4] Spelman, in verb. Geldum.

ing masses as well for the living as for the dead [1]. A particular association, called the Cnightengild [2], is mentioned by Madox [3] as having existed before the Conquest. It seems uncertain whether it was of a religious or of a secular description [4].

After the Conquest, a variety of religious gilds are found established in England, by royal charter, as proper corporate bodies [5]. Power was given them by the grants to choose certain officers, sometimes an alderman and two magistri, sometimes a magister only [6]. Institutions, of a similar nature, existed in France, under the name of confrairies [7]. In England they were abolished at the Reformation [8].

The gilda mercatoria in England, is of very ancient date; and, indeed, from the terms of a charter from Henry III. to the burgh of Wallingford, we might conclude that this association had existed in that burgh before the Conquest [9].

[1] See Turner's Hist. of the Anglo-Saxons, vol. iv. p. 136.

[2] The Gild of Cnights, 'Knight, Saxon cnyt, puer minister famulus, 'nec Germanis aliter hodie in usu;' Spelman.

[3] Page 23.

[4] In Baillie's Antiquities of London and Westminster, p. 101, this gild is said to have originated in the time of Edgar or Canute, and to have been of a military nature; but the account there given seems of a fabulous description.

[5] Thus a charter of Henry V., on the narrative that the fraternity, or gild of St George of Norwich, had been well governed for more than thirty years, grants 'quod prædictæ fraternitas et gilda fratrum et sororum 'prædictorum et aliorum qui de eisdem fraternitate et gilda esse volu-'erint sint perpetuæ et communitas perpetua temporibus successivis in 'perpetuum,' &c. Maddox, Firm. Burg. p. 24.

[6] Maddox, p. 24, 25. [7] Id. p. 26. [8] Id.

[9] 'Sciatis me dedisse et concessisse eis in perpetuum libertates et leges 'suas omnes et consuetudines bene et honorifice sicut melius et honorabi-'lius eas habuerunt *tempore Edwardi regis* et tempore, &c. *scilicet* gildam 'mercatoriam cum omnibus consuetudinibus et legibus suis libere habe-'ant.' Brady, App. No. 4. Brady says in a note, that *consuetudines* means rents, and that the whole means no more than that the rents of houses in that burgh were not raised after the Conquest; but the natural construction of the passage seems to be, that the merchant-gild was one of those pri-

In Domesday Book there is also mention made of a gihalla or gildhall which had existed in Dover [1], a passage which may, perhaps, refer to the existence of a merchant-gild before the Norman invasion. A charter of John to Dunwich, grants a hanse [2] and a mercantile gild, *sicut habere consueverint* [3].

In the charters soon after the Conquest, as those of Henry II. [4], and particularly of John [5], clauses very frequently occur, granting a mercantile gild to the burgesses or men of the town.

The name of merchant gild would import, that it consisted of proper merchants, or buyers and sellers only [6]; but there is reason to believe, that this distinctive character was not always, if ever, entirely preserved in England. The merchant gild is said by Maddox to be 'a gild of merchants, tradesmen, and 'artizans [7].' In a case also decided, in the beginning of the

vileges which had existed in the time of the Confessor, and were now confirmed. A similar construction may be seen in a charter of John to York; Brady, Append. No. 21.

[1] See Heywood on Burgh Elections, p. 11.

[2] Hanse is nearly synonimous with *gilda mercatoria*.—See Spelman, Gloss. in voce Ause, Ausen.

[3] Brady, Append. No. 3 a.

[4] Maddox, p. 27.

[5] Brady's Append. *passim*.

[6] The following clause in the charter of Henry III. to Wallingford, is expressive of the mercantile nature of the merchant gild: 'Prohibeo 'etiam et præcipio ne aliquod mercatum sit in Craumersa (a neighbouring village), nec mercator aliquis nisi sit gilda mercatoria;' Brady's Append. No. 4.

[7] We are informed by Sir Edward Coke, that he had 'seen a charter, 'made by King Henry I. to the weavers of London, by which he grants 'to them that they shall have *gildam mercatoriam*, and a confirmation of it 'made by Henry II.;' a passage which, in this instance at least, seems to identify a craft with a merchant gild. Coke, as cited by Kydd, p. 63. We find, however, mention made in Maddox, Firma Burgi, p. 191 *note*, of the *gild* of the weavers in a record of the time of Henry II.; and again (p. 203–4 notes) it is mentioned, in an Exchequer record of the time of Henry IV., that they had a *gild* in the time of Henry I. which was confirmed by Henry II.; from which circumstances we may probably infer, that the gild alluded to by Sir E. Coke was truly an ordinary crafts gild.

last century, a custom appears to have been established, as existing in the city of Winchester, that mechanics were not allowed to exercise their trades within the town, unless they were members of the merchant gild [1].

In general, however, the merchant gild undoubtedly appears to have been of a different nature from a mere craft or association of a *particular* mechanical trade; and if it sometimes or always included mechanics, as well as proper merchants, the former were probably not of any particular craft, but operatives in general, as seems to follow from the case of Winchester just mentioned. If, indeed, the merchant gild should be held, as has been done by some, to be identified with the corporation of the town itself, a point which will be immediately considered, it is not remarkable that it should also have included mechanics.

The merchant gild was under the superintendance of one or more officers, who, judging from the analogy of the religious gilds, we may conclude were elected by the body itself. When there was only one chief, he usually got the name of Alderman. Thus we find the alderman of the merchant gild of Oxford [2] in the time of Edward II., and that of the merchant gild of York [3] in the reign of Stephen.

[1] Mayor, &c. of Winchester *v.* Wilks. 2 Lord Raymond, 1129.

[2] Monast. Anglican. vol. ii. p. 141. 'Edwardus, &c. Nos autem concessio-
'nes, &c. necnon donationes quas Will. de Cher, aldermannus de gilda
'mercatorum Oxen. per chartam suam de consensu et voluntate civium
'Oxenefordiæ de communi civitatis et de gilda prædicta fecit ecclesiæ (de
'Oseneya).'

[3] 'Thomas de Everwick, &c. ut sit aldermannus in gilda mercatoria de
'Everwick,' Maddox, Hist. of Exchcq. p. 273. Maddox, Fir. Bur. p. 27, identifies this gild of York with the commune or corporation of the town, without assigning any reason why that should be done in this instance more than in any other, and perhaps would conclude that the alderman here mentioned was one of the city aldermen; but we shall afterwards see that this identification of merchants' gilds with the town corporation is questioned in England, and I therefore venture to regard this alderman of the York gild as having been, what he appears to have been in other

Where there were more than one officer, the principal was commonly called alderman, and the others custodes or scabini, the last designation being borrowed from the Continent. Thus we find a charter, in the time of Henry VIII., granted by the alderman, four custodes or scabini, and the brethren of the merchant gild of Lenn in Norfolk [1]. The alderman appears to have acted as the judge of the gild, and decided the disputes of the merchants [2]. Thus in the charter of Henry III. to Wallingford, the king forbids his *præpositus* to meddle with the merchant gild, but to leave it to the alderman and minister [3].

Some difference of opinion has existed in England on the point, whether the merchant gild, as granted by the royal charters, is to be considered as the same with the community of the town. Spelman [4] and Brady [5] regard them as the same; and Maddox states, that they were sometimes identified [6]. The circumstance alluded to by Spelman, that the town-halls are often called guild-halls, is certainly of considerable weight in this question. But in the case of Winchester, just quoted, the Court, although they inclined to the opinion that they were the same, and stated that this rather

cases, a peculiar officer of the gild, and not one of the ordinary magistrates of the town.

[1] 'Sciant presentes et futuri, quod nos Richardus Bowghere, alderman-'nus, Edwardus Baker, Joh. Broune, Rob. Sime, and Will. Hall, draper, 'custodes sive scabini, et fratres fraternitatis sive Gildæ Mercatoriæ Sanc-'tæ Trinitatis villæ Lenn Episcopi in Com. Norff.' &c. Spelman v. Scabini.

[2] In Brady, p. 20, we have this passage: 'Aldermannus gildæ mer-'catorum Oxonie, judex gildæ Oxoniensis, qui mercatorum lites diju-'dicabat;' and reference is made to Monast. Ang. tom. ii. fol. 141. But all that is there to be found, is the passage already quoted, p. 445, note 2.

[3] See Brady's Appendix.

[4] 'Gildarum nomine continentur non solum, minores fraternitates et 'sodalitia, sed ipsæ etiam civitatum communitates. Inde hodie illarum 'prætoria, publicique concessus ædes gildhallas vocant, id est gildæ au-'tas.' Glos. in verb. Geldum.

[5] Page 20.

[6] Firma Burg. p. 27.

seemed the import of the evidence, held the matter to be sufficiently doubtful to refuse action to the mayor and others of the incorporation of Winchester, to enforce the privileges of the gild [1]. Mr Kydd has given it as his opinion, that the merchant gild is distinct from the general corporation of the town [2], relying chiefly on this case of Winchester.

In farther corroboration of this opinion it may be stated, that the alderman, or other officers of the merchant gild, do not appear to have enjoyed the chief magistracy in the town. Thus in the charter, granted by Henry III. to Wallingford, we find mention made both of the præpositus of the town, and of the alderman who presided over the gild. Indeed the chief officer of a merchant gild, and, as we shall immediately see, of a trades' gild also, seems almost invariably to have got the title of alderman, whereas in the proper town corporation, that denomination generally belonged to a secondary magistrate.

Another circumstance, which tends to show a distinction between the merchant gild and the community of the town, is, that the former does not appear to have necessarily included all the citizens or burgesses. Thus, in a charter of Richard I. to Winchester, the privileges are granted, 'civibus nostris Win-'toniæ de gilda mercatoria [3];' and in a charter to another town, certain privileges are given to its citizens, as the 'bur-'genses Wintoniæ qui sunt de gilda mercatoria' enjoy them [4]. In a charter of Henry III. to Gloucester [5], some of the privileges are given to the burgesses generally and others 'Bur-'gensibus nostris Glocestriæ de gilda mercatoria [6].' It is therefore plain, that the merchant gild did not necessarily include all the burgesses; whereas we have seen, that the com-

[1] See the Opinions of the Judges, as given 2 Lord Raymond 1129.

[2] Vol. i. p. 64. [3] Brady, Append. No. 19. [4] Ib. No. 6.

[5] Maddox, p. 132.

[6] See also p. 445, note [2], where a distinction seems made between the cives *de communi* and those *de gilda*. *Merc. Oxenf.*

munity or corporate body was, by the ancient charters, made to consist of the burgesses in general.

There is, however, one instance, where it appears, from a charter of James II. to New Windsor [1], that the common council of the town was completely identified with a select number of twenty-eight or thirty, called in the grant the guild-brethren, or 'fratres guild-hall;' and the other magistrates of the town, consisting of ten aldermen or chief benchers, two bailiffs and a mayor, were appointed to be chosen out of these guild-brethren.

Associations of the mechanics of particular trades, although probably not so ancient in England as the merchant gild, existed at a very remote period. They appear to be at least as old as the time of Henry I., in whose time the weavers of London seem to have existed as a society [2]; and in the reign of Henry II. we find mention made of the weavers' gild, and also of that of bakers of London [3]. The weavers had gilds in a variety of other towns at remote periods, as in Oxford, York, Nottingham, Huntingdon, and Winchester [4]. These bodies were also called misteres, mysteries, and crafts [5]. These mysteries were, however, not confined to proper mechanics, as we find mention made of the mistery or gild of haberdashers in the time of Henry VIII. and Philip and Mary [6].

These societies were under the direction of officers, who bore various denominations. In a document, which Maddox conjectures to be of the reign of Henry II., Richard I., or John, there is mention made of the alderman, chaplain, echevins, and other members of the gild of saddlers of London [7]. In the time of Edward the Fourth, the pewterers of London

[1] Brady's Appendix, No. 29.

[2] See what has been already stated as to their gild, p. 444, note [r].

[3] Maddox, Firm. Burg. p. 191.

[4] Maddox, p. 26.

[5] Maddox, p. 33, 34.

[6] Ibid.

[7] N. Aldermanno, N. Capellano, N. quatuor Schivinis et omnibus senioribus gildæ sellariorum amicis et confratribus suis salutes et orationes in Christo. Firm. Burg. p. 27.

were governed by a *master*[1]; and the haberdashers' gild of London, in the reign of Philip and Mary, by a master and four wardens[2].

There are various examples, in the records of Exchequer, of fines imposed for unauthorised gilds[3]. From the expressions used in these records of adulterine gilds, and gilds without warrant, we may infer that these associations could not regularly be set up, without the royal authority. The mere circumstance of imposing a fine was, perhaps, no very satisfactory evidence of illegality, because we know that the Norman kings took this mode of filling their treasury on every occasion[4].

[1] Magister liberorum hominum misterse de peuterers. Ib. p. 33.

[2] Magister et quatuor gardiani gildæ sive fraternitatis Sanctæ Katerinæ artis de marchant haberdashers civitatis de London. Fir. Burg. p. 34.

[3] Maddox, Hist. Exchequer, p. 390.

[4] See Hume's Hist. Eng. App. 2.

## CHAPTER III.

### HISTORICAL VIEW OF THE ANCIENT CONDITION, AND OF THE MUNICIPAL CONSTITUTION, OF THE BURGHS OF SCOTLAND.

As a great part of the knowledge which we at present possess, regarding the ancient constitution and customs of the burghs of Scotland, is derived from the collections known under the titles of Leges Burgorum, Statuta Gildæ, and Iter Camerarii, it becomes proper, before entering into any inquiry regarding the condition of those burghs, to submit some observations with respect to the authority of those collections; and, first, with respect to the *Leges Burgorum*.

There exist a variety of ancient manuscripts, containing, amongst other matters, a series of laws or customs, varying in its extent, and principally relating to the burghs of Scotland. This series is now known under the name of the Leges Burgorum. The more modern of these manuscripts, but not the more ancient, contain also that compilation called Regiam Majestatem, which has been the subject of so much critical and antiquarian controversy. The authority of this latter compilation, however, does not concern our present subject; and it may be mentioned, that the question as to the authenticity of the Leges Burgorum, as a collection of Scottish laws or customs, is altogether independent of that regarding the authority of Regiam Majestatem.

The precise dates of those manuscripts are unknown; but the most ancient is thought to be as old as about the middle of the thirteenth century, and several of them appear to be of different dates in the course of the fifteenth century[1].

[1] The most ancient is now admitted to be that which was long preserved in the library at Berne in Switzerland, having been purchased in England

It cannot now be determined from what precise sources Skene published that series of the Leges Burgorum, which makes a part of the collection of ancient laws, published by him, and now usually known by the general title of Regiam Majestatem[1]. This series contains a greater number of borough laws than any of the more ancient manuscripts[2]; but, in so far as some of these manuscripts go, it corresponds with them, although not with perfect accuracy.

These borough laws have sometimes been considered as the enactments of David I.[3]; but there can be no doubt, that, in so far as respects the *whole* series of these laws, as published by Skene, this view is incorrect[4], and there is, perhaps,

in the time of Cromwell, and which has since, with the utmost liberality, been gratuitously transferred to this country. It contains a copy of the English compilation of Glanville in the reign of Henry II., and various other English collections. It then contains a collection of 'Leges Scotiæ,' corresponding to a considerable extent with certain of the laws contained in Regiam Majestatem; but it does not contain this latter compilation. It comprehends, lastly, a series of borough laws, extending to fifty-four; but there can be no doubt that it once contained a greater number, as some leaves are awanting. See a fuller account of this manuscript in Chalmer's Caledonia i, p. 729. Mr Thomson, by whose kindness I was favoured with a view of this curious and instructive manuscript, conjectures, from internal evidence, that it was written in the reign of Henry III. The manuscript, regarded by Mr Thomson as claiming the next place in point of antiquity, is one which has been very recently brought into notice, or discovered, in the town of Ayr. It contains the Statuta Gildæ, and a series of about 105 leges burgorum. It does not contain Regiam Majestatem. The manuscript presented to the Advocates' Library by the Earl of Cromarty contains a series of 116 of the borough laws, but they end abruptly. See a fuller account of this manuscript in Lord Hailes examination of the arguments for the authenticity of Regiam Majestatem, p. 4. *et seq.* It is probably not of a much older date than the middle of the fifteenth century. Many other manuscripts of that century exist, containing the Leges Burgorum. Skene's published collection contains 143 borough laws.

[1] See his Introductory Address to the reader.

[2] See note, *supra*, p. 450.

[3] Erskine, book i. tit. i. sect. 36. See also Wight, p. 39.

[4] It has been already stated, that the whole of this series is not contained in the more ancient manuscripts; and some of them, as c. 135, themselves bear a much more recent date.

no sufficient authority for such a conclusion, even with respect to the *whole* series in the more ancient manuscripts. The usual title of them in the older manuscripts is, 'Leges 'et Consuetudines quatuor Burgorum, Edinburgh, Rockes-'burgh, Berwic, Strivelin, constitute per dominum David, re-'gem Scotiæ[1],'—a title which, although ambiguous, may mean that they were the enactments of David, and were observed or enforced in the Court of the Four Boroughs, which was, at an early period, constituted by delegates from these four towns. But, perhaps, little faith is to be given to any such titles, as they may be merely the production of persons contemporary with the manuscripts. That some particular laws of this collection, however, were the enactments of that monarch, who, we know, did enact laws[2], or, at least, contain the substance of some of his statutes, is very probable. Thus, a charter of William the Lyon to the borough of Inverness, makes mention of one or two borough laws enacted by his grandfather David, and, at least, one of these enactments, or a law in substance the same, can now be found in the Leges Burgorum[3].

[1] This is the title of the Leges Burgorum in the Bern manuscript, Caledonia, i. p. 73. That of the Cromarty manuscript is similar.

[2] See Hailes on Regiam Majestatem, p. 11, and what follows in the text.

[3] William, in his charter, commands 'ut nullus infra balliam de Inver-'ness faciat extra burgum meum, pannum tinctum vel tonsum contra 'assisam *Davidis* et meam.' The 22d chapter of the Leges Burgorum is in these terms: 'Nullus nisi burgensis potest emere lanam ad tingen-'dum nec facere pannum; nec pannum secare nec in burgo nec extra 'burgum; secus est si habeat lanam de propriis ovibus.' The charter also has this prohibition, 'Prohibeo etiam firmiter, nequis emat vel vendat 'extra burgum meum, aliquod quod sit contra assisam regis Davidis avi 'mei, et meam.' It is possible that some such law as the following may be here alluded to: 'Nullus mercator extraneus vel alienus potest emere 'lanam aut coria aut alia mercimonia seu mercantias, extra burgum nec 'infra, nisi emerit a burgense.' Leg. Burg., c. 18. See also stat. Gul. c. 37. This charter certainly shews that David I. did enact borough laws; and reference may also be made to a passage, inserted in Fordun, lib. v.

But whether a considerable portion of the borough laws, which we now have, be truly the enactments of David I. or not, there is no doubt that there existed, at a very ancient period, and, in all probability, as early as the twelfth century, certain laws peculiarly framed by some authority or other for the regulation of borough polity[1]; and we have every reason to believe, that the earlier part of the collection we now have consists of those ancient laws. Indeed, if the oldest manuscript we now possess, containing this collection, is of as early a date as is supposed by those best qualified to judge of such matters[2], it becomes certain that a large proportion of our present collection is of at least as ancient a date as the thirteenth century.

Arguments may also be drawn, from internal evidence, both in favour of the antiquity of many of these laws, and also in proof that they really were, at one period, acted on in the boroughs of Scotland. Probably the most remarkable evidence of this nature respects those laws regulating the sale of heritable property within borough.

c. 48, and attributed to Aldred or Baldred, a contemporary of David, in which a particular monastery is said to have been founded by David, 'ut patet *in prologo ejus super statutis burgorum.*' Lord Hailes, after expressing his doubts as to the authenticity of Regiam Majestatem, proceeds thus: 'There is no less doubt, that most of the statutes in the collection 'called L. L. Burgorum, were enacted, or at least enforced, during the 'reign of David I.' Annals, vol. i. p. 104. ed. 1819.

[1] In a charter of William the Lyon to Glasgow, mention is made of the 'assisa burgorum meorum,' in evident allusion, not to a particular law, but to a code. See the Charter, Gibson's History of Glasgow, p. 301. In the list of articles, which, in the year 1292, in the time of Edward I, were transferred from Edinburgh Castle to Roxburgh Castle, and delivered to Alexander Balliol, Camer. Scotiæ, for John Balliol, king of Scots, one item was as follows: 'In uno sacculo continentur 46 rotuli magni et parvi 'quorum quidam sunt de debitis, que debebantur domino regi, et duo de 'legibus et assisis regni Scotiæ, et *de legibus et consuetudinibus burgorum Scotiæ*, et de quibusdam statutis editis per reges Scotiæ.' Robertson's Index, Introduction, p. xvi.

[2] See note, *supra*, p. 450.

By a law or custom of the boroughs, at an early period, no person could sell property within borough, or at least such as he had obtained by inheritance, unless he had first made an offer of it at three head courts, to his heirs or near relations. This rule is laid down in a great many passages of the Leges Burgorum [1]; and that it was frequently acted on in practice, in the thirteenth century, is proved by many deeds of sale of borough property, preserved in various of the monastic chartularies [2],—a circumstance which appears of very considerable importance, in shewing that many of those laws and customs recorded in the Leges Burgorum, which are entirely obsolete, were, nevertheless, at one period, genuine parts of the system of borough jurisprudence.

Another provision of the Leges Burgorum is, that sasine should be delivered in presence of the provost and twelve burgesses [3]. That this rule was also acted upon about the same period, is proved by several deeds [4].

A remarkable coincidence is also to be observed between those passages of the borough laws, regarding the head courts, and the customs in relation to those courts, which, we know, from authentic evidence, were observed in various boroughs.

[1] 'Quilibet potest dare in sua legitima potestate terram suam quam 'habet de conquestu suo cuicunque voluerit. Sed si sit necessitate com-'pulsus, ita quod ipsam hæreditatem vendere oporteat; tunc debent il-'lam ad tria placita capitalia suis proximis hæredibus offerre.'—Leges Burgor., c. 45.

'Qui probabunt, quod terra illa in tribus placitis capitalibus, propin-'quioribus amicis et parentibus venditoris per ipsum oblata fuit.'—C. 127, sect. 2. See also c. 94, 95, 96, 115.

[2] See the Deeds of Sale in the Appendix, No. 19, and 20. See also a Deed of Sale in 1268, from Chartulary of Glasgow, vol. i. p. 244, in Gibson's History of Glasgow, p. 303; and another deed, Kennedy's Annals, of Aberdeen, i. p. 31, Note.

[3] 'Secundo quod intrans habuit sasinam supra solum coram prædictis 'duodecim hominibus et præposito; et quod dedit unum denarium pro in-'troitu,' c. 127, sect. 3.

[4] See Appendix, No. 20, and the Deed, Gibson's Glasgow, p. 303.

We shall have occasion, afterwards, to see ample evidence on this subject [1].

From all that has been said, we certainly are prepared to come to the conclusion, that, whatever may be the real sources from which the burgh laws were originally derived, and whatever may be the precise date at which they were first introduced, a very high antiquity may at all events be claimed for a large proportion of them, and they may be legitimately used for illustrating the ancient constitution and general internal polity of the burghs of Scotland. An ancient body of laws, although the evidence of its original authority may be doubtful, yet if it is proved, to a considerable extent, to have been acted on in practice, may come to be of great importance as evidence of consuetudinary law, even in those cases where other proof of that consuetude is awanting, and may thus acquire a degree of authority of which it was not originally possessed.

The *Statuta Gildæ*, in the ancient manuscripts containing them, profess to have been framed in the town of Berwick, in the latter part of the thirteenth century, by R. de Bernham [2], mayor of that town, and by other burgesses belonging to it. There seems every reason to believe that this statement is a true account. The statutes of the gild are, from their whole tenor, evidently the regulations of a particular town; and it is a circumstance worthy of attention on this point, that, throughout them, the chief magistrate of the town is denominated *major* or mayor, an appellation which appears seldom or never to have been applied to the chief governor of

[1] See infra as to the head courts, and the ancient mode of election within borough. A curious coincidence may also be observed between the 104th chapter, relative to contempt of the magistrates, and a trial for that offence in the records of Aberdeen. See the trial, Kennedy's Annals of Aberdeen, vol. ii. p. 473.

[2] This name is written *R. de Duramhe*, in Skene's Collection, which appears to have been an error. The Ayr MS. has the name in the text.

any other town of Scotland [1]. But what constitutes still stronger evidence of the authenticity of those laws, as the regulations of the town of Berwick, is, that there is sufficient proof that there really did exist, about the middle of the thirteenth century, a mayor of Berwick, bearing the name of R. de Bernham, who, there is reason to believe, is the individual by whom, in conjunction with others, those laws bear to have been framed [2].

From the circumstances of these statutes being found frequently in the same collections with the Leges Burgorum, and other ancient laws, there can be little doubt, that, although the enactments of a particular town, they were used as a part of the general system of our old laws, and were probably observed in other towns. They may therefore be properly used in illustration of the ancient borough customs.

Little or nothing is known as to the origin of the Iter Camerarii. It occurs in ancient manuscripts; and there can be little doubt that it may be used in the way of illustration. The

[1] In the chartulary of Cambuskeneth, fol. 29., there is a deed in 1324, in which Joannes de Londoniis, *major* of this town, and four others ballivi, are mentioned.—See also next note.

[2] In the chartulary of Coldingham, (p. 35. Macfarlane), there is the following precept: 'Alexander, Dei gratia, Rex Scotorum, R. de Bernham, 'majori et prepositis suis de Berwic, salutem. Mandamus vobis et preci-'pimus quatenus extraneos mercatores qui veniant usq. prioratum de 'Coldingham ad lanam et alias mercaturas prioris et conventus de Cold-'ingham emendas nullo modo impediatis, quin dictas mercaturas emere et 'abducere possunt, salvis nobis antiquis consuetudinibus nostris. Testibus 'Patricio Comite de Dunbar et Waltero Olifr. Justic. Laodon. apud Edin-'burc, xii. die April anno regni Domini Regis vicesimo quarto.' This Walter Olifard was Justiciary of Lothian, from 1221, to 1242, during the reign of Alexander II., (Caledonia, vol. i. p. 704.); and the 24th year of the reign of that king was 1239, which is therefore the date of this deed. In the Ayr MS. the date of 1281 is affixed to one of the gild-laws; another bears date 1284. The first laws in the series have no date attached to them, and may therefore possibly have been somewhat older. Hence there is nothing improbable in supposing that the R. de Bernham, mentioned in this precept, may have been the individual who published the whole, or at least the earlier, of those laws.

utility of any ancient body of laws, in this point of view, may be, to a great extent, independent of their original authority.

Having thus premised a short account of the sources of much of our information as to the ancient condition of the Scottish boroughs, we shall proceed with our inquiry into the general history and municipal constitution of these towns.

The early history of the towns of Scotland is involved in that general obscurity which so largely envelopes the ancient annals of North Britain. Little appears to be known with respect to those towns, previous to the twelfth century.

About that period, we find that many of them had already acquired the appellation of burgi or burghs [1]. In the charter of foundation, in the reign of Alexander I., by Earl David, afterwards David I., of the monastery of Selkirk, afterwards removed to Kelso, the appellation of burgus is applied to Berwick and to Roxburgh [2]. The different burghs or towns were, as early as this century, the property either of the sovereign, or of nobles and barons, or of the ecclesiastical orders. This we learn from the Leges Burgorum [3]; and we find ample proof of it from other sources.

In the reign of David I. we find, in different charters of that monarch, the appellation of '*meus burgus*' applied to a

[1] The word *burg* has given rise to much etymological discussion. The Latin word *burgus*, although not used by the more classic authors, is found in Vegetius, who wrote nearly 400 years after the Christian era, and has been derived from the Greek πυργος, *turris*. In this view of its derivation, *burgus* would signify, in its original meaning, a fortified town. *Burg* has also been derived from the Saxon *beorgan*, in tutum recipere servare.—See Brady, p. 2. Or from *beorg*, a rock, Hailes' Annals, vol. i. p. 112. *Burg* has further been said to be a pure German word, signifying the placing or situation of many houses together.—See Brady, p. 1.

[2] Chartulary of Kelso, p. 7. Macfar. A copy of this charter is in Dalrym. Hist. Col. p. 403.

[3] 'Burgensis domini regis potest habere duellum de burgensibus Abbatis Comitis Prioris vel Baroni et non e converso.' Leg. Burg. c. 15.

variety of towns. Thus he granted to the monks of Dunfermline, by one deed, a toft in *his burgh* of Haddington [1]; and, by another, a 'mansura,' in each of *his burghs* of Dunfermline, Stirling, Perth, and Edinburgh [2]. We find the same expression applied to these and other towns by the succeeding monarchs. Thus Malcolm IV. bestowed a toft in *his burgh* of Rutherglen, on the monks of Kelso [3]. In like manner, William the Lion granted 100 merks out of the ferm of *his burgh* of Edinburgh, to the Abbey of Dumfermline [4], and a toft in *his*

[1] 'David, Rex Scotorum, episcopis, abbatibus, comitibus, baronibus, vicecomitibus, prepositis, ministris, et omnibus probis hominibus totius terre sue salutem: Sciatis me pro salute anime mee et antecessorum meorum abbati de Dunfermlin, et fratribus ibidem deo servientibus, unum plenarium toftum in burgo meo de Hadingtun dedisse, libere et quiete, ab omne consuetudine et servitio, sicut predictus abbas tenet aliquod toftum melius et liberius per burga mea. Testibus Gregorio episcopo de Dunkeld, et Galtero cancellario, et Duncano comite, et Thoro vicecomite Alfwyno apud Edenburg.' Chart. Dunferm. fol. vi b.

[2] 'David, Dei gratia, Rex Scotorum, Roberto electo Sancti Andree, et omnibus comitibus et baronibus, et omnibus fidelibus suis salutem. Sciatis me concessisse et dedisse in perpetuum in elemosina pro anima patris et matris mee, et fratrum et antecessorum meorum, ecclesie Sancti Trinitatis de Dunferm. omnem decimationem de omnibus dominijs meis de Dunferm., nisi de illis que ad alias ecclesias pertinent, et unam mansuram in burgo meo de Dunferm. liberam et quietam, et aliam in burgo meo in Strivelin, et aliam in burgo meo de Perth, et aliam in burgo meo de Edenburg. Testibus Roberto electo Sancti Andree, et Herberto cancell. apud Dunferm.' Chart. Dunferm. fol. vii b.

[3] 'Malcolmus, Rex Scotorum, dapifero suo et vicecomiti de Cludesdale et omnibus aliis probis hominibus suis tocius terre sue salutem. Sciatis me, in perpetuam elemosinam dedisse Deo et Sancte Marie de Kalchou et Monachis ibid. Deo servientibus, et in posterum servituris, unum toftum in burgo meo de Rutherglen plenarium tenendum ita libere et quiete sicut ipsi aliquod toftum in aliquo aliorum burgorum meorum liberius et quiecius tenent. His testibus.' Chart. Kelso, p. 25. Macfar.

[4] 'Willus, Rex Scotorum, episcopis, abbatibus, comitibus, baronibus, justiciariis, vicecomitibus, prepositis, ministris, ceterisq. probis hominibus suis universis salutem. Sciant clerici et laici presentes et posteri me in liberam elemosinam concessisse et confirmasse Deo et ecclesie Sancte Trinitatis de Dunferm. et monachis ibidem Deo servientibus, divisam il-

*burgh* of Montrose, to Robert de Lundoniis, designed his son in the deed [1]. It may be observed, however, that this mode of expression was not invariably used, as we occasionally find the simple expression of *burgh* applied to some of these towns.

The sovereigns, during this period, not only exercised the right of giving charters of particular tenements, within their burghs, to religious houses, and to individuals; but also bestowed on the nobles and dignified clergy, entire towns, which had previously been royal possessions,—a fact which may shew that the expression of *meus burgus* was not a mere unmeaning title.

Thus in the munificent grant made by David to the steward of Scotland, Walter, the son of Allan, and confirmed by Malcolm IV. [4], 'Renfrew' was included; and although this grant undoubtedly comprehended the district or barony of

'lam quam Rex Maleolmus frater meus eidem ecclesie fecit C. redditum 'scil. solidorum habendum sibi singulis annis de firma burgi mei de Eden- 'burg quousq. eundem redditum prefate ecclesie reddendum aliunde con- 'stituam. Preterea concedo eidem ecclesie pro anima fratris mei xx. acras 'terre, et unum toftum in Dunferm. liberas et quietas sicuti ceteras pos- 'sessiones suas liberius et quietius tenet, quas Walterus filius Alani, dapi- 'fer meus prefate ecclesie dedit ea die qua Rex Malcomus frater meus 'ibidem sepultus fuit. Testibus Andrea episcopo de Katen, Matho archi- 'diac. Ricardo capellano, Waltero filio Alani. David Olifard., Phillippo de 'Vallon, Bernardo filio Briani, Waltero de Berkelai, et Roberto Berkelai, 'Roberto filio Saul, apud Kingorn.' Chart. Dunf. fol. xii.

[1] 'Willelmus, Dei gratia, Rex Scotorum. Omnibus probis hominibus 'tocius terre sue clericis et laicis, salutem. Sciant presentes et futuri me 'dedisse et concessisse, et hac carta mea confirmasse, Roberto de London 'filio meo, unum plenarium toftum in burgo meo de Munros, scil. illud 'toftum quod est inter toftum Alexandri, vicecomitis de Strivelyn, et tof- 'tum Jocelini hostiarij mei, tenend. in liberum burgagium de me et he- 'redibus meis in feodo et hereditate, ita libere et quiete plenarie et hono- 'rifice, sicut aliquis baronum meorum, aliquod toftum in aliquo burgorum 'meorum quiecius, plenius et honorificentius tenent. Test. H. cancellario 'meo. Comite David fratre meo. Will. de Moravill Constabl. Alan filio 'Wal. teri dapiferi. Adam Syreis. Georg. de Mortimar. apud Munros.' Chart. Arbroath, fol. viii b.

[4] See the charter of confirmation by Malcolm, in Steward's Genealogical History of the Stewarts, p. 4.

Renfrew; yet it is probable that the town of Renfrew existed when the grant was originally made by David, and was included in the gift; for we find the steward, early in the following reign, bestowing a toft, in *his burgh* of Renfrew, on the monks of Dumfermline [1]. The charter of Malcolm also bestowed on this illustrious progenitor of a long line of kings, a liberal portion of land in every royal burgh in the kingdom, as a place of residence [2].

The burgh of Dundee was bestowed by William the Lion on his brother David Earl of Huntingdon. This gift is mentioned by Fordun [3], or his continuator, and is also noticed in a charter of Robert Bruce to that burgh [4]. After this gift, we find that Earl David made various grants of subjects in this town, and applied to it the usual phrase indicative of a right of property or lordship. Thus, he granted

[1] 'Walterus filius Alani, dapifer Regis Scotie, omnibus hominibus suis et 'amicis, clericis et laicis, tam futuris quam presentibus salutem. Univer-'sitati vestre innotescat me, pro amore Deo et pro salute corporis mei et 'anime, in liberam et perpetuam elemosinam dedisse, et hujus mee carte 'confirmasse testimonio Deo et ecclesie Sancte Trinitatis de Dunferm. et 'monachis ibidem Deo servientibus, et servituris unum toftum plenarium 'in burgo meo de Renefru. Tenendum eis ita libere et quiete sicut ali-'quod toftum in eodem burgo in elemosina datum liberius et quiecius te-'netur et possidetur. Testibus Englr. cancell. Nich. camerar. Ric. capel-'lano Merleswano, Nessio folio Willi. Hugone fisico, apud Perth.' Charta Dunferm. fol. lxxxiv b. Engelram, the witness of this deed, was chancellor from 1160 to 1164; Caledonia, i. p. 712. Malcolm began his reign in 1160.

[2] 'In uno-quoque burgo meo et in una-quaque dominica gista per to-'tam terram meam unum plenarium toftum ad hospitia sibi in ea facienda 'et cum uno quoque tofto viginti acras terræ.' Chart. Malc. *supra*. p. 459, note.

[3] Lib. ix. c. 27.

[4] 'Robertus, Dei gratia, Rex Scotorum, omnibus probis hominibus to-'cius terre sue salutem. Sciatis nos concessisse et hac præsenti carta nos-'tra confirmasse burgensibus nostris burgi de Dunde hedibs. suis et assig-'natis, ac eorum successoribus in perpetuum, omnes lib'tates et jura quas 'vel que tempore bone memorie domini Willmi Regis Scotorum, habue-'runt vel possiderunt antequam, idem Rex Willmus David fratri suo dic-'tum burgum contulerat,' &c.

to the Priory of St Andrew's, a toft in *his burgh* of Dundee, and a merk out of his firm of that town[1]. He also bestowed a piece of ground, in the same burgh, on an individual, Robert Furmage[2]. After his death, his son John, Earl of Huntingdon, afterwards Earl of Chester, by a deed, in which the same expression of lordship is to be found, granted a toft in the same burgh to the monks of Arbroath[3].

[1] 'Comes David frater Regis Scotorum Universis Sancti matris ecclesie 'filiis, salutem: Sciant tam presentes quam futuri me dedisse et concessisse 'et hac carta mea confirmasse, deo et Ecclesie Beati Andræ Apostoli, et ca- 'nonicis ibidem Deo servientibus et servituris in perpetuam elemosinam 'unum plenarium toftum in burgo meo de Dunde. Tenendum de me et 'heredibus meis liberum et quietum ab omni servitio et consuetudine et 'exactione seculari, sicut aliqua elemosina liberius et quietius tenetur, et 'possidetur in toto regno, Regis fratris mei. Dedi etiam illis et concessi cum 'predicto tofto, unam marcham argenti in perpetuam elemosinam haben- 'dam de me et heredibus meis ad oblatas faciendas annuatim eis reddendum 'ad pascha de firma burgi mei de Dunde. Ita ut quicunque præpositus 'ibi fuerit, reddat illis marcham illam ad prefatum terminum pasche 'prompte et absque ulla disturbatione. Testibus Duncano Comite, Mal- 'colmo filio ejus, Wuetone abbate de Lundors, Alano dapifero regis, Ma- 'lisio fratri Comitis de Strathern, Willelmo capellano meo, David de Lind- 'seya, Roberto Basset, Nicolao de Alles, Willielmo Revel, Willielmo Bur- 'det, Gaufrido de Watervilla, vale.' Chart. St And. Prior, p. 296; Macfar.

[2] See Chartulary of Arbroath, vol. i. p. 193; Macfar.

[3] 'Johnes Comes Huntend. omnibus has litteras visuri vel audituris sa- 'lutem. Sciatis me concessisse et hac carta mea confirmasse Deo et ecclesie 'Sancti Thome Martiris de Arbroath et monachis ibidem Deo servientibus 'et servituris, toftum illud in burgo meo de Dunde quod Robertus clericus 'nepos Phillippi clerici de Dunde eisdem dedit. Tenend sibi in liberam 'et puram et perpetuam elemosinam, ita libere quiete plenarie et honorifice 'in omnibus, sicut bone memorie comes David pater meus toftum illud 'Roberti Furmage liberius et quiecius plenius et honorificencius dedit et 'carta sua confirmavit; reddendo unum denarium ad Festum Sti Michaelis 'pro omnibus seravijs. Test. Dno Abbate Johē de Lundoris. Dno Galfrido 'de Crauford. Dno Henrico de Ferrer, Henrico de Strivelyn, et Henrico 'de Brethen patribus meis. Dno Ricardo Syward Roberto de Campen et 'Henrico patre ejus. Symon Tuschette, Johe de Brus, Henrico de Dun- 'de more, et multis aliis.' Chart. Arbroath, vol. i. p. 194; Macfar.

Earl John left no children [1], and, upon his death, the lordship of Dundee probably returned into the hands of the sovereign. Inverbervy also was bestowed on Earl David by William [2]; but whether it was then a town or not does not appear. Fordun, or his continuator, in detailing the titles of Earl David on his death, gives him, amongst others, that of Lord of Dundee and Inverbervy [3].

The burghs of Haddington and of Crail, if we may judge from the test of the expression which has been alluded to, had probably been bestowed on Ada, the wife, and subsequently the widow, of Prince Henry, and the mother of Malcolm IV. and William the Lion [4]. In the reign of David I. we have seen that the former of these towns was a royal possession; whilst, at a subsequent period, there are several charters in which Ada bestows on it the title of *her burgh*. Thus, she bestowed a toft in her burgh of Haddington on the monks of Dumfermline [5], and another on the Priory of St Andrew's [6]. She also founded a monastery in that town [7]. Af-

[1] Fordun, lib. ix. c. 27. [2] Ibid.

[3] Lib. ix. c. 33.

[4] According to Chalmers, Caledonia, vol. ii. p. 412, Hadington and its territory were settled on Ada, on her marriage with Prince Henry, as her marriage portion. There is, however, no *direct* support for this *specific* statement in the authorities to which he refers, although it may be a very probable inference from those authorities.

[5] Chartulary of Dumfermline. 'Ada Northumbrie Comitissa, preposito 'suo et burgensibus suis et omnibus probis hominibus suis de Hadigtunes 'scyra, Francis et Anglis, clericis et laicis, salutem. Notum sit vobis 'omnibus me concessisse Dno Deo et Sancte Marie et ecclesie de Dunferm. 'unum plenarium toftum in burgo meo de Hadigtona libere quiete et in 'perpetua elemosina, pro saluto anime Comitis Henrici domini mei et pro 'solute anime me, et omnium predecessorum meorum et omnium fideli- 'um Dei defunctorum. Testibus hijs Magro R. Alex. de Sancto Martino, 'Hugone Gifford. Apud Perth.' Chart. Dumf. fol lxxxiii.

[6] In this grant, she is styled Ada Mater Regis Scotor., and one of the witnesses is Hela, Comitissa de Fife; Chartulary of St Andrew's Priory, p. 261; Macfar. Ada herself is a witness to one of the charters of William the Lion; Hay's Vet. Diplom. vol. i. p. 403.

[7] Fordun. lib. viii. c. 25.

ter her death, which took place in the year 1178 [1], we find William the Lion applying the same phrase to this town which had been used with respect to it by David I. He bestowed on the monks of Dumfermline 'tres marcas de firma 'burgi mei de Haddington [2].'

Crail in like manner is called *burgus meus* by Ada [3]; and there is this peculiarity attending some of the grants of this noble person in the burgh of Crail, that they were afterwards confirmed by William the Lion, even during her life; a circumstance which does not occur with respect to the similarly expressed grants of Walter the Steward, the Earls of Huntingdon, and Robert of London. Thus, a grant by her of a toft in the burgh of Crail to the Monastery of Cambuskenneth, was afterwards confirmed by William the Lion [4]. In like manner, a grant, which she made to the same monastery, of a mark out the *firm* of that burgh, was confirmed by that monarch [5]. It may be observed, that a grant of this latter

[1] Fordun, lib. viii. c. 25.

[2] Chartulary of Dumfermline, fol. xii. Hugo Cancellarius, who obtained the chancellorship in 1189, (Caledonia, vol. i. p. 712.) *i. e.* eleven years after the death of Ada, was a witness to this deed.

[3] See a grant of a toft in 'burgo meo de Karel' by 'Ada Comitissa mater Regis Scocie.' Chartulary of Dumfermline, fol. lxxxiii.

[4] 'Willmus Rex Scotorum. Omnibus probis hominibus totius terre suo 'salutem. Sciatis me concessisse et hac carta mea confirmasse Deo et eccle-'sie Sancte Marie de Striveling, et Canonicis ibidem Deo servientibus, 'unum plenum toftum in burgo de Carell quod A. Comitissa mater mea 'eiis dedit, cum dimidia carrucata terre in Peteorchin cum communi pas-'tura, tenendam ita libere et quiete in liberam et perpetuam elemosinam 'sicut carta A Comitisse matris mei testatur et confirmatur. Teste Engel-'ramo episcopo Glasgw. Nic. Cancell. Matheo Archideacono Sancti An-'drei. Waltero filio Alani Dapro. Alexandro de Sancto Martino. Gil-'berto filio Rith apud Castellum puellare. Chartular. Cambusken. fol. 128.

[5] 'Wilelmus Rex Scotorum, episcopis, abbatibus comitibus, baronibus, 'justiciis, ministris, et omnibus probis hominibus tocius terre sue clericis 'et laicis salutem. Sciant presentes et futuri me concessisse et hac carta 'mea confirmasse Deo et Ecclesie Sancte Marie de Cambuskynneth et ca-'nonicis ibidem Deo servientibus, in liberam et perpetuam elemosinam,

description is a strong mark of a right of lordship, because the firm of the burgh was due to the superior, unless otherwise gifted by him.

In like manner, 'Robert de Londoniis,' designed 'filius 'regis Willielmi [1],' appears to have acquired a certain right in the burgh of Inverkeithing. A toft in the burgh of Inver-

'unam marcam argenti in burgo de Carel, de firma ipsius burgi quam A Co-'mitissa mater mea eis dedit ad luminare ipsius Ecclesie, tenendam ita li-'bere et quiete et honorifice sicut carta matris mei testatur et confirmatur. 'Test. W. de Bid cancellario, Hugone cappellano meo, Phillippo de Cole-'vill. Thoma de Muschamp apud Linlidgw.' Chart. Cambusken. fol. 44. Nicholas, witness to the deed mentioned in the preceding note, died in 1171, before the death of Ada; and Walter de Bidon, witness to the deed in this note, died the same year with her, viz. in 1178. See Caledonia, i. p. 712.

[1] It seems doubtful whether this person really was a son of William. A Robert de Londoniis or Londonia is found in many deeds in the chartularies designed 'filius regis Will.;' and sometimes 'frater regis Alexandri;' See Chartulary of St Andrew's Priory, p. 523; Macfar. Chart. of Arbroath, vol. i. p. 62; Macfar. Chart. Arbroath, vol. ii. fol. viii b. Chart. Dryburgh, fol. 21, &c. A Robert de Londonia also occurs in the Chart. of Dryburgh, fol. 19 b., whose father is there mentioned to have been Richard de Londonia, and his mother Matilda Ferers; and several others, apparently members of the same family, are there mentioned in different deeds. Chalmers says, that these two Roberts must not be confounded; Caledonia, vol. i. p. 533; and evidently regards the former, as being truly the natural son of William the Lyon. Lord Hailes seems to consider this as doubtful, on account of the term *filius* being applied to a natural son; and conjectures that he may have been married to a natural daughter of William; Annals, vol. i. p. 168; although it would appear that this would not remove the difficulty, because the connection would still be through a bastard. It may be observed, that the latter of these Roberts granted the church of Lassedewyn in Roxburghshire to the Monastery of Dryburgh; Chart. Dryburgh, fol. 19 b,—a grant which was confirmed by William, ib. fol. xx.; and that the former Robert granted to the same monastery, 'Redditum 'meum in *Lessedewyn* quem singulis annis percepi de domo, et tofto meo 'in predict. villa,' by a deed, in which he is designed 'frater Dni Alex. 'Reg. Scotor.'; Chart. Dryburgh, fol. 21; a circumstance which seems either to identify these two individuals, and perhaps to confirm the conjecture of Lord Hailes, or at least to shew a connection between the two, perhaps by the mother of the former. I have not been able to discover the deeds in which Chalmers seems to say that the two Roberts occur together as witnesses.

keithing had been bestowed by Malcolm IV. on the monks of Kelso; and this grant was afterwards, in the reign of William the Lion, confirmed by 'Robertus de Londoniis in *meo* '*burgo* de Inverkeithing[1];' an expression which, in this instance, can hardly be explained on any other idea than that of a right of lordship in the town, since we cannot suppose a subject confirming an antecedent royal grant, unless an intervening right of this description had been acquired by that individual. In the beginning of the reign of William, that town appears to have been still a royal possession[2]; and the right had probably been afterwards acquired by Robert of London.

When Cospatrick, the Earl or Governor of Northumberland, fled from the vengeance of William the Conqueror into Scotland, he obtained from Malcolm III. a grant of 'Dun-'bar, cum adjacentibus terris in Lodoneia (Laudonia).[3]' We have reason to believe that the Castle of Dunbar then exist-

[1] 'Universis Sancte Matris Ecclesie filiis, tam presentibus quam futuris, 'Robertus de Londoniis, filius Domini Regis Scotiæ, salutem. Sciant omnes 'tam posteri quam presentes me concessisse et hac carta mea confirmasse 'Deo et Sancto Columbæ et canonicis de Insula Beati Columbæ ibidem 'Deo servientibus, unam marcam singulis annis in puram et perpetuam ele-'mosynam assignatam ad terram de Kincarnedder, quam Other tenuit, sic-'ut carta Waldeni filii Cospatricii eisdem canonicis testatur, et confirmat; 'et in burgo meo de Innerkeithen unum toftum plenarium quod bonæ me-'morie Rex Malcolmus predictis canonicis dedit, et carta sua confirmavit, 'Tenend. et habendum libere et quiete et honorifice, sicut liberius quietius 'et honorificentius, aliqua elemosyna in regno Domini mei Regis Scotiæ ex 'donatione alicujus baronis tenetur et possidetur, et sicut predictorum vi-'rorum carte testantur et confirmant, his testibus Hugone cancellario Do-'mini Regis, Abbate Dunfermline Archibaldo. W. Abbate de Sancta Cruce, 'W. de Collicester canonico, Willielmo de Bosco clerico Domini Cancel-'larii, Simone Medico, Helia de Dundas, et multis aliis. Chartular Inch-'colm, p. 40;' Macfar.

[2] A grant of that king, of which Ada Comitissa is a witness, is addressed, 'Prepositis burgensibus meis de Inverkeithing;' Hay's Vet. Diplom. vol. i. p. 403. William survived his mother Ada many years.

[3] Simeon Dunelm, 205.

ed[1]; but, perhaps, it would be an improbable supposition to imagine that the town had then arisen. Lord Hailes appears to be of opinion, that the town did not exist even in the time of William the Lion [2]; but we know that the burgh of Dunbar was burnt by King John in the year 1216, during the reign of Alexander II. [3]; and it is therefore very probable that it existed in the preceding reign, and perhaps at a much earlier period. The town of Dunbar, at whatever period it first arose, continued for ages the demesne town of the Earls of March and Dunbar. There is a deed in the chartulary of Dryburgh, in which Patric, Earl of March, styles this town 'meus burgus de Dunbar [4].' It was erected into a *free* borough by David II. as will afterwards be seen; but it did not then cease to hold of the Earls.

In the charter of creation of the earldom of Wigton in favour of Malcolm Fleming, David II. conveyed to that individual 'Terras nostras de Farynes et de Rennys, et *totum* '*burgum nostrum de Wigtoun*, cum pertinentiis,' and erected these subjects into an earldom, and appointed that Malcolm Fleming and his heirs should have the title of Earls of Wigton [5].

During the 12th century many towns and villas were also in the hands of various ecclesiastical bodies [6].

There is in the chartulary of Aberdeen, a series of charters of David, Malcolm IV. and William, giving to the bishop

[1] See Macpherson's Geog. Illust. of Scot. Hist. in verb. Dunbar.

[2] Ad. Case of Sutherland, p. 69. c. iv.

[3] 'Quos duos burgos, Dunbar scilicet et Hadingtonam combussit;' Fordun, lib. ix. c. 28. See also Hailes' Annals, vol. i. p. 171.

[4] Fol. 39. The deed has no date.

[5] Robertson's Index, p. li.

[6] One of the most ancient existing deeds conveying a *villa* to any collective body, or to any individual, is a charter of Edgar, King of Scotland, to the monastery of Coldingham, by which he conveyed to that establishment 'villam totam Swinton,' (Anderson's *Diplomata*, p. vi.); but the subject conveyed was a portion of land, and it is called '*terram*' in a subsequent part of the charter. The word villa, as explained above, p. 428. note 5, was in England not originally applied to a town, but to a *praedium* or farm, and

of that diocese the villa de Veteri Aberdon [1]. At a much later period, in the reign of James IV., we find a charter of that monarch, erecting old Aberdeen into a burgh of barony, in favour of the bishop [2].

It does not appear quite certain at what period the Abbey of Dunfermline acquired the right which it ultimately came to have in the town of Dunfermline. In a charter of David I., already quoted, he calls it *meus burgus* [3]; and in one of the general charters of confirmation granted by that monarch to the Abbey, he speaks of the burgh in such terms as plainly shew that it still continued a royal possession [4]. By this

in this sense is used in the charter in question. At an early period, however, it appears also to have been applied in Scotland to a town or village. In the charter of foundation of the monastery of Kelso, in the reign of Alexander I., already noticed, p. 457, the expression *vetus villa* occurs, probably applied to the *town* of Selkirk, as distinguished from the *terra*. In the reign of Malcolm IV., we find that monarch bestowing the appellation of '*villa mea*' on Clackmannan; Chartulary of Dumfermline, fol. x.;—and even in the reign of David this place had probably acquired the nature of a small town or village, as we find a grant of a toft in Clackmannan by that king; Chartulary of St Andrew's Priory, p. 231. There is a charter of William the Lion, allowing the monks of Coldingham to remove as many of their *homines* as they can 'de Coldingham scyra,' 'ad 'Coldingham *villam*,' Chartulary of Coldingham, p. 27. Macfar.; by which latter expression was probably meant a village already formed, or then growing up around the monastery. The word *scyra*, as this and numberless other instances in the chartularies shew, was then generally, if not always, applied to much smaller territorial divisions than the modern shires or counties. Chalmers seems to consider the word, as thus applied, to have been synonymous with parish; Caledonia, i. p. 715. Schira 'proprie sectio, divisio, Saxon *scyran* scindere, dividere, radere, quod a Græc. 'ξυρειν i. radere, tondere;' Spelman in verb *schira*.

[1] Chartulary of Aberdeen, fol. 47 b, *et seq.* Chalmers, i. p. 755, however, has pronounced the charters of David and Malcolm fabrications, because the kings witness them in person, 'Teste meipso.' I shall not pretend to decide as to the justice of this sentence. It may be mentioned, that a charter of James IV. in 1498, Chartulary of Aberdeen, p. 542, Macfar., narrates a grant of David of Old Aberdeen as the episcopal seat.

[2] Chartulary of Aberdeen, p. 542.

[3] Page 458, note 2.

[4] By this charter he grants 'unam mansionem in burgo Dumfermlin,

charter, however, as well as by a more ancient deed of confirmation[1], David granted to the Abbey, 'Dunfermline citra 'aquam in qua eadem ecclesia sita est,' a grant which, whatever it embraced, could not have comprehended the whole burgh, as is evident from the other expressions just alluded to. In the reign of David II., we find Dunfermline, Musselburgh, Kirkcaldy, and Queensferry, ranked as burghs of the abbey[2].

Many of the other towns, which, at an early period, we find in the hands of the dignified clergy, such as St Andrew's and Glasgow, had probably not been the subjects of any specific grants; but had either been acquired along with the lands on which they stood, or had grown up in the neighbourhood of the ecclesiastical establishments to which they belonged. The charter of Malcolm IV. to the Bishop of St Andrew's, which shall be immediately noticed, presumes the existence of one or more burghs then belonging to that see; and the charter of William the Lion, granted to the Bishop of Glasgow, is not a conveyance of the town of Glasgow, but it probably conferred the privileges of a burgh on an already existing town[3].

We find the clergy, in the same manner as the temporal lords of towns, granting charters of particular lands or tenements within the towns respectively belonging to them[4]; and sometimes also making use of the expression *of noster burgus* in these grants[5].

'liberam et quietam, et omnem decimationem denariorum *firme burgi*, et 'decimationem molendini, et de omnibus dominiis meis de Dumfermlin;' Chartular. Dunferm. fol. ix. A copy of this charter is printed in Dalrym. Hist. Col. p. 383.

[1] Chartulary of Dunfermline, fol. viii.

[2] Chartulary of Dunfermline, fol. lx b. See the charter of David II. in the Append. No. 21.

[3] See this charter, Gibson's Hist. of Glasgow, p. 299.

[4] See grant of a toft 'in burgo de Glasgow,' to Paisley Abbey, by Joseline, Bishop of Glasgow; Hay's Vet. Diplom. vol. i. p. 165.

[5] 'Hugo, Dei gracia, ecclesie Sancti Andrei, humilis minister, omnibus 'Sancte Matris Ecclesie filiis, salutem. Sciant tam posteri quam presentes

Almost every one of the king's boroughs was in the immediate vicinity of a castle or stronghold, which was occupied by a royal officer, called sometimes a Constable. The protection afforded by these establishments was perhaps in some instances the origin of the borough, and in all cases must have been a cause of inducing new settlers. A general law in the Leges Burgorum, plainly supposes every town to be situated in the neighbourhood of a castle: 'Si aliquis forisfecerit burgensi, burgensis petat jus suum ad castrum extra portas, si vero burgensis forisfecerit castellano, castellanus petat jus suum in burgo de eo[1].' The castles of Roxburgh, Berwick, Edinburgh, Stirling, Dumbarton, Linlithgow, Rutherglen, and others, are well known in Scottish history.

Some of the boroughs of the nobles and clergy were also in this situation, and the castle was occasionally the residence of the lord of the town, as in the case of Dunbar.

The most ancient existing royal charters given to the boroughs of Scotland, are principally grants of particular mercantile privileges to the burgesses of those towns, and are not expressed in terms of incorporation. It has generally been sup-

'nos concessisse, et hac carta nostra confirmasse, ecclesie de Scone, et canonicis ibidem Deo servientibus et servituris, duas perticatas terre, quas predecessor noster Ricardus, bone memorie, eisdem dedit in burgo nostro de Sancto Andrea, tenendas sicut carta ejusdem testatur et confirmat.; sciant quoq. nos dedisse et concessisse, et hac carta nostra confirmasse, eidem ecclesie de Scone et canonicis, in liberam et perpetuam elemosinam, alias duas perticatas terre predictis duabus adjacentes, ut sit plenarium toftum quatuor perticarum, tenendas libere quiete et honorifice. Quare volumus et episcopali auctoritate precipimus, ut predicti canonici predictas quatuor perticatas terre adeo libere teneant, quiete et honorifice possideant, sicut aliqua abbacia aliquam terram, vel aliquod toftum in aliquo burgo tocius regni liberius *tenet* quiecius et honorificencius possidet. Testibus Waltero Archid. Sancti Andree, Hugone monacho de Aberbrothoc. Alexro. et Gregorio capellanis episcopi, Willo persona de Dervesin. Roberto capellano, Hugone senescallo, Stephani camerario episcopi, Roberto de Eboraco, Hugone Delboys, Magro Gamello hostiario.' Chartular. Sconen. fol. 71[b].

[1] Leg. Bur. c. 49. See also c. 50. and c. 60.

posed that there are none extant of an older date than the reign of William the Lion, and that we have no knowledge of any older grants from later deeds [1]. There is, however, preserved in the town of St Andrew's, a charter of Malcolm IV. to the burgesses of the bishop of that diocese, which is perhaps the oldest existing grant of privileges to the inhabitants of the towns of Scotland [2]. There is also a charter of Robert Bruce to the borough of Rutherglen, which narrates a charter of William the Lion, which in its turn mentions certain boundaries as having been conceded by David I. to that borough, within which its privileges might be exercised [3]; and in an act of Parliament of the year 1661, it is stated, that a supplication had been given in to Parliament by Rutherglen, bearing 'the said burgh to have been erected a frie burgh by

[1] Wight, p. 36. Caledonia, i. p. 780.

[2] The following are the terms of this charter, as given in Grierson's History of St Andrew's, p. 222.: 'Malcolmus, Rex Scotorum, omnibus suis probis hominibus, salutem. Sciatis, me concessisse, et hac carta confirmasse, burgensibus episcopi Sancti Andreæ, omnes libertates et consuetudines quas mei burgenses communes habent, per totam terram meam, et quibuscunque portibus applicuerint. Qua de re volo, et super meum plenarium prohibeo forisfactum, ne quis ab illis aliquid injuste exigat. Testibus, Waltero cancellario, Hugone de Moriville, Waltero filio Alani, Waltero de Lindsay, Roberto Avenel.' *Apud Sanctum Andream.*' The witnesses shew that the charter is of Malcolm IV. A gentleman skilled in Antiquarian matters informs me that he has seen the charter, and that it appears to be genuine.

[3] The following is a portion of William's charter, as recited in that of Robert: 'Willielmus, Dei gratia, Rex Scotorum, episcopis, abbatibus, comitibus, baronibus, justiciariis, vicecomitibus, præpositis, ministris, et omnibus probis hominibus, totius terræ suæ, clericis et laicis, salutem: Sciant, præsentes et futuri, me concessisse et dedisse, et hac carta mea confirmasse, burgo meo de Rutherglen, et burgensibus meis ejusdem villæ, omnes consuetudines et rectitudines quas habuerunt tempore Regis Davidis, avi mei; et illas divisas, *quas eis concessit;* scilicet, de Nethan, usque ad Polmacde: et, de Garin, usque ad Kelvin: et, de Loudon, usque ad Prenteineth; et de Karnebuth, ad Karn,' &c. A copy of Robert's charter will be seen in Ure's History of Rutherglen, p. 5.

'King David in the year 1126[1].' It appears, therefore, that this town had obtained certain privileges from that monarch; and, in all probability, a charter had been granted to it by David.

Besides the charters to particular boroughs, one or two charters were granted by William to the burgesses in general, of certain districts in the north of Scotland. One of these granted the privilege of a mercantile association: 'Burgensibus meis de Aberdoen, et omnibus burgensibus de Moravia, et omnibus burgensibus meis ex aquiloni de Munth manentibus[2].' Another charter of that king, granted 'burgensibus meis de Moravia,' the privilege that their goods should not be pointed except for their own proper debts[3], a privilege probably of some consequence in these early times, and very generally granted in these or in similar terms to various bodies, both secular and clerical, by the sovereigns of Scotland of that period, and sometimes also by those of England[4].

William granted charters to the boroughs of Aberdeen[5], Ayr[6], Rutherglen[7], Glasgow[8], Inverkeithing[9], Perth[10], Inverness[11], and perhaps to some other towns. That of Ayr is apparently a grant to a town newly established; that to Rutherglen is evidently a concession to a burgh of considerable standing, and which had obtained former privileges; and

[1] Mr Thomson's Acts, vol. vii. p. 239.

[2] Kennedy's Annals, vol. i. p. 8. See this charter afterwards mentioned under the subject of the Mercantile Gild.

[3] 'Ut nullus scilicet eorum namum capiat pro alicujus debito nisi pro eorum debito proprio.' This charter is narrated in a charter of James III. to the burgh of Inverness. See Wight, App. No. 2.

[4] See, for instance, King John's charter to Dunwich, Brady, App. No. 3 b, and that of Henry III. to Guildford, Maddox, Firma, p. 43.

[5] See Kennedy's Annals of Aberdeen.

[6] See Wight's App. No. 38. [7] See *supra*, p. 470, note 3.

[8] Gibson's History of Glasgow, p. 299, *et seq.*

[9] House of Commons' Report, 1793, p. 36.

[10] Cant's Hist. of Perth, App. p. 6. [11] App. Wight, No. 2.

that to Perth is a grant to the new town of Perth, which arose after a dreadful inundation, in the year 1210, had destroyed the old town[1]. A variety of charters were also

[1] This destructive inundation, which had nearly proved fatal to William, his brother David, and his son Alexander, is mentioned by Fordun, Boece, and Buchanan. According to the two last, the new town was built on a *different* site from the old. Boece says, lib. xiii. fol. 278, 'ædo civi-'tatem transtulit, et novam urbem condidit nomine Perthum'. Buchanan's words, lib. vii. p. 216, ed. 1697, are '*paulo infra* ad eundem amnem 'novam urbem commodiore loco extruendam curat, et nomine non mul-'tum immutato Perthum appellat.' According to those two authors the old name was Bertha. Fordun, lib. viii. c. 72, makes no express mention of the rebuilding, although, in describing the inundation, he mentions a change of name. Cant, in his history of Perth, App. p. 112, and the annotator on this passage of Fordun, reject the account of Boece and Buchanan, and maintain that the new town occupies the same site with the old. There is a passage relating to this inundation in a deed of sale, only nine years after it took place, preserved in the Chartulary of Scone, p. 201; Macfar. 'Sciant universi presens scriptum visuri vel audituri quod anno ab 'incarnationis Dni. M° CC° XIX° regni regis Alex. secundi V°. Johes Ylbarem 'de Perth vendidit canonicis de Scona locum tofti quem habuerant antequam 'inundacio fluminis per violencia eum asportaverit, in australi parte pon-'tis maximi in oriente versus flumen de Tay, in capite scilicet tocius vici 'habentem in longitudine LXX pedes, et in latitudine XX; et hoc fecit idem 'Johes quia non potuit prefatum toftum prenimia profunditate aque in 'pristinum statum relevare.' According to Boece, Buchanan, and Fordun, the old name of this town was *Bertha*. There is perhaps not much difference between this and *Perthum*; but, such as it is, it may be doubted if the change happened at the time of the inundation. A variety of charters of David I. prove that this town bore the name of *Perth* (sometimes written *Pert*) in the time of that king, and therefore many years *before* the inundation. Thus a charter of David I. in Anderson's Diplomata, Plate xvi. is dated 'Apud Pert.' See also the charter of that king, which has been quoted at p. 458. note 2, another of Ada, p. 462. note 5, and a third of Walter, the son of Alan, p. 460. note 1, in all which the town is called *Perth*. A charter also of William to the burgesses of Aberdeen and of Moray, granted several years before the inundation, is dated 'Apud 'Pert.' Kennedy's Annals of Aberdeen, vol. i. p. 8. Fordun, indeed, does not expressly say that the alleged change of name took place at the time of the inundation.

granted by Alexander II. and Alexander III. to different boroughs [1].

These charters of William and of the Alexanders are in general of a uniform style, granting 'burgo et burgensibus,' or 'burgensibus' simply, one or more privileges narrated in the deed. The usual privileges are, that their goods shall be free from toll or tribute; that they shall not be distrained but for their own debts; and that they shall have a market, on certain days. The great objects evidently were to encourage settlers, and to promote traffic. The immunities are the same with some of those which were granted to English towns by the sovereigns posterior to the conquest [2].

Besides the privileges thus granted by royal charter, various others are to be found bestowed on them in the collection of statutes attributed to William the Lion; such as the right of a merchant gild, and certain exclusive privileges of buying and selling [3]. Certain mercantile privileges are also to be found in the Leges Burgorum [4].

The privileges thus granted were, however, not entirely confined to the boroughs of Scotland, as we find that some similar concessions were made to the ecclesiastical establishments. The monks of Coldingham obtained from William more than one charter, exempting them from toll, in terms similar to those in which this privilege was granted to boroughs [5]; and they received from Alexander II. a charter allowing them to deal directly with foreign merchants [6]. Other

[1] See those of Alexander II. and III. to Aberdeen, Kennedy's Annals, vol. i. p. 11, 12, 13; and of one of the Alexanders to Inverness, App. Wight, p. 411.; and mention made of various charters to different boroughs by these kings, Report 1793, App. (A).

[2] Compare the charters which have been alluded to with those in Brady's Appendix, and in Maddox Firma Burgi.

[3] Stat. Wil. c. 35, 36, 37. [4] C. 18, 22, 139.

[5] Chartulary of Coldingham, p. 16, 17; Macfar.

[6] Chartulary of Coldingham, p. 36. It is a singular circumstance, that the monks of Arbroath obtained a series of charters from John, Henry III, and Henry IV, Kings of England, giving them the right of selling

monasteries also obtained mercantile privileges from different monarchs [1].

The controul of the magistrates, and of the whole affairs of the royal boroughs of Scotland, was, at an ancient period, possessed by the chamberlain of Scotland. This great officer existed at least as early as the reign of David I; and in him was vested the charge of the royal revenues. The chamberlain, or his deputies, held courts in ayres or circuits throughout the kingdom; in which they took cognizance of the whole affairs of the different boroughs. The magistrates and all the burgesses were bound to give attendance at the ayre, and a fine was imposed on the absentees [2].

In this court, the chamberlain heard and determined the various charges for breach of official or other duties, brought against the magistrates and other inferior civil officers, and against various classes of the inhabitants, as the butchers, bakers, brewers, and others. In the Iter Camerarii is given a detailed account of the different charges which might be brought against them. The complaints and other matters brought before the chamberlain, it would appear, were tried by an assize of the more respectable citizens [3].

The chamberlain also exercised a controul over the manner in which the common good of the borough was employed, as shall be afterwards shewn. He likewise levied the various portions of the royal revenue which were derived from the towns, as shall also be afterwards pointed out.

Besides this court of the chamberlain, held in his ayre, the

their goods in England free from toll, and naturalising them in England. The charter of Henry IV. also naturalises their servants and tenants, when they came to England, and allowed them to traffic on paying the duties; Hay's Vet. Diplom. vol. ii. p. 371, 373.

[1] Caledonia, vol. i. p. 782, *et seq.*

[2] Iter Camerarii, c. 3.

[3] 'Postea vocentur omnes querelæ, et super his tenetur bona assiza et 'non suspecta de melioribus et fidelioribus burgi;' Iter Camerarii, c. 3. 'Deinde levetur assiza pro inquisitione facienda super articulis, itineris 'camerarii;' ib.

same officer held another tribunal, called the Court of the Four Boroughs, the proper object of which appears to have been the *falsing* of dooms, or reviewing the judgments pronounced in the borough courts. In this court, the chamberlain was originally assisted by delegates from the boroughs of Edinburgh, Stirling, Berwick and Roxburgh. But, by an act of the Parliament held at Perth in the year 1368, it was provided, that, so long as Berwick and Roxburgh should be in the hands of the English, Lanark and Linlithgow should be substituted in their places [1]. This court was at that date held at Haddington [2]. It would appear, however, from the expressions of a charter granted by James II. in the year 1454 to Edinburgh, appointing the Court of Four Boroughs to be held in that town for ever, that, as early as the reign of James I, or probably before that period, this court had been held at Edinburgh; for this charter recites another charter granted by James I, with the consent of his Parliament, ordaining the court of Four Boroughs "apud burgum nostrum de Edinburgh annuatim teneri, *sicut a temporibus retroactis tenebatur* [3]". It would also appear, that, in the year 1405, a court of the Four Boroughs was held at Stirling [4].

From the terms of this charter of James II, some idea may be formed of the constitution of this court, and of the purposes for which it was held. After appointing the court to be held at Edinburgh, it proceeds thus: 'Quare magno 'Camerario nostro, et suis deputatis qui pro tempore fuerint, 'stricte precipiendo mandamus: quatenus curiam Parliamenti 'quatuor burgorum haberi et teneri more solito faciatis, in 'burgo nostro antedicto, convocatis et summonitis annuatim ad

[1] Curia Quat. Burgorum, c. 2. This enactment, *verbatim* as it is printed by Skene, occurs in the record discovered in the State Paper Office, and brought to Scotland in 1793, and pronounced by a committee of the judges to be an authentic record; See Robertson's Records of Parliament, p. 114.

[2] Cur. Quat. Burg. c. 2.

[3] See this charter; Black on Burghs, App.

[4] Cur. Quat. Burgorum, c. 1.

'hoc comparituris commissariis quatuor burgorum principali-
'um, viz. Edinburgh, Stirlin, Lithcow et Lanerk, dictæ curiæ
'sectatoribus, sive accessoribus, ad subeundum, ordinandum,
'et finaliter determinandum, de et super judiciis burgorum
'universalium regni nostri curiis dictis, sive contradictis: Ac
'etiam mensuram ulnæ, firlotæ, sive bollæ, laginæ, et petræ,
'more solito Leigiis et communibus nostris, dandum, liberan-
'dum et recipiendum: Nec non omnia alia facienda et exer-
'cenda quæ in hujusmodi curia Parliamenti, secundum leges,
'statuta, et burgorum consuetudines sunt tractanda, subeun-
'da, et finaliter determinanda."

In a court of the Four Boroughs, held in the year 1405, it was provided that two or three commissioners should come to that court annually from each borough south of the Spey, to treat of such matters as concerned the immunities and general welfare of the boroughs [1].

The court of the Four Boroughs is mentioned in an act of the year 1503 [2], as still judging in the falsing of dooms. The precise period at which it ceased to be held is unknown; but it is not probable that it was ever held after the establishment of the College of Justice by James V. in the year 1532.

It appears also uncertain at what precise time the chamberlain ceased to hold his Ayre Courts. It seems most probable that they ceased at the same time with the court of Four Boroughs. In one town, however, the precise date is fixed. In Aberdeen the chamberlain's visits had been reckoned a grievance; and it is stated in the records of that borough, that, in the year 1512, the sum of L. 500 was raised by an assessment on the inhabitants, and paid to the crown, for relieving Aberdeen from chamberlain's courts, as well as from the justice ayres [3]. After that period the chamberlain's court was abolished in Aberdeen [4].

The office of chamberlain, long after that officer had ceased to have any controul over the boroughs, still continued to be borne

[1] Cur. Quat. Burgorum, c. 1.
[2] C. 95.
[3] See Kennedy's Annals of Aberdeen, i. p. 83.
[4] Ib.

by various noblemen. About the year 1584 it became hereditary in the ducal family of Lennox [1]. On the death of Charles Duke of Lennox, in the year 1672, the estate and offices of the house of Lennox, including that of Great Chamberlain, fell to King Charles II., as the nearest heir-male and of tailzie to the Duke, to whom he was served heir the 6th of July 1680 [2]. The office of chamberlain was afterwards bestowed by Charles on his natural son the Duke of Monmouth [3].

The act of the Four Borough Court, already alluded to, by which commissioners were called from the boroughs south of the Spey to join in its deliberations as to the general welfare of the boroughs, is generally understood to have been the origin of the convention of royal boroughs [4]. It appears, however, to be uncertain how far this provision actually took effect. The act 1487, c. 111, describes more nearly the nature of the convention as at present constituted. It provides. 'That yeirly in time to cum, certaine commissares of all 'burrowes, baith south and north, conveine and gadder togidder anis ilk zeir in the burgh of Innerkeithing, on the morne 'after Saint *James* day, with full commission; and there to 'commune and treate upon the weilfare of merchandice, the 'gude rule and statutes for the common profite of burrowes, 'and to provide for remeid upon the skaith and injuries sustained within the burrowes; and quhat burrow that compeiris not the said daie be their commissares, to paye to the 'coastes of the commissares five pound; and zeirly to have 'our soveraine lordis letter to distreinzie herefore, and for the 'inbringing of the samin.'

[1] Crawford's Officers of State, p. 333. [2] Ib. p. 339 [3] Ib.

[4] 'In Curia Quatuor Burgorum tenta apud *Stirling* 12 die mensis *Octobris* 'anno domini 1405, decretum est quod duo vel tres sufficientes de quolibet burgo Domini Regis, ex parte *australi* aquæ de *Spey*, sint quolibet 'anno, secum commissionem habentes, ad dictum Parliamentum quatuor 'burgorum ubicunque tenendum fuerint, ad tractandum, ordinandum et 'determinandum super his omnibus quæ ad utilitatem reipublicæ burgorum universorum, dicti domini nostri regis, et ad eorum libertates et 'curiam, dignoscuntur pertinere;' Cur. Quat. Burg. c. i. sect. 1.

Of the meetings of this assembly, however, there is no record before the year 1552.

A subsequent statute, 1578, c. 64, gave the burghs 'freedom and privilege to convene four times in the zeir, for sik 'matters as concernes their estait; and that in quhat burgh 'it sall be thocht maist expedient to the maist part of the 'saidis Burrowes. Providing alwais for eschewing of tumultes, that there be present at the saides conventiones, for 'everie burgh, in number ane; except the towne of Edinburgh, to have ane mae nor the other burrowes.'

For a long time past, the convention has annually met at Edinburgh on the second Tuesday of July [1].

In so far as can be collected from the Leges Burgorum, the ancient foundation of burgess-ship and of its privileges, was the possession of a portion of land within burgh, which the proprietor was bound to occupy or at least to build upon and render habitable within a year. This is evident from a variety of texts of the Leges Burgorum [2], and also, of the

[1] We have formerly had an opportunity of mentioning those cases which have occurred in our courts with respect to their power of altering the sets of burghs. See p. 345, *et seq.*

[2] C. 197. 'Nullus debet gaudere libertate burgensis, nisi habeat infra 'diem et annum post introitum suum, vnam terram hospitatam et 'distringibilem.'

C. 53. 'Nullus potest esse burgensis domini regis de aliqua terra nisi 'faciat servitium domino regi, quantum pertinet ad vnam particatam terre.'

C. 29. Qvicunq. factus fuerit novus burgensis de terra vasta et nullam terram habuerit hospitatam, potest habere respectuationem 'quæ dicitur *hirset*, in primo anno.'

2. 'Et post primum annum hospitabitur et ædificabit terram suam.'

C. 13. 'Si rusticus manens extra burgum in burgo burgagium habeat, 'non tenebitur in alio loco aliquo pro burgense, nisi in eodem burgo in quo burgagium habet.'

2. 'Si verò burgensis ille rusticus, calumniet burgensem in burgo manentem: Burgensis contra rusticum se lege burgi defendet.'

3. 'Si autem burgensis in burgo die ac nocte manens, hujusmodi rus-

Curia Quatuor Burgorum [1]. Heritage, in short, appears to have been in the early history of the Scottish burghs, the essence of burgess-ship. It was also provided, that not more than one person could have the privilege of burgess-ship from the same tenement [2]. The son of a burgess, however, so long as he remained in his father's house, was entitled to the same privileges of buying and selling as his father [3].

There seems to be a trace of the same doctrine with respect to what constituted burgess-ship in a charter of William the Lion erecting the royal burgh of Ayr [4].

It is said that a custom existed in the burgh of Lauder, at least as late as the year 1668, by which the right of burgess-ship was made to depend on the possession of a burgh property. A royal grant of 150 acres is said to have been made of old to that burgh, under this explanation, that they should be possessed by 150 burgesses, and that there should not be a greater number of burgesses than this limited number [5]. It is very probable that the custom may have existed, but the account given of its origin is rather vague.

'ticum appellaverit de aliqua re, vnde oriatur duellum, ille rusti-
'cus potest se bello defendere contra burgensem.'

[1] C. 1. sect. 3. 'Item quod nullus gaudeat libertate burgi, nisi habue-
'rit unam terram hospitatam, et distringibilem infra diem et annum post
'introitum.'

[2] '—quia duo homines simul et semel non possunt habere libertatem
'burgi de uno et eodem burgagio.'—Leg. Burg. c. 138.

[3] Leg. Burg. c. 16. 'Filius burgensis quandiu fuerit ad mensam patris
'sui, habebit eandé libertate emendi et venendi, quam et pater
'suus habet.'

2. 'Sed cum ab eodem recesserit, ista libertate non gaudebit, nisi ip-
'se filius fuerit burgensis.'

[4] One clause is this: 'Concessi etiam burgensibus meis ibidem manen-
'tibus ut cum quolibet plenario tofto suo, habeant sex acras terræ, quas
'de boscho extirpaverint infra predictas quinque nummatas terræ, ad fa-
'ciendum inde commodum suum.' This clause seems to take it for granted that each burgess had a toft.—App. Wight, No. 38.

[5] This account is given in the report of a case by Gilmour, p. 67. One of the parties offers to prove, 'That the constant custom of the town of

In the Iter Camerarii, one of the points of accusatiou against the bailies of burgh, is thus expressed, 'Quod ven-'dunt et concedunt libertates burgi servientibus extraneis, ut 'possunt emere et vendere cum burgensibus et uti cæteris 'commoditatibus et libertatibus burgi [1].' From this passage we should collect, that such sales of privileges were altogether illegal. In a subsequent chapter, however, of the same book [2], we find a point of inquiry to be made by the chamberlain in these terms, 'Si ballivi aliquibus vendunt libertatis 'burgi *sine consensu communitatis*;' from which we might infer, that such a sale *might* be made *with* the consent of the community. But in a subsequent part of the same chapter [3], another point of inquiry is, 'de illis qui utuntur *libertate* 'burgi non habentibus aliquam terram edificatam ultra an-'num.' Taking the whole of these passages together, we may conclude, that, at the date when the Iter Camerarii was written, which was probably posterior to the Leges Burgorum, the proper right of burgess-ship was still conferred by the possession of burgh property; and that the sale of the liberties of a town to a stranger was illegal; or, at least, that it could only be made with the consent of the community of the burgh, and when so obtained, was only a privilege enjoyed by a stranger, and was not to be viewed as a proper right of burgess-ship.

'Lauder among the burgesses is to transmit their rights to burgess acres 'by naked dispositions and acts of the town courts; concerning which 'acres, there are diverse other privileges singular and not elsewhere in 'any other burgh; for there being of old disponed by the king, 180 acres 'to 180 burgesses of Lauder, they were disponed with this quality, that 'there can be no more or fewer burgesses than there are burgesses acres; 'and no burgess can possess more than one, and they are not transmitable 'to any but to a burgess, who is never infeft, but bruiks by an act of 'court, by a naked disposition.' This account is also given by Spottiswood in his notes on Hope's Min. Prac. p. 325.

[1] Iter Camer. c. 4. sect. 15. [2] Ib. c. 39. sect 18.

[3] Sect. 40.

The same view of the nature of ancient burgess-ship in Scotland is confirmed by that provision of the Leges Burgorum, relating to villains or bondmen: 'Si homo comitis vel 'baronis, seu cujuscunq. servus fuerit, venerit in burgo; et 'emerit sibi burgagium, et manserit in eodem burgagio, per 'vnum annum et vnum diem, sine calumnia domini sui, vel 'ejus ballivi, semper erit liber, et libertate burgi guadebit, 'sicut burgensis, nisi sit servus Domini Regis [1].'

The possession of burgage property was thus made essential to this privilege [2].

By the ancient law of Scotland, as shewn by the Leges Burgorum, a person does not appear to have lost the status and privileges of burgess-ship by residing without the town. As the possession of burgh property conferred the character of citizenship, so it preserved it, even although the proprietor lived beyond the precincts of the burgh [3]. Many texts of the

[1] Leges Burg. c. 17.

[2] It may be observed, that the account of this privilege given in Regiam Majestatem differs considerably from that in the Leges Burgorum, and coincides nearly with that laid down by Glanville as the ancient law of England. In Regiam Majestatem it is as follows: 'Item, si nativus 'servus, cujuscunque servus fuerit, quiete per vnum annum et vnum 'diem in aliqua villa privilegiata (sicut in burgo domini regis) manserit, 'scilicet, in eoram communia, vel gilda, tanquam burgensis, sine calumnia 'domini sui, vel alterius nomine suo, scilicet, ballivi vel senescalli, eo ipso 'facto, a jugo liberatur servitutis.'—Lib. ii. c. 12. sect. 17. In Glanville the law is thus given: 'Item si quis nativus quiete per unum annum et 'unum diem in aliqua villa privilegiata manserit, ita quod in eorum com-'munem gyldam tanquam civis receptus fuerit, eo ipso a villenagio libe-'rabitur.'—Lib. v. c. 5. This rule is also laid down in a charter of Henry III. to Glocester.—Madox, p. 123: and in another charter of Richard, Earl of Cornwall, brother of Henry III. and who afterwards became King of the Romans, in favour of the borough of Portvan, or West Looe, in Cornwall.—Merewether's West Looe Case, p. 31.

[3] It has sometimes been thought, that simple residence constituted burgess-ship at an early period; but the authorities which have been alluded to, and which follow in the text, show how very far this was from being the case by the ancient constitution of the burghs of Scotland.

Leges Burgorum establish that this was the law, as the following for instance: 'Si rusticus manens extra burgum, in 'burgo burgagium habeat, non tenebitur in alio loco aliquo 'pro burgense, nisi in eodem burgo in quo burgagium ha-'bet [1].'

The same doctrine may be collected from the law as to attendance at the head courts. Every burgess, whether living within or without the burgh, was bound under a penalty to attend the three principal head courts: 'Quicunque burgen-'sis ad hæc (*i. e.* the head courts) not fuerit nisi se legaliter 'essoniaverit, vel nisi fuerit infirmus, vel extra patriam, vel 'ad nundinas, sed fuerit manens in burgo, dabit quatuor de-'narios ad forisfactum suum. Si vero extra dabit octo so-'lidos: et hæc est causa; quia burgensis rure manens, non 'compellitur venire ad aliqua placita, nisi ad hæc tria princi-'palia per annum [2].' As a nonresident burgess was thus bound to attendance at the three head courts under a heavy penalty, we cannot doubt that he was entitled to all the privileges of that attendance; and, amongst others, to that of having a voice with the rest in the election of magistrates [3].

In like manner, a burgess was not deprived by non-residence of the *freedom* of the burgh in a mercantile point of view: 'Nullus burgensis qui manet extra burgum, potest ali-'quid emere, nec vendere, nec liber esse in aliquo burgo, '*nisi in illo burgo in quo est burgensis* [4].'

The following law may, perhaps, be thought inconsistent with this doctrine, and to import the necessity of residence after a year: 'Quicunque factus fuerit novus burgensis de 'terra vasta, et nullam terram habuerit hospitatam, potest 'habere respectuationem, quæ dicitur *hirset* [5], in primo an-'no. Et post primum annum hospitabitur et ædificabit ter-

[1] C. 43. sect. 2 and 3. [2] C. 13.

[3] See *infra* as to the ancient privileges of burgesses in elections.

[4] C. 108.

[5] Continuationem ne cogatur solvere firmam vel redditum burgalem.—*Skene.*

'ram suam [1].' But as the other texts which have been quoted are express, this last law seems to mean nothing more than that a person who acquired a waste piece of ground (terra vasta) was bound within a certain time to build upon it and render it habitable, so as to be *distrainable* for debt in general, or for the firm of the superior. There are other laws to a similar effect; as the following: 'Nullus debet gaudere libertate burgensis, nisi habeat infra diem et annum 'post introitum suum, unam terram hospitatam et distringibilem [2].

Such appears to be the doctrine of the Leges Burgorum as to non-residence. In the Statuta Gildæ, however, which were probably the rules of a particular town, and of a later date than the more ancient part of the Leges Burgorum, we find a law imposing certain restrictions on non-resident burgesses [3].'

Every person who became a burgess was bound, according to one of the Leges Burgorum, to swear fidelity to the king, his bailies, and to the community of the burgh [4]. In this provision may be traced the ancient use of a burgess oath.

Every burgess of the king paid to the sovereign a certain annual reddendum for his borough property. The rate of this duty is fixed in the Leges Burgorum, at fivepence for each *perticata* or rood of land [5]. In the charter of Wil-

[1] Leg. Burg. c. 29. sect. 1, and 2. [2] Ib. c. 137.

[3] 'Nullus burgensis vel confrater gildæ nostræ forisbabitans audeat vel 'præsumat aliqua mercimonia ad gildam nostram pertinentia infra bur-'gum nostrum emere vel vendere, nisi tantum in die fori. Et quod nul-'lus forisbabitans, emat aliqua victualia, ad burgum nostrum per naves ve-'nientia. Et si contrarium fecerit, et super hoc convictus fuerit, dabit 'vnum dolium vini ad gildam nostram.'—Stat. Gild. c. ult.

[4] Leges Burgorum, c. 2. 'Quicunque factus fuerit de novo Burgensis 'Domini Regis, primo jurare debet fidelitatem Domino Regi et Balivis 'suis et communitati illius burgi in quo factus est novus burgensis.'

[5] Leges Burgorum, c. i. 'Imprimis quilibet Burgensis debet Domino 'Regi burgagio quod defendit, pro particata terræ, quinque denarios an-'nuatim.' 'Quilibet burgensis *domini regis*,' &c. Ayr M.S.

liam to the borough of Ayr, that king granted to the burgesses that, with each toft, they should have six acres of ground, within a space of ground given to the town, and ordered that for each toft with its six acres, an annual duty of twelve pence should be paid [1].

The burgesses were also bound to take care that their houses should be duly watched. The mode of doing this is minutely described in a passage of the Leges Burgorum [2]. It seems by the terms of that passage to have been held as the condition on which the mercantile privileges of the town were enjoined. In the Chamberlain Ayr, the bailies and other borough officers were liable to accusation for neglecting to enforce the watching of the borough by all ranks [3].

The burgesses thus, at this period, held their property under the twofold obligation of paying the borough mailles to the king, and of watching and warding; from which circumstances we may collect, that the latter duty was not then the *sole* reddendum of borough holding.

[1] 'Concessi etiam burgensibus meis ibidem manentibus, ut cum quolibet plenario tofto suo habeant sex acras terræ, quas de boscho extirpaverint infra predictas quinque nummatas terræ, ad faciendum inde commodum suum: Reddendo annuatim mihi, pro quolibet tofto, et sex acris terræ illi adjacentibus, xii. denarios.' Wight, p. 476.

[2] C. 86. 'De omni domo in qua aliquis habitat, vnus tenetur propter metum periculi, vigilare. Qui cum baculo ostiatim circumibit. Et erit de ætate virili. Qui etiam cum duabus armaturis exibit, quando pulsabitur ignitegium (cover-feu.) Et sic vigilabit caute et solicite, vsq ad diei auroram. Et si inde defecerit dabit quatuor denarios ad forisfactum.'

'2. Exceptis viduis, quæ tamen si communicaverint cum vicinis suis, in emendo et vendendo, vigilare debent, et alia onera supportare.'

The Ignitegium, Cover-feu, or Curfeu, which had been established in England by the Conqueror, as a warning to extinguish fires at a particular hour at night, had made its way into Scotland. The custom appears to have actually prevailed in the considerable towns, and traces of it are still to be found in some of the towns of Scotland, in the practice of ringing bells at particular hours in the evening. See Kennedy's Annals of Aberdeen, i. p. 88.

[3] Iter Camerarii, c. 4. sect. 16. and 17, c. 5. sect. 4.

These borough mailles formed a part of the royal revenue at this time; and the great chamberlain of state, in virtue of his superintendence of the royal revenue, and of the general affairs of the boroughs of the kingdom, made inquiry in his ayres or circuits, as to the regular payment of these duties [1].

The other principal source of the king's revenue, derived from the boroughs at that period, was the amount of customs levied on the sale of commodities within the liberties of the boroughs. Each town, at least those holding of the king, had an office called a *custumarius*, who levied the king's duties, and paid them over to the chamberlain [2]. The customs were divided into two classes, the *great* and the *small* custom [3]. The former appears to have been levied principally on the great staple commodities of that period, which all the statutes and charters of those times show were wool and skins [4], the proper products of a mountainous and pastoral country. Even with respect to the boroughs of the church, and of the nobles, the king appears to have had a right to levy the great customs, as is shown by the special grants

[1] In the Iter Camerarii, there is this provision: 'Deinde petatur rentale 'burgi per quod firmæ perticatarum terræ leventur vel levari debeant 'tam de terris vastis quam ædificatis.' c. 3. And inquiry was to be made 'Si sit aliqua terra in burgo vel extra, quæ non solvit domino regi, an- 'nuum redditum.' C. 39, sect. 8.

[2] See the chamberlain's accounts as far back as the year 1330, printed from the originals in Exchequer, by the late Mr Davidson, writer to the Signet, and reprinted in the 3d vol. of Hailes's Annals, edit. 1797. See also the rules as to accusations against the *custumarii* in the Chamberlain Ayr. Iter Camerarii, c. 12 and 13.

[3] See the Iter Camerarii, *ut supra*.

[4] Lana, pelles et coria, are the perpetually recurring articles of traffic. See Stat. Will. c. 36., Leges Burgorum, c. 18., and the royal charters to different boroughs. David II. gave a grant of one-fourth of the great custom, 'de lanis, coriis, pellibus, carnibus, et aliis quibuscunque, ad magnam custumam pertinentibus,' to the Bishop of St Andrew's, which grant was confirmed by Robert III. Reliq. Div. Andreæ, p. 84. See also Hay's, Vet. Diplom. v. ii. p. 363, and the charter in Appendix, No. 22.

which he sometimes made to monasteries of the whole or a part of the great customs of their towns [1]. In the case of such gifts, precepts were addressed to the royal chamberlain, and the inferior revenue officers, to give effect to them [2]. It was also extremely common for the sovereigns to make grants to the nobility, and other individuals, of certain sums by way of pension out of the great customs [3]. Accordingly, in the chamberlain accounts, we find many instances in which that officer takes credit for sums paid to these pensionaries, in virtue of royal grants, which had been made either out of the customs or firms [4].

About the beginning of the 14th century, the sovereigns of Scotland adopted the method which had been followed by the kings of England, of granting feus or perpetual leases of the boroughs, and of certain branches of the royal revenue to the communities of these boroughs, in return for which, they stipulated a fixed annual reddendum of money [5]. This measure produced a change in the form of the royal charters granted to boroughs. The early ones, we have seen, were usually concessions of particular mercantile privileges. They now frequently assumed the form of a regular feudal grant of the town in fee-farm, to the burgesses and community, for a money reddendum. Robert Bruce appears to have been the first King who adopted this method. The borough of Aberdeen, together with the royal forest of Stoket, was granted by him in fee-farm to the burgesses and community of that town, for an annual reddendum of L. 213 : 6 : 8, *pro omni*

[1] See grants of this kind by David II. and Robert III., to the monastery of Arbroath, recited in various deeds; Hay's Vet. Diplom. vol. i. p. 363, *et seq.*; and similar grants by one of the Roberts to the monastery of Dunfermline. Chartulary, Fol. lx b.

[2] See examples of such precepts, Chart. Dunfermline, ibid, and Hay's, Vet. Diplom. vol. ii. p. 364, *et seq.*

[3] Many examples of such grants exist in the record of the Great Seal.

[4] See Davidson's publication.

[5] See *supra* p. 430. as to this practice in England.

*alio servitio* [1]. He also granted the city of Edinburgh in feu, for a reddendum of 52 merks [2].

David Bruce followed the example of his father in this mode of granting borough charters. The town of Inverness was feued by him to the burgesses and community of that town, for a reddendum of 80 merks [3].

Robert II. granted feus of the boroughs of Perth [4], Linlithgow [5], Haddington [6], and Rutherglen [7], to their several communities for reddenda of L. 80, L. 5, L. 15, and L. 13, respectively. Robert III. granted the borough of Ayr to the burgesses and community in fee-farm, for a reddendum of L. 10; and the borough of Inverkeithing, in like manner, for a reddendum of 100 shillings, 'una cum servitiis debitis 'et consuetis [8].'

[1] See this charter in Kennedy's Annals, vol. i. p. 24.

[2] 'Robertus, &c. Sciatis nos dedisse, concessisse, et ad feodissimam di-'mississe, et hac presente carta confirmasse burgensibus burgi nostri de 'Edinburgh, predictum burgum nostrum de Edinburgh, una cum portu 'de Leith, &c. Tenend. et habend. eisdem burgensibus, et eorum succes-'soribus, de nobis et hered. nostris, &c. Reddendo inde nobis, et heredi-'bus nostris annuatim dicti burgenses et eorum successores quinqua-'ginta duos marcas sterlingorum ad terminos, &c. Apud Cardros vices-'octav. die Maii anno reg. nost. vices. quarto.' See Appendix to Replies drawn by Mr Thomson in Gibson *v.* Forbes 1818. It may here be observed, that nearly the whole of the account given in the text of the system of the royal feus of towns, was written before I had seen this paper of Mr Thomson, in which a similar account is given of this system. I have been happy to add his examples of such grants to the other examples mentioned in the text. In Hay's collection of ancient charters, vol. i. p. 505, there is a document entitled, 'List of charters, and other things 'found in the Thesaure House of the town of Edinburgh, before the 'revolutions that happened Queen Mary.' In this list there is no older charter to Edinburgh than that of Robert Bruce.

[3] This charter is narrated in a confirmation by James III.; Wight, App. p. 412.

[4] Reg. Diplom. Abbrev. Roll 2., No. 66.

[5] Reg. Diplom. Roll 7, No. 26.

[6] See Mr Thomson's paper in the case of Gibson *v.* Forbes 1818, p. 11.

[7] Roll 7, No. 76.

[8] The original is in the archives of the borough. See Mr Thomson's paper, p. 11.

In some of these charters the small customs and borough firms were conveyed in the dispositive clause [1]; at other times they were narrated in the tenendas [2], and, although, according to strict feudal principles, they might not in the latter case be held as duly conveyed, yet in all probability the grant was equally effectual.

By virtue of these grants, therefore, the king conveyed the town, and gave up certain parts of his revenue, on condition of receiving a fixed annual sum in lieu of them. The great custom was never included in these feus, and was sometimes expressly reserved, as in the Perth feu. It still continued to be paid by the *custumarii* to the chamberlain. The chamberlain accounts, in so far as related to the revenue drawn from the boroughs comprehended two great classes, the sums drawn from the magistrates, and those drawn from the *custumarii* of each town. The former class appears to have chiefly consisted of the firms of the town [3], *i. e.* of the annual reddendum stipulated in lieu of the king's proper duties, where a feu had been granted, or perhaps of those duties themselves where no equivalent was drawn; and from these firms, as from the great customs, the sovereign made frequent grants to the monasteries [4], as well as to individuals [5].

[1] 'Sciatis quod concessimus et ad firmam dimisimus burgensibus et 'communitati dilectis et fidelibus burgi nostri de Lynlithee, burgum 'nostrum predictum una cum portu de Blacknes, *firmis burgi et parvis* 'custumis ac tholoneis, cum curiis et curiar. exitibus,' &c. Roll 7, No. 26.

[2] In the feu of Perth by Robert II., the town is conveyed, 'Tenend. 'cum annuis redditibus particatarum, et burgagior. firmis toloniis ac par-'va custuma.'

[3] Thus an item in one of the accounts is, 'Item idem onerat se de fir-'mis burgi per ballivos.' See the accounts made up from the rolls in Exchequer. Kennedy's Annals of Aberdeen, i. p. 44. See also p. 47.

[4] See the chartularies *passim* for those grants. There is in the chartulary of Dryburgh, fol. 97, a letter addressed by Edward R. Angliæ dilecto clerico suo Joanni de Sandal, Camerario Scotiæ, directing him to take care

[5] See the Magistrates' accounts in Kennedy's Annals of Aberdeen, p. 45, &c.

The other class consisted principally of the great customs levied from the chief articles of trade, wool and skins, as appears from various accounts rendered by the collectors of customs to the chamberlain [1]. The magistrates also rendered to the chamberlain accounts of charge and discharge of the reddenda due to the king by the feu-charters, with which reddenda the sums for which they take credit accurately correspond [2]. The discharge in these accounts consists principally of royal grants made to individuals from the firms of the burghs, and these firms are sometimes so exhausted by such liberality, as to leave nothing to be paid to the chamberlain.

After the method of granting feus of the towns had been introduced, that form of charter was not adopted to the exclusion of all others. During the 14th century, we find that charters were sometimes given, which merely narrated and confirmed previous grants of certain privileges, as in the charter of Robert Bruce to Rutherglen [3]; and at other

care that the monastery should receive payment of what was due to it, 'de firmis burgorum nostrorum sive de ceteris dominicis nostris Scotiæ.' And there follows a precept addressed by this Chamberlain, 'prepositis et 'ballivis villæ de Rokesburgh,' to carry the object of Edward's letter into effect. Dated Berwick, 29th Jan. An. Reg. Dni. Nost. Regis. 34.

[1] See, for example, the Compotum Ade Pyngle et Roberti Bullok custumarios burgi de Abyrden redditum apud Perth 11th January 1368; Kennedy's Annals, vol. i. p. 42.

[2] See the Compotum Ballivorum burgi de Aberd. redditum apud Perth ult. die. men. Januar. 1392. 'Iidem onerant se imprimis de receptis per 'firmas et exitus burgi de Aberdene L. 213 : 6 : 8;' and then follow the items of discharge; Kennedy's Annals, vol. i. p. 47. The sum of L. 213, 6s. 8d. with which the bailies charge themselves here, is precisely the reddendum of Robert Bruce's charter. The same observation applies to the account, Kennedy, p. 46; and to the *half-yearly* account, p. 43, where the sum put to their charge is L. 106 : 13 : 4. There are many other accounts of the bailies of other boroughs, as Linlithgow, Haddington, Perth, where there is the same correspondence. See the accounts in Mr Thomson's paper, p. 13. The firms are in general stated as having been received 'per 'assedationem eis factam in feodo.'

[3] See Ure's History of Rutherglen, p. 5.

times charters were given, confirming in general terms former privileges, as in that of David Bruce to Aberdeen [1], or granting a variety of particular privileges, as in one of Robert Bruce to Dundee.

David Bruce appears also to have granted a general charter to his burgesses throughout Scotland, giving them power to buy and sell within the liberties of their respective burghs, and other privileges [2]; and this deed is the more worthy of attention, because it is nearly a literal transcript of three statutes attributed to William the Lion [3].

David Bruce also granted a general charter to Dunfermline, Kirkaldy, Musselburgh, and Queensferry, as boroughs of the Abbey of Dunfermline, giving the burgesses of those towns liberty to sell wool and other privileges, within the bounds of the regality of the Abbey [4].

After the kings had adopted the mode of feuing their boroughs to the respective communities of those towns, their example was followed by the monasteries. In the year 1395, an indenture was entered into between the abbey of Dunfermline and the alderman and community of the town of Dunfermline, whereby that town was feued *cum parvis custumis*, &c. to the alderman and community, for a reddendum of 13 merks [5]. The town of Kirkaldy was also, in the year 1450, feued by the same abbey to the bailies and community, for a reddendum of 30s. 4d [6]. In the year 1466,

[1] Kennedy's Annals, vol. i. p. 27.

[2] The charter is given in Black's Privileges of the Royal Boroughs, p. 41. Black has not said from whence he took it. The witnesses appear in several charters of David II.

[3] Stat. Wil. c. 35, c. 36, and c. 37, sect. 1.

[4] See this charter in the Appendix, No. 21. [5] Ib. No. 22.

[6] The indenture bears, 'Quod dictus Dns Abbas et conventus ex 'unanimi consensu et assensu concesserunt, locaverunt, et ad feodifirmam 'dimiserunt dictis ballivis et communitati, et eorum successoribus in 'perpetuum burgum illorum de Kyrcaldy, ac portum ejusdem, omniaque 'firmas burgales dicti burgi, cum parvis custumis, &c. adeo libere in om-'nibus et per omnia, sicut burgenses burgi de Dunfermlyn, dictum 'burgum seu aliqui burgenses, seu aliquem burgum de dictis Dno Ab-

Musselburgh was feued by this abbey for an annual sum of 4 merks [1].

In the year 1490, the town of Paisley was granted in feu by the abbey of Paisley, 'Prepositis, ballivis, burgensibus et 'communitati;' to be held, 'cum dictis parvis custumis;' reddendo, 'firmam burgalem et servitia curiarum debita et 'consueta, cum annuis redditibus inde debitis secundum te-'norem nostri rentalis [2].'

It is probable that the feus of the king's boroughs, as well as the grants of pensions out of the customs and borough firms, had been thought prejudicial to the royal revenue; for, in the year 1424, in the reign of James I., an act was passed annexing both the great and small customs, as well as the borough mails, to the crown, for the maintenance of the King [3].

By a subsequent act, passed in the year 1597 [4], allaliena-

'bate et conventu, ad feodifirmam tenent, &c. Pro quibus quidem su-'perius concessis, dicti ballivi, et communitas, eorumque successores in 'perpetuum solvent annuatim prefatis Dno Abbati et conventu, eorum-'que successoribus in perpetuum mx tres solidos, et iiii denar. usualis 'monet. reg. Scot. ad duos anni termin.' &c.; Chart. Dunferm. vol. lxii[b].

[1] The indenture bears, 'Quod dicti Dns. Abbas et conventus locave-'runt, et ad firmam dimiserunt in perpetuum prefatis ballivis et commu-'nitati, omnes redditus dicti burgi, ad eorum scaccarium pertinen. cum 'parvis custumis, &c. ac totum burgum in plena libertate, cum omnibus 'suis commoditatibus, &c. ad eund. burg. spectantib. seu spectare valent. 'quoquomodo in futurum, adeo libere in omnibus, et per omnia, sicut ali-'quis burgus Dni Regis aliquem burgum in regno de dicto Dno Rege ad 'feodifir. tenent.' &c. 'Pro quibus quidem superius concessis predicti 'ballivi et communitas solvent annuatim in perpetuum memoratis religio-'sis quatuor mercas usualis monet,' &c.—Chart. Dunfermline, fol. lvii b.

[2] Hay's Vet. Diplom. vol. iii. p. 264.

[3] *Item*, 'It is consentit be the hail Parliament, that all the greate and 'small customes and burrow-mailles of the realme, abide and remaine 'with the king till his living; and gif onie persone makis onie claime till 'onie part of the said custumes, that he schaw to the king quhat he hes 'for him, and the king sall make him answere with advisement of his 'council.'

[4] C. 236.

tions, assedations, and pensions, of the annexed property, and especially of the customs, great and small, made before lawful dissolution in Parliament, were declared null.

Whatever effect the former of these statutes may have had at the time of its enactment, it is clear, that, in later times, neither it nor the subsequent act was allowed to interfere with this method of granting royal charters to the boroughs. During the reign of James VI, both before and after the latter of these acts, and during the reign of Charles I, the usual form of these charters appears to have been either expressly a grant in fee-farm, or at least a conveyance of the same nature, of the town, with a variety of appendages of lands, duties, and privileges, to the magistrates and community, for a certain reddendum, generally of a fixed sum of money, and sometimes with the addition of service used and wont [1]. Words erecting the town into a royal borough were also sometimes added.

The charter of privileges, granted at different times by the sovereigns, were not confined to the boroughs holding of the crown, but were also extended to those of the church, and of the nobility. Nor can we discover any essential distinction between the privileges conceded by the early charters to church boroughs, such as those given by Malcolm IV. and William to St Andrew's and Glasgow, and those immunities bestowed at that period on the king's proper towns [2].

[1] Many such charters are to be found in the archives of the Royal Boroughs. See, as one example in literal terms, the charter of James VI. to Edinburgh, quoted by Maitland, p. 240, whereby the town, the ports of Leith, and Newhaven, and various lands, are conveyed in fee-farm for a reddendum of 200 merks.

[2] I know not whether it is to be considered as a distinction, that the charters granted by William to his own proper boroughs, usually contained a *special* exemption from *toll* 'de dominicis catallis suis.' The charter of William to Glasgow, is granted 'cum omnibus libertatibus quas 'aliquis burgorum meorum in tota terra mea melius, plenius, quietius et 'honorificentius habeat.' That of Malcolm to the burgesses of the bishop of St Andrew's is in similar terms. In a charter, however, of William to

David II. granted a charter, erecting the town of Dunbar 'in liberum burgum,' but still as the demesne town of the Earls of Dunbar [1]. The causes of this erection are stated in the grant to have been, that English merchants were in the habit of bringing various articles of traffic into Scotland without paying any duties for them; and that this evil was probably owing to the distance of Haddington, and the revenue officers of that town, from the borders. By this charter, Dunbar was put upon a footing, as regarded mercantile privileges, with Haddington, and free boroughs in general.

Even when certain towns, holding of the church, which never have yet acquired the rights of *royal* boroughs, in the modern sense of that word, were, by James IV. expressly erected into free boroughs of barony [2], we cannot discover any essential difference between the privileges thus granted, and those bestowed on the towns holding of the sovereign [3]. As one example, we may mention, that these charters gave the privilege of buying and selling certain articles, such as wine, wax, &c., which we find that royal boroughs were sometimes specially empowered to sell by the charters granted to them [4]; and which, we shall immediately see, were afterwards peculiarly assigned, by certain statutes, as articles of traffic of proper boroughs royal, bearing their share of taxation, and ha-

the monks of Kelso, of certain privileges to be enjoyed by their 'homines' in the '*villa*' of Kelso, he provides that these privileges shall not interfere 'foro meo de Rokesburg.' Chart. Kelso, p. 327. Macfar.

[1] Reg. Diplom. Abbrev. vol. ii. p. 142. Dunbar appears represented in the records of Parliament in the year 1459.

[2] 'Liberum burgum in baronia.'

[3] See the charter of James IV. erecting Paisley of new; Vet. Diplom. iii. p. 270. A previous charter of erection had been granted by the same king in his minority; Ib. p. 262. See also the charters of the same king to Old Aberdeen; Chart. Aberdeen, p. 542, Macfar.; and to Torry, Chartulary of Arbroath, fol. 166.

[4] See a charter granted to the Town of Irvine in the year 1601. Reg. Diplom. lib 43. No. 34. Irvine appears represented in the records of Parliament as early as the year 1469.

ving vote in Parliament. By the charter erecting Paisley of new in 'liberum burgum in baronia,' the grant was declared to be made 'adeo libere in omnibus et per omnia sicut burgus 'et civitas Glasguensis burgi de Dunfermlyn et Aber-'broyth, sive aliquis alius burgus in baronia infra regnum 'nostrum, liberius infeodatur, tenetur seu infeodari seu teneri 'poterit in futurum [1].' Thus, Paisley was at this time put on the same footing in point of privileges with Glasgow, Dunfermline and Arbroath, which, although they were merely church burghs, probably had as full mercantile privileges at this time as any king's burgh [2].

By various acts of the legislature also, mercantile privileges were conferred on the free burghs generally, without distinguishing whether these were burghs holding of the king, or burghs of regality or barony [3].

The act 1607, c. 6. however, confirmed these privileges to 'his Majestie's royal brughs, wha underlyes and beares all 'burdings imposed upon the estate of burrowes;' and the act 1633, c. 24, declared that these privileges, comprehending the right of using merchandise, and of buying and selling wine, wax, silks, &c., were only 'competent to the free burrowes 'royal that have vote in Parliament, and bear burden with 'the rest of the burrowes, and to no others.'

These exclusive privileges, however, thus conferred on the *royal burghs*, *i. e.* the burghs having vote in Parliament, and bearing their share of taxation, whether held of the crown or of subjects, were modified by the subsequent act 1672, c. 5. That statute, in its preamble, specially narrates the privileges

[1] See Appendix, No. 26.

[2] Glasgow appears first represented in the published records of Parliament in the year 1560, 'Andreas Hamilton pro Glasgow;' Mr Thomson's Acts, vol. ii. p. 471; but may have sent a member at an earlier period. James II. granted the city of Glasgow, &c. 'in liberam et puram 'regalitatem' to the bishop of that diocese. Gibson, p. 306.

[3] 1503, c. 88. 1540, c. 107. 1555, c. 49. 1564, c. 86, &c.

conferred by the act 1669, c. 24, on the royal burghs; and states, that the 'privileges so extended, were never in use, 'and are highly prejudicial to the common interest and good 'of the kingdom, and are, by the said statute, extended far 'beyond the ancient privileges of burrows, repeated and con-'firmed therein; applying the privileges granted to burrows 'generally to royal burrows only, to the prejudice of the 'burghs of regalities and barony, and extending of the sale 'of imported commodities which could only be understood 'of wholesale, to the topping and retailing of the saids com-'modities. And, on the other part, the just privileges of the 'royal burrows have been encroached upon by others, not 'only by exporting, but by importing, of staple commodities 'without bearing burden with the saids royal burrows in the 'public taxations and aids granted to his Majesty.'

This act then confines the monopoly of the royal boroughs in buying and selling wine, wax, silks, &c. to wholesale dealing; and allows boroughs of regality and barony to retail all commodities whatsoever, and to import, in exchange for native commodities, timber, iron, tar, &c.

After the Revolution, however, the monopoly of the royal boroughs was again farther extended. The act 1690, c. 12, on the narrative of 'the royal burrows being one of the es-'tates of this kingdom, bearing a sixth part of all public im-'positions, being obliged to watch, ward, build and maintain 'prison houses, with several other obligations, for support of 'their majesties' government,' gave them the exclusive right of importing, by sea or land, foreign commodities, except cattle, horses, and other bestial, and of exporting by sea native commodities, except corns, cattle, minerals, &c.; reserving to boroughs of regality and barony to buy and sell native commodities; and likewise foreign commodities, if they bought the latter from freemen of royal boroughs.

A method, however, was afterwards devised, by which the benefit of foreign trade was communicated to such boroughs of

regality and of barony, as should be willing to bear a proportion of the tax-roll imposed on the royal boroughs. The convention of royal boroughs, assembled at Dundee in the month of July 1692, empowered their agent to carry this arrangement into effect for the space of five years; and these instructions were ratified in Parliament by the act 1693, c. 20, which farther declared this communication of trade perpetual, upon payment of such a share of the tax-roll as should be fixed by the convention of boroughs. This arrangement was farther ratified and explained by the act 1698, c. 19; and by the following act 1698, c. 20, power was given to certain commissioners, to be named by the king, to fix the proportions which should be paid by the boroughs taking the benefit of the communication; and when once so fixed, any subsequent alterations were to proceed from the convention, with the remedy of an appeal to Parliament, in case of injustice.

A few boroughs of barony accepted the benefit of this arrangement, and payed the proportion of the tax-roll imposed upon them[1]. A small proportion is still paid by certain boroughs not coming under the description of royal, as a composition for this communication of trade. This proportion has, for many years, been about 2½ per cent of the total annual cess due by the royal boroughs of Scotland; and is levied, in the first instance, by the proper officer of the convention of boroughs, and by that body paid over into the national revenue.

Within these boroughs of barony, which have taken the benefit of this communication, the tax is imposed as well upon the manufacturers and mechanics, as upon those inhabitants who are actually engaged in foreign trade, because the benefit reaches indirectly the former classes, by increasing their employment[2].

[1] Black on Burghs, p. 28.

[2] Kell and others v. Stentmasters of Saltcoats, 27th 1794; Fac.

We have seen that, at an early period, the Great Chamberlain exercised a superintendence over the royal revenue, derived from the boroughs, and actually levied from the magistrates and collectors of customs the duties which belonged to the king. But, besides this superintendence of the proper royal revenue, the same great officer exercised a controul over the common good possessed by each borough, for its own particular purposes. Of this circumstance, we have evidence both from the Chamberlain Ayre [1], and also from an express act of the Legislature, passed in the year 1491 [2], by which it was provided, with respect to the common good, that inquisition was 'zeirly to be taken in the Chalmerlane Aire, of ex-'pences and disposition of the samyn.' This controul arose principally from the general superintendance exercised by the Chamberlain over the affairs of the boroughs, and also might, perhaps, in some measure proceed from the circumstance, that, at that period, nearly the whole common good of the towns arose from royal gifts of lands and revenues of various kinds, sometimes granted by the charters of erection, and sometimes by deeds specially conveying these subjects.

When the office of Chamberlain fell into disuse, the controul over the common good was transferred by various statutes to the Court of Exchequer. The act 1535, c. 26. provided, 'that all provostes, baillies and aldermen of burrowes, 'bring zeirly to the checker, at the day set for giving of 'their compts, their compt buiks of their commoun gudes, to 'be seene and considdered be the Lords' Auditours, gif the 'samin be spended for the commoun weill of the burgh or

[1] A point of inquiry in the Chamberlain Ayre was 'Si de communibus 'profectibus burgi, legalis fiat assedatio, et levatio. Et si de eisdem fide-'le computum communitati burgi reddatur. Et si ita non sit, per quem, 'et in quorum manus devenerunt, et quomodo transeunt in negotiis com-'munitatis' Iter. Camer. c. 39. sect. 45.

[2] 1491, c. 36.

'not, under the paines foresaids. And that the saidis pro-
'vest, baillies, and aldermen of everie burgh warne zeirly,
'fifteen daies before their cumming to the checker, all they
'quha likis to cum, for the examining of the saidis compts,
'that they may argune and impugne the samin, as they
'please, swa that all murmure may cease in that behalf.'

In the act 1693, c. 28, the controul of the Court of Exchequer was again recognised.

In the year 1784, however, it was adjudged by that court, that, from certain changes which had taken place in its constitution, in consequence of the Union, it no longer had any power of superintendence over the disposition of the common good of burghs [1].

It was also adjudged by the Court of Session, that the burgesses had no title to pursue, nor that Court any jurisdiction to entertain, an action for the purposes of calling the magistrates to account in that Court, where it was not averred that the private patrimonial interest of the burgesses was directly affected [2].

In consequence of this state of the law, the magistrates of the different royal burghs were hardly under any controul in the management of the common good, and it became necessary that some means should be adopted for the purpose of calling them to account.

This object was at last accomplished by means of an act passed in the year 1822 [3], by which it was provided, that an account of charge and discharge of the magistrates of each royal burgh shall be annually exhibited, within three months after the election of the magistrates of the several burghs, and shall remain open for thirty days, after the expiry of the said three months, to the inspection of the burgesses, who

[1] Fol. Dict. iii. p. 341.

[2] Magistrates of Inverury, 14th December 1820; Fac.

[3] 3d Geo. IV. c. 91.

may state objections in writing within that time, or within two months after expiry of the thirty days; and if a satisfactory answer shall not be given to these objections, it shall be lawful to any three or more of the burgesses to complain, in writing, to the Barons of Exchequer, within three months after the expiry of the said thirty days,—provided the complaint be confined to such objections as were previously stated in writing, or sufficient cause be shown why the subject of complaint was not so stated.

Having thus given a short sketch of the general condition of the Scottish royal burghs, from an early period down to the present times, we now proceed to inquire more particularly with respect to the history of the system of *magistracy* within those boroughs, and with respect to the changes which have taken place in the modes of election of the various civic officers.

None of the more ancient royal charters granted to the burghs of Scotland contain any clauses relative to the election of magistrates. There is no charter containing such a clause, and expressly empowering the burgesses to elect their rulers, previous to the act 1469, c. 29, which introduced the present self-elective system of burgh government. This fact is stated in broad terms by the Committee of the House of Commons on the royal burghs of Scotland in the year 1793, who had an opportunity of examining the greater proportion of the Scottish burgh charters[1].

It is however certain, that, long before the date of the statute 1469, the burghs exercised the right of choosing their magistrates,—a fact, indeed, which is proved by this statute itself. We find this privilege recognised in the Leges Burgo-

[1] Report 1793, p. 4. 'Many of the charters are very ancient; but 'there is no instance of a clause of election being introduced into any 'charter before 1469; and even after that period, it appears that some

rum, as will be afterwards more fully seen; and we may presume that the *exercise* of the right is at least as old as those laws which acknowledge it.

As early as the reign of David I., deeds occur in which mention is made of certain officers called *præpositi*, who may sometimes have been the magistrates of particular towns [1]; although occasionally, perhaps, this expression may be merely a denomination for some of the king's officers having jurisdiction over a larger territory [2]. No information is, however,

'charters do, and others do not, contain clauses of election, though 'granted in favour of the same borough.' See again Report, p. 12. The only charter, forming in any degree an exception to this rule, so far as I know, is one of Robert III. to Perth, empowering the aldermen of Perth to choose a sheriff. This charter is narrated in a subsequent charter of James VI. to that burgh, of which a translation is given in Cant's History of Perth. See Cant's App. p. 10. In Fletcher, on Burgh Reform, p. 132, the right of electing this sheriff is said to have been given to the aldermen and burgesses; and reference is made to notorial copies sent to London, whilst the reform question depended in Parliament.

[1] A charter of David I. is in the following terms. 'David, Dei gratia, 'rex Scotorum omnibus fidelibus hominibus suis totius Scocie, et *præpo-* 'sitis de Perth, salutem. Sciatis me dedisse in elemosina ecclesie Sancte 'Trinitatis de Dunfermlyn unum toftum in meo burgo de Perth quie- 'tum de omnibus rebus. Ideo mando vobis quatenus faciatis eidem eccle- 'sie haberi illud ibidem quod Swain saisivit. Testibus H. Cancellario 'et Hugone de Moreville apud Strivelin.' Chart. Dunferm. fol. vii.... The following charter of Malcolm IV. is plainly addressed to the magistrates of Perth. 'Malcolmus rex Scotorum *præpositis* et omnibus *aliis* 'suis burgensibus de Perth salutem. Sciatis me dedisse et concessisse 'homini meo Baldwino, quandam terram in Perth, habentem decem pe- 'des in latitudine, viginti quatuor in longitudine, juxta domum Vilchil. 'ita liberam et quietam ut habet domum suam propriam. Testibus Wal- 'tero Cancellario, Waltero filio Alani, Hugone Ridal, Roberto de Mun- 'degun. Apud Berwick.' Chart. St Andrew's Priory, p. 256. Macfar.

[2] Thus a charter of David I. is addressed, 'Vicecomiti et præpositis 'de Strivilinis *scyre*.' Chart. Dunferm. fol. vi....A charter of Ada, mother of William the Lion, is addressed, 'Præposito suo et burgensibus suis et 'omnibus probis hominibus suis de Hadigtunes *scyre*.' See this charter. *Supra*, p. 462....See *supra*, p. 446, note [6], as to the word *scyre*....By a

to be derived from these sources as to the mode of appointment of these functionaries in towns.

This expression of *præpositi* is one of the earliest, if not the very earliest, by which town magistrates were designated. In the Leges Burgorum we find it plainly applied to town rulers elected by the burgesses [1]; and used sometimes in the plural number, and in such a way as probably to apply to all the magistrates of the town [2], and sometimes in such a manner as apparently to mark the chief magistrate as distinguished from the inferior functionaries [3]. In the chamberlain accounts, during the fourteenth century, the word *præpositi* is used as a general phrase for the magistrates of the different burghs from which the revenue was collected.

The expression of *ballivus*, or bailie, also occurs in the Leges Burgorum, and is probably used in the same sense as at present, to designate the inferior magistrates [4]. Under the same meaning it is employed in the Iter Camerarii [5]. Sometimes, however, it is used as a general denomination for the magistrates of a town, as in the Chamberlain Accounts [6], and perhaps in some passages of the Burgh Laws and the Chamberlain Ayre.

The denomination of *alderman* made its way into this country from England, although it came to be employed here in a somewhat different sense. At the time when it was chiefly used in Scotland, it appears to have generally designated the chief magistrate of the town, as distinguished from the inferior office-bearers [7].

charter, addressed 'Vicecomiti et præpositis de Strivilin,' David I. gave 'decimam denariorum de censu meo de Strivilin' to the Abbey of Dunfermline. Chart. Dunferm. fol. vi. [b]

[1] c. 77, &c. [2] See c. 77. & c. 63.

[3] See c. 111, c. 135. [4] See c. 111, c. 135, c. 65, &c.

[5] c. 37. [6] See the extracts in Kennedy's Annals of Aberdeen.

[7] 'Quicquid Camerarius in sua sententia ordinaverit seu decreverit; '*aldermannus et ballivi* ipsius burgi debent curare ut solvatur.' Iter. Cam. c. 37....In 1284, an alderman and four inferior magistrates of Aberdeen,

The title of *major*, or *mayor*, was very little used in Scotland, and appears to have been almost peculiar to the town of Berwick, which may have acquired it, from being situated so near the English territory. In several deeds of the 13th and 14th centuries, mention is made of the mayor and the inferior magistrates of Berwick [1]. The Statuta Gildæ also bear to have been framed by the mayor of Berwick, and other persons; and in the provision of that collection, relative to the election of magistrates, we find the title of mayor applied to the chief magistrate, and that of *præpositi* used to designate the inferior civic officers [2].

At a very early period of the history of the burghs of Scotland, certain courts or assemblies were held by the magistrates, at which all the resident burgesses were bound to attend. Of these, there were three principal or head courts, at which every burgess, whether living in the town or in the country, was obliged, under a penalty, to be present [3]. The

appear as witnesses to a deed.; Kennedy's Annals, i. p. 14.—In a deed in 1338, we meet with the *aldermannus* and *ballivi* of Rokisburgh; Chartulary of Dryburgh, fol. 112....A deed, granted at Aberdeen in 1350, is thus witnessed: 'His testibus Robto de Edynhme tūc aldermanno de Aberden, 'Rogero de Nesbit, Andr. filio Walti Gregorii dti Spalding, & Alexo de 'Bryce tūc bāllis ejusdem burgi, et multis aliis.' Kennedy's Annals, i. p. 31....In several acts of the Legislature, in 1432, we find mention made of the alderman and bailies; Mr Thomson's Acts, vol. ii. p. 21, sect. 4 & 7; and of the alderman and *his* bailies; ib. sect. 7. *in fine*.—In 1482, 'Robertus Blindsele, alderman of Aberdeen,' represented that burgh in Parlia-'ment;' Id. p. 145: and this name corresponds with the list of provosts or chief magistrates of Aberdeen given by Kennedy, vol. ii. p. 231, and by Skene, Memorials of Burghs, p. 249. Other evidence to the same purpose might be adduced.

[1] See *supra*, p. 456, notes.

[2] Stat. Gild. c. 33 & 34. These circumstances have been already referred to, as tending to prove that the Statuta Gildæ really were framed at Berwick, as they bear to have been. See *supra*, p. 455–6.

[3] Leges Burg. c. 43. 'Tria sunt placita principalia in burgo per an-'num, ubi quilibet burgensis debet interesse: Primum est, post Festum

principle on which the attendance of the burgesses was required, was nearly the same with that feudal principle, by which all the vassals of a superior were bound to give presence in the court of their lord, as one of the implied conditions on which they held their fees. We have already seen that the ancient foundation of burgess-ship appears to have been the possession of burgh property; and one of the services due for this property was suit and presence in the burgh courts. In the Iter Camerarii we find this article:—'Item petatur rotulus rectæ curiæ tam infra habitantium 'quam extra *tam de terris vastis quam ædificatis*[1];' expressions plainly shewing that the foundation of the *suit* which was owed, was the possession of property[2].

The resemblance between these burgh courts and the court-leet, still held in some of the English towns, is worthy of remark. They possessed the common quality, that certain classes were under an obligation to attend them, and were fined if absent; and, at both, important duties relating to the electing of magistrates were exercised, as will be immediately

'S. Michaelis: Secundum est, post natale Domini: Tertium est, post 'Pascha.

'Quicunque burgensis ad hæc non fuerit, nisi se legaliter essoniaverit, 'vel nisi fuerit infirmus, vel extra patriam, vel ad nundinas, sed fuerit 'manens in burgo, dabit quatuor denarios ad forisfactum suum.

'Si vero extra dabit octo solidos, et hæc est causa; quia burgensis 'rure manens, non compellitur venire ad aliqua placita nisi ad hæc tria 'principalia per annum.

[1] C. 3. The *curia* mentioned in this passage appears to be the burgh-court, because the roll of the chamberlain-court is mentioned in the beginning of the same chapter. But, even if it were the chamberlain-court, the principle is the same, because the burgesses equally owed suit there as in the burgh-court. See the beginning of chap. iii. of the Iter Cam.

[2] In the year 1415, the procurator of the abbot of Arbroath appeared 'in presence of the alderman, bailies, and community of the burgh of El-'gyne, in their hede court haldyn,' and protested, that, 'in so far as the 'abbot of the of Abberbrothock is called yearly in the sut rolle of 'the said town, of ane rude of land forenent the cruce on the north side of

seen, with respect to the Scottish head-courts. A certain degree of similarity is also to be traced between these head-courts and those assemblies which were known in the towns of England during the Saxon period, and continued for some time after the Conquest, and which have been already described [1].

The ordinary burgh courts at which the resident burgesses owed suit, were held very frequently [2]; and in these tribunals appears to have been vested the ordinary jurisdiction [3]. The right of administering justice was not confined to the magistrates, but was also exercised in some shape or other by the burgesses, who owed suit [4]. At the close of the 14th century, and beginning of the 15th, we find from the records of Aberdeen, that the questions which came before the borough court of that town being partly of a civil and partly of a criminal nature, were determined by a sworn assize [5]. This assize, there can be no doubt, was chosen from those who owed suit at the court; and perhaps this mode of exercis-

'the town,' and could get no entry to said land, he hereby reserved entire this right of the abbot to the said land. Hay's Vet. Diplom. v. ii. p. 234.

[1] See *supra*, p. 429 and 433, as to the English burgh courts.

[2] From c. 51 of the Leg. Burg. they appear to have been held every fortnight. 'Sciendum est quod de quindena in quindenam currunt placita 'in burgo per annum, tam de terris quam de mobilibus.'

[3] Leges Burgor. c. 81, 'quicumque debet jus capere, vel facere in burgo, 'veniat ad placita in hyeme ante horam tertiam, et in æstate ante horam 'primam. 2. Et si veniat ante judicia facta, appellator, appellet; et ca-'lumniatus respondeat coram præposito, et aliis hominibus villæ in plana 'curia.'

[4] See c. 81, quoted in the preceding note; and c. 104, where any one who persisted in calumniating a magistrate was held to be 'in jurisdic-'tione præpositi vel ballivi et vicinorum suorum ut emendet quod male-'dixit de eo;' and c. 7. sect. 3., where it is said, that every one 'judicari 'debet per suos pares secundum leges et assisas burgorum,' and many other passages.

[5] See Kennedy's Annals, vol. ii. p. 471, *et seq.* The period during which examples of jury trial are there given, is from 1399 to 1561.

ing the jurisdiction of the burgesses was in use at a much earlier period.

In the Leges Burgorum, there seems to be hardly any trace of a common council consisting of a select number. The general import of that collection of laws, appears to be, that the affairs of the burgh were managed by the magistrates, and by the different head courts and ordinary courts held by the magistrates, and at which the burgesses attended [1]. In the Statuta Gildæ, however, which bear to have been framed towards the end of the 13th century, there is a provision which relates to an institution similar to the town-council, as it exists at present:—'Statuimus quod commune consilium, et 'communia gubernentur per viginti quatuor probos homines, 'de melioribus, discretioribus, et fide dignioribus ejusdem burgi 'ad hoc delectos: una cum majore, et quatuor præpositis. 'Et quandocunque prædicti viginti quatuor homines fuerint 'ad commune negotium tractandum vocati: qui non venerint 'ad citationem sibi factam ultra noctem, emendet in duos 'solidos [2]. These 24 *probi homines* may probably be viewed as the town councillors of the present day. The Statuta Gildæ, however, were merely the enactments of a particular town; and the institution may not have extended to other burghs.

[1] There is one of these laws, however, c. 133, which certainly appears to refer to something different from the ordinary magistrates. "In omni 'burgo totius regni Scotiæ vicecomes (aliter Major et Aldermanni et 'recte, *Skene*), faciet duodecim legales homines de sufficientioribus et 'discretioribus illius burgi sacramento suo asserere, quod omnes leges et 'consuetudines istas prædictas, apud se pro posse suo observabunt, et in 'ipso burgo observari facient.' Perhaps these twelve were merely certain of the better citizens, whom the magistrates employed to assist in regulating the police of the burgh. This law, to whatever it may refer, is perhaps not one of the more ancient of the Leges Burgorum. In Robertson's records of Parliament, p. 7, the following similar law is entered, of the date of 1244:—'In ilke burghe of all Scotlande, ye sheref sall gar xii 'lele men suer yat thei sall lelely and treuly keip and use all ye lawis yat 'fallys to ye gouernance of ye kingis burgh.'

[2] Stat. Gild. c. 33.

At the close of the 14th century, we find that common councillors existed in the burgh of Aberdeen[1]; and by the middle of the 15th, it is clear from the act 1469, that there was a town-council in all the burghs of Scotland.

As early as the date of the Leges Burgorum, the important function of electing the magistrates was exercised at the Michaelmas head court of each borough. 'Ad primum placi-'tum S. Michaelis eligendi sunt præpositi de consilio communi 'proborum hominum villæ qui sunt fideles atque bonæ 'famæ[2].' The *probi homines*, by whose common opinion or consent the prepositi or magistrates were to be chosen, appear to have been the burgesses who owed suit at the head court. It has sometimes been argued, that the expression *probi homines* marked out a select body of the more discreet citizens, or the governing part of the community. But it has been already shown, that the ancient foundation of burgessship, as appears from the Leges Burgorum, was the possession of burgh property; and that *burgess* was therefore synonymous with *heritor*. Hence it is plain, that the burgesses, in relation to the rest of the inhabitants with whom they are by no means to be confounded, might be viewed as a select or superior body; and even, therefore, supposing there were something distinctive in the phrase *probi homines*, it might not be misapplied when used to designate the burgesses. We have already seen that the burgesses were compelled to attend all the head courts, as well

[1] See the records as quoted in the report, 1793, p. 39.

[2] Leg. Burg. c. 77, sect. 1.—'Et jurent fidelitatem Domino Regi et 'hominibus villæ: Et jurent se etiam observaturos consuetudines et jura 'villæ: et quod non facient justitiam de aliquo vel aliqua propter iram, 'odium, timorem vel amorem alicujus, sed juxta considerationem consi-'lium, et judicium sapientium, et proborum hominum villæ; jurabunt 'etiam, quod nec timore, amore, vel odio alicujus, nec consanguinitate 'cujuscumque, vel rerum suarum amissione, parcent alicui in justitia 'facienda.' Ib. sect. 2.

as the other courts, and that they actually, in some shape or other, exercised jurisdiction; and this being the case, it does not appear any great stretch to suppose that they also exercised elective rights. The expressions *probi homines* [1], *homines villæ* [2], and *vicini* [3], appear to be applied promiscuously to the burgesses [4].

The rule laid down as to the election of Magistrates in the Statuta Gildæ, which illustrate the general custom of the towns of Scotland at that period, although only the enactments of a particular burgh, appears conformable to that of the Leges Burgorum. 'Statuimus quod communne concilium 'et communia gubernentur per viginti quatuor probos 'homines, de melioribus, discretioribus, et fide digniori-'bus, ejusdem burgi ad hoc delectos; una cum majore, 'et quatuor præpositis. Et quandocunque prædicti viginti 'quatuor homines fuerint ad commune negotium tractan-'dum vocati, qui non venerint ad citationem sibi factam 'ultra noctem, emendet in duos solidos [5]. Statuimus, 'quod major et præpositi eligantur per visum et consi-'derationem totius communitatis. Et, si aliqua contro-'versia fuerit in electione majoris vel præpositorum; Fiat 'tunc electio per sacramentum viginti quatuor hominum, 'prædicti burgi electorum per communiam [6].'

The election of the mayor or provost, and of the infe-

[1] Leges Burg. c. 67, 68, 70. [2] C. 81. [3] C. 104.

[4] C. 68. § 1. is to this effect: 'Qui serviunt in molendino Domini Re-'gis, vel habent molendinum ad firmam; non habeant servientes in mo-'lendino, nisi per considerationem *proborum hominum* villæ;' and one of the articles of accusation against the *molendarii* in the *Iter Camerarii* is as follows: 'Quod tenent plures servientes in molendino quam eis conside-'ratum est *a burgensibus* in damnum regis et populi;' c. 11, sect. 1. Thus the *probi homines* and the *burgenses* seem identified by these two laws. In like manner, the persons chosen to serve on a jury in Aberdeen in 1399 are called '*probi homines*,' (Kennedy's Annals, ii. p. 471); and there can be no doubt that they were the ordinary burgesses or other inhabitants.

[5] Stat. Gild. c. 33. [6] Stat. Gild. c. 34.

rior magistrates, was thus, according to the gild statutes, to be made with the opinion or consent of the *whole community*; an expression which, upon the most limited view, may be held as synonymous with the *probi homines*, or proper burgesses, who attended the head courts. Yet a more limited interpretation has been attempted to be affixed to this phrase, in like manner as to that of *probi homines*; and it has been contended to be applicable to a select body of the more respectable citizens, or to what is now called the *Town-Council*. In support of this view, reference has been made to the opinions of Brady [1] and of Wight [2], as to the meaning of the word community, as applied to towns. But it has been already shewn that Brady's view has not been universally adopted in England; and many instances might be adduced in Scotland of a more extended interpretation than that which would limit it to the ruling part of the citizens. Thus, from an act of the Town-Council of Edinburgh in 1546, appointing the decreet-arbitral of James II. relative to the set to be registered, we learn, that appearance was made for the bailies and a variety of individuals, merchants and craftsmen of the town, 'for themselves, and the hail *body* 'and *community* of the town, *as well merchants as craftis-* 'men.' The word community here plainly applies to the burgesses in general. In like manner, in the year 1590, an action was brought by certain burgesses and craftsmen of Aberdeen, 'for thame selfes and remanent burgesses, 'craftismen, and *communitie* of the said burgh, *against* 'certain persons, *provost, baillies, and pretended counsel-* 'lors of the said burgh of Aberdeen [3];' The *community* is here directly opposed to its rulers; and the same observation applies to the following instance. An act of the burgesses of the same burgh, assembled in the Guild Court, was passed a year or two afterwards, ratifying a decreet-arbitral of

[1] P. 20. [2] P. 27. [3] Report, 1793, p. 7.

James VI. and certain Lords of Session, upon a submission by the magistrates and council on the one part, and certain persons for themselves, and for 'the remanent their neighbours of the said burgh,' on the other part, for settling all disputes 'betwixt the *counsall of this burgh and the communitie thereof*[1].' But the best proof of the meaning of this expression in the texts of the Statuta Gildæ, which have been quoted, is afforded by the general import of those texts themselves. The administration of the burgh appears to be committed by these laws to a body consisting of the twenty-four *probi homines*, with the mayor and four bailies; and this collective body may be viewed as constituting the town-council. It will be observed, that it is provided that, in case of any controversy in the election of the mayor and bailies, the choice is committed to the twenty-four councillors. But it plainly would have been absurd to make this provision, if the mayor and bailies had been in the *first* instance eligible by these very twenty-four persons, with the addition only of the former mayor and bailies. The controversy would not have been much diminished by the second method prescribed. It therefore follows, that the *tota communitas* by whom the mayor and bailies were eligible in the first instance, consisted of some much larger body, such as that of the burgesses, amongst whom it was extremely probable that such a controversy should arise as would call for the more orderly election of the select twenty-four. And if this meaning be given to those words, there seems no reason for withholding the same interpretation from the *communia*, by whom the twenty-four *probi homines* were to be chosen.

It is true that we have no evidence precisely applicable to the period of these ancient laws, tending to shew that they were *acted upon in practice*; but, at a later period, there is sufficient proof that something of the nature of a poll-election

[1] Report, 1793, p. 10.

took place in the burghs of Scotland; and the presumption therefore is, that the above mentioned laws took effect either entirely, or to a considerable extent, at an earlier date. The narrative of the act 1469, c. 30, is expressed in terms which do not admit of much doubt. 'Item, touching the election 'of officiares in burrowes, as aldermen, baillies, and other of- 'ficiares, because of great contention zeirly for the chusing 'of the samin, throw multitude and clamour of commones, 'simple persones: It is thought expedient, that na officiares 'nor councel be continued after the kingis Lawes of Bur- 'rowes, further than ane zier. And that the chusing of new 'officiares be in this wise: That is to say, the auld councel 'of the toune sall chuse the new councel, in sik number as 'accordis to the toune. And the new councel and the auld 'in the zeir foresaid shall chuse all officiars perteining to the 'toune: as aldermen, baillies, dean of gild, and uther offi- 'ciares. And that ilk craft sall chuse a person of the samin 'craft, that sall have voit in the said election of officiares, for 'the time, in likewise zeir by zeir. And attour it is thought 'expedient, that na captaine, nor constable of the kingis cas- 'telles, quhat toune that ever they be in, sall beare office 'within the said toune, as to be alderman, baillie, dean of 'gild, thesaurer, nor nane uther officiar that may be chosen 'be the toun, fra the time of the next foorth.'

The evil proposed to be removed by this statute was the clamour and contention of 'commons simple persons' in the chusing of the magistrates; and the remedy was, that the old council should chuse the new, and both together the office-bearers; and, probably as some compensation to the people for being deprived of their former right, it was provided that each craft should chuse a person who should have vote in the election of office-bearers. The whole terms of this enactment can leave very little doubt that, previous to its date, the election of magistrates or officiares was vested in some considerable body of the burgesses or other inhabitants,

although as to the precise description of the electors no certain information is afforded by the statute.

Neither does the statute throw any light on the previous mode of election of the common council; and it will be particularly observed, that the 'officiares' and council are distinguished from one another throughout the act. The object of the enactment was to prescribe a new mode of election of the office-bearers, and the mention of the mode of choosing the council seems principally introduced as a step towards the accomplishment of the principal object.

The records of election of the borough of Aberdeen have been preserved from a date considerably earlier than the act 1469[1]; and from these we not only derive some information as to the mode of election in that town before that statute, but we learn, that, during a very long period subsequent to its date, its provisions were, to a great extent, overlooked in that borough, and the elections of magistrates were made by a poll of the burgesses[2].

[1] Considerable extracts from these records have been published in the Report of the Committee of the House of Commons on Burgh Reform, in the year 1793, App. B. A few extracts have also been published in Kennedy's Annals of Aberdeen.

[2] It is stated in Kennedy's Annals of Aberdeen, i. p. 80, that, at Michaelmas 1479, in consequence of a letter from the king, addressed to the magistrates, the old council proceeded to the annual election, in conformity to the statute, by nominating the new council, and both councils jointly elected the office-bearers, as had been enjoined by the king; and reference is made to the records of the burgh in proof of this statement. This account, in so far as regards this year, may be accurate enough; but the author goes on to say, that all future elections continued to be made in this form, without stating from what evidence that averment is made; and, admitting that it is not afforded by the records, as these records continued in the same form afterwards as before. In so far as regards the period from 1526 to 1580, the averment is quite inconsistent with the records, as published in the Report of the House of Commons of 1793, as will appear from what follows in the text. Whilst, however, indulging in this criticism on this passage of Mr Kennedy's work, it is but justice to him to acknowledge the great industry, learning, and apparent accuracy with which his very interesting work is in general composed.

From the records of this borough it appears, that the election of the chief magistrate and of the bailies was conducted in the Michaelmas head court, at which the burgesses owed suit, a roll of their names being called over, and the absentees marked, and subjected to fines. The records also bear, that, from the year 1526 to 1580, the provost and bailies of the borough were elected, in some instances, 'de communi 'omnium burgensium consensu;' in others, 'de communi om-'nium civium et burgensium consensu;' in one instance, 'de 'communi omnium comburgensium consensu et assensu una-'nimi voto absque contradictione;' in another, 'expressu 'consensu voce et voto omnium burgensium;' and in another, 'per majorem partem comburgensium et de communi consensu 'eorundem[1].' These expressions evidently mark a poll election. We also learn, that, in the year 1582, thirteen tradesmen or craftsmen being called upon in the 'suit-roll, by their 'names, to give their votes at the head court in the election of 'the provost, and bailies, and officers, according to the common 'order and consuetude of this borough, observit in times by-'past,' they refused to vote, until an act, which had deprived them of their freedom, should be annulled[2]. There is thus no doubt, that, in this borough, the provisions of the act 1469, as to the mode of electing magistrates, had been, during a long period, disregarded. The terms of the records, before the date of this act, are somewhat differently worded, and are not of a uniform style. Thus we learn, that, in 1398 and 1399, certain persons were elected aldermen and bailies, 'cum con-'sensu et assensu *totius communitatis* dicti burgi[3];' and, in 1435, the provost and bailies were elected 'per commune 'consilium et *confratres gildæ*[4].' This latter mode of election appears to have been of a more limited nature than the election by the *whole* burgesses; because we have every rea-

[1] See the Report 1793, p. 44, *et seq.*

[2] Report, p. 6.

[3] Kennedy's Annals, i. p. 81.

[4] Report 1793, p. 39, 40.

son to believe, that, at this period, the gild-brothers did not constitute the whole burgesses. Before this period, the act 1424, c. 29, had empowered the crafts to elect deacons, which shews that they then had acquired a fixed status in the boroughs; and in the Iter Camerarii, written, in all probability, at a much earlier period, there is this passage, 'Item 'petantur in scriptis omnia nomina burgentium infra habi- 'tantium et extra, videlicet nomina fratrum gildæ per se et no- 'mina *aliorum* per se[1].'

The expression tota communitas, which occurs in the election record of the years 1398 and 1399, probably designated either the burgesses at large, or the guild portion of them. It would plainly be unreasonable to affix any very limited meaning to this expression, when we find incontestible evidence in this borough, at a much later period, that the election was by the poll; and these examples furnish an argument, that these words were not, invariably at least, used in that limited sense which it has been attempted to affix to them.

On a general view, therefore, it may be said, that there is evidence, that, in Aberdeen, the election of office-bearers was conducted, prior to the act 1469, either by the whole burgesses, or at least by the gild brothers; and, during a long period after that act, almost invariably, by a poll of the whole burgesses.

It is more doubtful with whom the right of electing the council of Aberdeen lay during this period. The records do not directly throw any light on this subject, unless, indeed, in regard to three instances, in the years 1549, 1580, and 1587; and, therefore, subsequently to the act 1469, upon which occasions certain persons were chosen by the council itself, to be added to their own number[2]. It was indeed

[1] Iter Cam., c. 3. In one of the mystic dramas common in Popish times, represented at Aberdeen in the year 1442, we find parts borne by various descriptions of crafts as well as by the gild brethren.—Kennedy's Annals, i. p. 96.

[2] See Report 1793, p. 5.

stated in an act of council in 1591, that it was the ancient custom of the borough to continue the council to the day of the death of the several councillors. It is, however, at all events clear, that the records sometimes bear, that certain persons had been elected as councillors, and occasionally for the ensuing year only; so that the form of an election was, perhaps, sometimes gone through, whether the same parties were continued or not. There also appear in some of the lists of names given, greater changes than could reasonably be accounted for by ordinary mortality. The common council appears to have been, in general, chosen in the Curia Gildæ, although sometimes in the head court.

In an action raised by certain burgesses of Aberdeen, in the year 1590, to set some of the elections aside, it was stated, that even the magistracy had been continued for a number of years, 'without lawful election or change, except 'it was to place the son in the father's place, as one happened 'to die.' But it appears from the records, as already stated, that a poll of the burgesses was actually gone through; and if the same individuals were continued, it was, probably, either because they were preferred to any others, or because there were no other candidates. The small change which took place, in some years, in the election, both of office-bearers and of councillors, is, however, certainly remarkable. Thus, in the year 1587, the same four individuals were elected bailies who had been chosen in the preceding year; the same persons, amounting to twenty-two, were chosen councillors, with the exception of two or three individuals; and the son and heir apparent of the provost was elected as successor to his father in that office. In that year, the record bears, as usual at that period, that the election of magistrates took place by the common consent of all the burgesses.

The general silence of the records of this borough, as to the mode of election of the common council, is the more worthy of remark, because the act 1469 is equally destitute

of information with respect to the method of their election; and these circumstances certainly seem to afford considerable ground for supposing, that some mode of choice was resorted to, in regard to the councillors of the boroughs in general, during the period under consideration, different from that which was observed in electing the magistrates. The supposition is not without support from the records of Aberdeen, that the council itself had either the entire choice, or at least the power of completing the numbers of its own members. This evidence certainly refers to a period subsequent to the act 1469; but we know that this act had not then taken full effect, as to the election of office-bearers, which appears to have been the principal object for which it was framed [1].

The mode of election in Aberdeen was altered by an act of council in the year 1591, to the method prescribed by the statute 1469; and this act of council was ratified, first, by a judgment of the Court of Session, sustaining the election for the year 1591 made under it, and then by a decreet-arbitral of James VI, and certain Lords of Session, and other individuals.

The statute 1469 [2], as we have seen, prescribed for the boroughs generally rules of election, new in so far at least as regarded the office-bearers; and provided that the old council should choose the new, and the old and new council, in conjunction with certain persons from the crafts, should choose the magistrates. It also provided, that the magistrates and council should continue one year only; but this clause was partially modified, in so far as regards the council, by the act

[1] If, however, we go back to a more remote period, and hold that the twenty-four probi homines, mentioned in one of the gild statutes already alluded to, (see p. 505.) were the common council of the town, then it follows, that, at that time, in the town of Berwick at least, the common councillors were chosen 'per communiam,' i. e. by some considerable body of the citizens.—Stat. Gild. c. 34.

[2] See this act, p. 510.

1474, c. 56; which ordained that four of the old council should be chosen to the new [1].

It is not easy to say, with certainty, to what extent the statute 1469 took effect throughout the boroughs in general, immediately after its enactment. In Aberdeen, indeed, we know that its provisions, in so far as regarded the election of magistrates, were, to a great extent, neglected.

Another circumstance also may have interfered to a considerable extent with its immediate operation. Soon after its date, a practice became common of inserting in the royal charters granted to boroughs, clauses, bestowing upon certain parties the right of electing magistrates, or magistrates and councillors. The earliest examples of these clauses seem to grant to the burgesses, or to the burgesses and community, the right of electing bailies and other office-bearers, without particularly mentioning councillors. Thus, a charter of James IV. to Forres in 1496, has a dispositive clause, 'burgensibus 'et communitati;' and a clause of election in these terms, 'cum potestate *dictis burgensibus*, aldermannum, balivos, 'aliosque officiarios necessarios de burgensibus annuatim 'eligendi.' A charter of the same monarch to Lauder in 1502, is granted 'burgensibus et communitati;' 'cum po-'testate *dictis burgensibus et communitati*, balivos aliosque 'officiarios, pro gubernatione dicti nostri burgi necessarios 'annuatim eligendi.' During the reign of Mary, and the earlier part of James VI., in the 16th century, the usual mode seems to have been to grant the right to the burgesses, the word community being seldom mentioned; and to include the councillors *nominatim* in the number of those to be elected; although one or two instances also occur, during this period, where the right of election was given to the magis-

[1] In the burgh of Cupar, where the whole merchant council are changed, four of the old council are afterwards added. See the Set of this borough, as abridged in the Committee Report, p. 52. The set, as there given, is an example of almost literal observance of the acts 1469 and 1474.

trates, or magistrates and councillors, as well as to the burgesses, as in the case of Nairn in 1589. During the 17th century, the practice was adopted, in many instances, of granting the right 'præposito, balivis, consulibus et communitati,' without including the word 'burgensibus' at all; although other examples occur during the same period, where it also is used. During the latter half of the 17th century, we find clauses of election to the magistrates and councillors alone, without mentioning either community or burgesses, but these are not numerous; the principal examples being, the cases of Forfar in 1665, of Tain in 1671, and of Campbelton in 1700. One example only of such a clause at an earlier period occurs, in the case of Inverkeithing in 1598. In several instances, although not in the earliest, we find the inhabitants or 'incolæ' included in the number of those to whom the right of election was given, as in the case of Sanquhar in 1598, and of New Galloway in 1629. There are various examples of charters, the dispositive clauses of which are granted to magistrates and burgesses, whilst the right of election is given to the burgesses, or burgesses and inhabitants, without mentioning magistrates; and there are also instances, where the dispositive clause includes the burgesses and community, whilst the elective clause is to the magistrates and councillors only, as in those of Inverkeithing in 1598, and of Tain in 1671 [1].

It is not easy to determine, at the present day, what effect these charters might have had in introducing particular modes of election, and in interfering with the provisions of the act 1469. That, in some instances, these clauses took effect partially we know with certainty. Thus, the town of Wick, belonging in property or superiority to the earl of Caithness, except a small portion belonging to the bishop, was erected into a royal borough, by a charter from James VI. in the year 1589, 'cum speciali et plenaria potestate li-

[1] See the election clauses in the Report 1793.

'beris inhabitantibus et burgensibus dicti burgi, et suis successoribus in futurum, cum expresso avisamento et consensu, 'dicti nostri consanguinei Georgii, Comitis de Caithness, et 'ejus hæredum et successorum, et non aliter seu alio modo, 'præpositum, et quatuor ballivos dicti burgi incolas seu inhabitatores, una cum thesaurario, gildæ decano, consulibus, 'burgensibus, serjandis, aliisq. officiariis necessariis intra dictum burgum pro gubernatione ejusdem, faciendi, eligendi, 'constituendi, et creandi, eosque toties quoties expediens videbitur pro causis rationalibus deponendi [1].'

It thus appears, that the right of election was vested 'in 'liberis inhabitantibus et burgensibus' of the town, with consent of the Earl of Caithness; and the manner in which this twofold right came at first to be arranged, was, that the Earls of Caithness always enjoyed the office of provost, and chose one of the bailies, whilst the town chose the other, and that the provost and two bailies chose seven councillors. In this way, the family of Caithness undoubtedly enjoyed a much greater share in the election than the burgesses; but, at a subsequent period, when that family took no concern in the borough, the town was in use to choose the provost and two bailies by the plurality of the poll, and the provost and two bailies chose the seven councillors, dean of gild, and treasurer. This mode of election appears to have continued till the year 1716, when a new set was recorded in the books of convention, introducing a mode of election by lots, for the provost and bailies [2].

In this case, we undoubtedly have an example of the charter of erection taking effect, to the total exclusion of the act 1469. It is true, the directions of the charter were not literally fulfilled, but we see that at first the entire right of election was vested in the only quarters in which the charter placed it, namely in the town, and in the Earl of Caithness;

[1] Report 1793, p. 33.

[2] See Kilkerran, p. 400.

and, at a later period, we find the town engrossing the whole right by a poll election.

In the case of Anstruther Easter, the charter which it obtained in 1583, 'dando burgensibus et liberis hominibus potestatem eligendi præpositos, ballivos,' &c., may have had some share in giving rise to that provision of the set of that borough, by which the whole burgesses choose the bailies from leets.

The provisions of the charter of erection of Campbelton in 1700, by which the first nomination was to be made by the Earl of Argyle, and the subsequent elections were to proceed in terms of the acts, out of leets given by the Earl, were also carried into effect.

When those examples, and particularly that of Wick, are considered, and when it is recollected that, in the borough of Aberdeen, the mode by poll continued for more than a century after the act 1469, we certainly are not prepared to say that that statute took effect generally throughout Scotland, immediately after its enactment, and rendered the clauses of election in the subsequent charters entirely a dead letter.

On the other hand, it is undeniable that no resemblance whatever can, in by far the greater number of instances, be discovered between the sets of the boroughs, as established at the present day, and the elective clauses of the corresponding charters; and, therefore, whatever may have been the practice followed at the date of the charter, the mode of election came afterwards to be modelled according to the provisions of the act 1469.

On a general view, it may indeed, perhaps, be said, that these clauses were not intended minutely to regulate the mode of election of the magistracy, but were merely intended as grants to the towns, of the *right* to have magistrates of their own selection, as distinguished from those officers appointed by the crown, to whom the other portions of the nation were subjected.

In the year 1552, a particular mode of election, founded on the act 1469, was laid down, for the city of Edinburgh, by the convention of boroughs, and the elections of the other boroughs were directed to proceed on this as a model [1]. This provision may be taken as an additional evidence that the act 1469 had been neglected, because otherwise no such order would have been acquired; and we have reason to believe that even this provision was not generally observed, as is shown by the practice in Aberdeen for many years afterwards, and by the mode which was adopted in the borough of Wick at its subsequent erection.

At various periods in the history of the royal boroughs, there are to be found instances of the interference of the sovereign in the election of magistrates, sometimes for the controlling the time or method of election, and sometimes for the purpose of pointing out particular persons, as proper for selection. In the year 1479, James III. addressed a letter to the magistrates of Aberdeen, directing them to proceed in their election, conformably to the statute 1469, and this order it would appear was complied with on that occasion [2], although afterwards departed from. In the year 1542, the persons elected magistrates in the town of Perth appear to have been chosen by the command of James V [3]. In the year 1609, a charge was directed by James VI. to the council of the same town, narrating one of the acts relative to the election of magistrates; and, in obedience to this charge, certain persons were chosen [4]. Charles I., on various occasions, gave instructions that particular individuals should be chosen in different burghs [5]. These royal examples were imitated

[1] See Manuscript Acts of Convention in Advocates' Library, p. 1.

[2] Kennedy's Annal's vol. i. p. 80. See what has been already said on the subject of this letter, *supra*, p. 511. note.

[3] Cant's Hist. of Perth, App. p. 69. [4] Ib. p. 97.

[5] Maitland's History of Edinburgh, p. 69. Kennedy's Annal's of Aberdeen, p. 240.

by Cromwell during his protectorship; for, in the year 1658, the election of the magistrates of Glasgow was delayed at his desire, expressed by letter [1].

The regular election of magistrates suffered great interruption by the introduction, in the year 1681, under the administration of the Duke of York, of the test, which excited so general a ferment in the kingdom at that period. Fountainhall [2] says, that, on the 10th November 1681, in the privy council, 'the same burgh of Ayr, and the towns of Coupar in 'Fife, and Queensferry,' are pursued, either for not electing their magistrates at the usual time of Michaelmas last, or else for the magistrates not taking the test. The council declared that the last two boroughs had lost their power of electing magistrates for this year, that therefore the election had fallen, and devolved in the king's hand, and that he and his council would name their magistrates.

Again, we find, that, on the 24th November 1681, an order was made by the privy council, that such of the burghs as had not elected magistrates the preceding Michaelmas, on account of the test, should be charged with horning to elect. Some time after this period, we find a variety of instances mentioned by Fountainhall, of nomination of magistrates by the king; as in 1687, with respect to three boroughs [3], and the same year with respect to other boroughs [4], and again in 1686 [5]. Whether those instances were connected with the test act does not appear; but it may be mentioned, that the test was not annulled by the king till after the middle of the year 1687, which was subsequent to these instances [6].

We are farther told by Fountainhall [7], that, in the privy council, on the 16th September 1686, the king's letter was read, stopping the elections of all boroughs royal, whether of magi-

[1] Gibson's History of Glasgow, p. 99.
[2] Vol. i. p. 161.
[3] Page 439.
[4] Page 442 and 445.
[5] Page 427.
[6] Laing's History of Scotland, vol. ii. p. 165.
[7] Vol. i. p. 424.

stratis, deacons, or counsil, and allowing the old ones to act and continue till his pleasure was farther known; that this step was taken to secure the election of the commissioners to next parliament better than they were the last; that the chancellor signed a letter for each borough intimating this step; and that obedience was given. Another similar instance is mentioned[1] on the 16th September 1687, stopping all elections, except in Perth and Rothsay, on which occasion a person was named by the king, as one of the magistrates of Perth.

These interferences with the freedom of elections were, however, declared to be illegal at the Revolution. One of the grounds on which James was declared by the Convention of Estates in 1689, to have forfeited his right to the throne, was his 'subverting the right of the royall burrowes, the third estate of Parliament; imposing not only magistrates, but also 'the whole toun councill and clerks, contrair to their liberties 'and express charters, without the pretence either of sentence, surrender, or consent. And the commissioners to 'Parliament being chosen by these magistrates and counsil, 'the king might in effect alswell nominat that intire estate of 'parliament[2].'

Subsequently, in the declaration of rights by the same convention, this article was included: 'that the nominating and 'imposing the magistrates, councils, and clerks upon be-'roughs, contrary to their liberties and express charters, 'is contrary to law[3].' And, with the view of doing away the effects of such interferences in the past elections, the 'estates doe find, that generally the foresaid haill royall 'burrowes have suffered encroachments on their liberties 'and priviledges by letters and recommendationes from the 'King, his counsill and others haveing power and influence, 'whereby, these several years past, many of the burgesses,

[1] Vol. i. p. 473.
[2] Mr Thomson's Acts, vol. ix. p. 34.
[3] Ib. p. 39.

'otherwayes qualified to elect and be elected, have been de-
'barred: Therefore the Estates doe hereby give order and
'warrand for new elections to be made of ordinary Magis-
'trats and Toune Counsills for the severall royal burghs, to
'be chosen by the poll, and that on such tymes, and at the
'sight of such persones, as the Estates shall appoynt. And
'ordaines the toune clerks to conveen the habile burgesses to
'that effect, (excluding honorary burgesses, toune servants,
'pensioners and beidmen.) And to proceed in the foresaid
'electione in the same manner as was formerly ordered and
'appoynted by the Estates in the electiones of the Magis-
'trats and Toune Counsills of Edinburgh and Dundee; and
'appoynts the Magistrates and Toune Counsills, so elected,
'to continou till the ordinary tyme of their electione at or
'neer Michaelmas next[1].'

The elections were intended afterwards to proceed according to the former sets of the boroughs, as was specially provided in some particular instances, in which warrants were granted for poll elections in the first instance.

At present each burgh has its own particular constitution or set regulating the mode of election of its magistrates and council. These sets are almost all, however, modelled to a greater or less extent on the provisions of the act 1469. They have in some instances been established by the convention, sometimes on submission, and sometimes without that step; and in other instances they are the result of a formal act of the town-council. Usage, also, has had probably the principal share in forming many of them. In general, they have not been lawfully established as they now exist at any one period, but have been the result of alterations and amendments by more than one of these methods.

These sets are recorded in the books of the convention of royal burghs. A general order to that effect was pronounced

[1] Mr Thomson's Acts, p. 49.

by the convention in the year 1708, and compliance was given by all the burghs except Nairn, Dornoch, and Inverary. At subsequent periods various alterations and additions have also been recorded in those books.

In the year 1784 a general convention of delegates from the various royal burghs of Scotland, assembled at Edinburgh, for the avowed purpose of effecting, by legislative interference, a radical change in the general system of government of the royal burghs. The great objects of those who favoured this design were to destroy the self-elective method which had originated in the act 1469; to restore what was conceived to be the original mode of election by the burgesses; and to provide some effectual means for preventing the undue disposal of the burgh funds. But this plan, after agitating the public mind for several years, and after a bill had been actually introduced into parliament, in the year 1788, and a committee had been appointed to inquire into the alleged abuses in the royal burghs, and had reported on the subject, was at length allowed to drop in the year 1796.

The subject was again revived in the year 1817, and was brought before parliament in the following session. Various petitions were presented to the House of Commons in the course of the years 1818, 1819, and 1820, and select committees were, on different occasions, appointed to inquire into the alleged abuses. After much discussion, in the House of Commons, on various motions, the result was, that, in 1822, the Lord Advocate of Scotland introduced two bills, the one to enforce the residence of magistrates, and to restrain undue compacts regarding elections, the other to introduce that mode of accounting with respect to the expenditure of the common good which has already been explained. The former of these bills was withdrawn, and the latter ultimately passed into a law in the month of July 1822.

Before concluding our view of the municipal constitution

of the burghs of Scotland, it will be necessary to advert shortly to the history of the gildry and of the crafts of those burghs.

Besides the general corporation of the town, consisting of all the burgesses, with the magistrates and council as heads, there are in almost all the burghs of Scotland lesser corporate bodies, consisting of particular portions of the community. The various societies of craftsmen are corporations of this latter kind. The gildry appears to be in general less well defined as a corporate association; but there are societies of the gild brethren in some towns which probably may be viewed as corporations. We shall begin with shortly tracing the history of the gildry, as being, if not the best defined of those subordinate associations, at least the most ancient and most important of them.

We have seen that, in England, the merchant gild existed at least as early as the twelfth century [1]. About the same period, the same institution appears in Scotland. It is mentioned in one of the Leges Burgorum [2]; and in a charter of William the Lion, as existing in the time of his grandfather [3]; and may, therefore, be perhaps as ancient as the time of David I. There is a law, attributed to William, allowing the merchants of the kingdom to have their merchant gild [4].

The sovereigns of England, after the Conquest, we have also seen, bestowed, in their charters to different towns [5], the privilege of a merchant gild. This method was also adopted by the kings of Scotland. William, before the close of the

[1] *Supra*, p. 443-4. [2] C. 99.

[3] See this charter mentioned *infra*, p. 526.

[4] 'Item statuit quod mercatores regni, habeant gildam suam mercatoriam et ita gaudeant in pace, cum libertate emendi, et vendendi, ubique infra limites libertatum burgorum; ita quod quilibet sit contentus sua libertate, et nullus occupet libertatem alterius ne forte in Itinere Camerarii nostri condemnetur, vt foristallator, et puniatur.'—Stat. Gul. c. 35.

[5] *Supra*, p. 444.

twelfth century, granted a charter to all his burgesses of Aberdeen, of Moray, and everywhere on the north of the Grampians, conferring on them the right of having their '*ausum*[1],' or merchant gild, as they had enjoyed it in the time of his grandfather[2]. A charter of Alexander II. granted to Aberdeen early in the thirteenth century, bestowed on the burgesses the privilege of a merchant gild, excepting from this privilege the waulkers and weavers[3]. Robert Bruce gave this privilege to the burgesses of Dundee[4], by his charter to that burgh. Robert II. bestowed on the burgh of Irvine the liberty of a gild, and of making gild brethren[5]. Many charters of James VI. as those to Edinburgh, Perth, and Rutherglen, contained grants of this privilege.

[1] 'Ausen conventio et societas magna, ex privilegio postulata, ad mercaturam terra marique faciendam.' *Ause* and *Hause* appear the same word as *Hanse*, the *u* being transmuted for *n*.—See Spelman in verb. Ause.

[2] '——— liberum ausum suum tenendum cum voluerint et quando voluerint, ita libere et quiete plenarie et honorifice sicut antecessores eorum tempore regis M. Avi mei ausum suum liberius et honorificentius habuerunt, &c. Apud Pert.' Kennedy's Annals, vol. i. p. 8. The expression, 'tempore M Avi mei,' is surely a mistake for 'tempore D avi mei.' Andrew, bishop of Caithness, witness to this charter, died in the year 1184 or 1185. Keith.

[3] 'Concedo et eisdem burgensibus, meis de Aberden ut habeant gildam suam mercatoriam exceptis fullonibus et tellariis.' See the charter, Kennedy's Annals, i. p. 11. There is a similar exception of weavers and waulkers in a charter of James VI. to Perth. Cant's Hist. of Perth, App. p. 7.

[4] 'Concedimus etiam et confirmamus eisdem ut habeant gildam suam mercatoriam.'

[5] 'Volumus etiam et concedimus eidem burgo de Irwyne, et burgensibus ejusdem, ac eorum heredibus et successoribus, pro nobis, heredibus et successoribus nostris, libertatem gilde prout alii burgi et burgenses regni nostri, ipsam libertatem habent, et habere consueverunt: quodque fratres gylde in burgo de Irwyne predicto constituere valeant qui gaudebunt, et gaudere debebunt omni libertate gylde, qua alii quicunque regni nostri burgenses hactenus sunt gavisi.' This charter will be found in Hay's Vindication of Elizabeth More.

The monastery of Dunfermline followed the example of the kings, and confirmed to the town of Dunfermline the privilege of a gild, which, from the terms of the grant, it appears to have previously enjoyed [1].

In England we have seen that the word gild was not confined to the merchant association, but was also applied to proper mechanical associations or crafts, and also to religious communities [2]. In Scotland it appears to have been always used to designate a society, properly speaking, of a mercantile nature, although probably, also, in its original character, embracing some of the mechanical arts. From the Iter Camerárii it may be collected, that the merchant gild comprehended some of these arts [3]. It is true that certain tradesmen are, by one of the burgh laws, excluded from the merchant

[1] 'Omnibus, &c. Noveritis nos unanimi consensu et assensu dedisse, 'concessisse et hac presenti carta nostra confirmasse, pro nobis et succes-'soribus nostris burgensibus nostris de Dunfermlyn, et eorum heredibus, 'in perpetuum, gyldam mercatricem, cum omnibus libertatibus juribus et 'commoditatibus ad liberam gyldam mercatricem pertinentibus vel de ju-'re pertinere valentibus, una cum domibus ad dictam gyldam ab antiquo 'spectantibus, salvo jure cujuslibet, tenendam et habendam predictis bur-'gensibus nostris et eorum heredibus, de nobis et successoribus nostris, in 'vendicionibus, empcionibus et omnibus aliis premissis, adeo libere, quie-'te, plenarie, honorifice bene et in pace sicut burgenses dni nostri regis 'in burgis ejusdem dni nostri tenent et possident salvis nobis et obedien-'ciariis nostris, et eorum ministris, pro nostris et obedienciariorum nos-'trorum usibus empcionibus, et aliis antiquitus usitatis justitia mediante. 'In cujus rei testimonium.' Chartular Dunferm. fol. lxxixb.

[2] See *supra*, p. 442-3. Spelman's account of it is as follows: 'Gilda '(exteris gildonia) est societas quorundam, puta charitatis, religionis, vel 'mercaturæ, gratia (instar Ganerbinatus apud Germanos) confœderatorum: 'bona quædam, interdum et prædia, necnon aulam societatis, prætorium, 'habentium communia. Latinis *collegium*, *fratria*, *fraternitas*, *sodalitium*, '*adunatio*.' Spelman, p. 260.

[3] 'Utuntur mercibus ad gyldam pertinentibus quia faciunt panes et co-'quunt cerevisiam vendunt vinum et ceram amurcam smegma, et aliis li-'bertatibus utuntur quibus in foro uti non debent.'—Iter. Cam. c. 21. sect. 4.

gild, unless they renounce their trade [1], but there is no such provision as to the other trades, and we have seen similar exclusions as to particular crafts in some of the royal charters. By certain acts of the legislature [2], without particular mention of the gildry it was provided generally that craftsmen should not use merchandise unless they renounced their crafts. But the sets and other regulations of certain towns admit craftsmen to the privileges of gild brethren, without any condition, as King James's set in Edinburgh; and, in a municipal regulation of Glasgow, called the Letter of Guildry [3], it appears to be taken for granted that craftsmen may be gild brethren. Such rules, it may be observed, do not necessarily import any encroachment on the privileges of the gildry as a body, as they do not allow tradesmen to use merchandise without becoming gild brethren, but merely admit them to that privilege, after acquiring the other character.

From the statute of William, which has been referred to as well from his charter to all his burgesses north of the Grampians, we might infer, that the association was of a general nature, comprehending all the merchants of the kingdom, or of an extensive district, and not a particular society in each burgh. But when it is remembered that special grants were also made, as has been shewn, to particular towns, of the privilege of having a merchant gild, and that, at subsequent periods, there is evidence of separate associations of this nature in different burghs; the preceding view must appear to be incorrect. There can be little doubt that particular mercantile societies came, in process of time, to be established in many towns of Scotland, although the question may remain how

[1] 'Nullus tinctor sutor vel carnifex potest esse in gilda mercatoria, nisi 'abjuret facere officium suum manu propria sed per servientes suos sub 'se.'—C. 99.

[2] 1466, c. 12. 1487, c. 107.

[3] See App. Gibson's Hist. of Glasgow.

far the gild of any particular town, ever acquired the legal character of a proper corporate body.

The earliest record from which we derive much information respecting the constitution of such an association in any individual town in Scotland, is the collection known by the name of the Statuta Gildæ, which bear to have been framed at Berwick by the Mayor and other burgesses of that town in the year 1283, and were evidently, from their whole strain, intended to be applicable to that burgh. Hence, they cannot farther illustrate the general history of the gildry in Scotland than in so far as we may presume that they would in some degree resemble those rules regulating similar institutions then existing in other towns. If we could suppose that the gilds of the other towns of Scotland were then established on a similar footing, there can be no doubt that they must then have borne nearly all the characteristics of proper corporations. Thus, this gild was to be continued by the succession of new members[1]; it had various sources of revenue[2], and those funds were to be applied for the benefit of its members and of their relatives[3]; it had certain officers as heads in whom was vested the power of calling assemblies of the whole members[4], and peculiar privileges as to buying and selling were enjoyed by those members[5].

The ancient records of the burgh of Aberdeen, which have been published, and which illustrate the ancient mode of electing the magistracy, throw very little light on the constitution of the guildry of that town. The fratres gildæ are, indeed, mentioned as early as the year 1485[6]; and in the records of subsequent years, the meetings of the curia gildæ are frequently entered. This court, however, was not held by any officer peculiar to the gildry, but by the provost, or provost and magistrates, of the town. Rolls were called of those

[1] Stat. Gildæ, c. 8.
[2] C. 2; c. 3; c. 4; c. 8.
[3] C. 9; c. 10; c. 11; c. 12.
[4] C. 14.
[5] C. 20.
[6] Report, 1793, p. 40.

who owed suit, and the absentees marked, as in the case of the head court. The suitors, we may presume, were the gild brethren; and, indeed, in one year, the court expressly bears to have been held 'per prepositum et confratres gil-'dæ[1].' At this court the common council of the town were generally chosen, although not uniformly; the deans of gild and masters of works were likewise usually elected in this assembly, although not by the gild brethren. They also appear to have been sometimes chosen in the head court.

In like manner the Curia Gildæ of Edinburgh, at an early period, was not held exclusively by any peculiar gild officer, but by him in conjunction with the ordinary magistrates of the town. In the year 1502 and 1562, it was held *in presence of* the magistrates, councillors, and dean of gild; and, in the year 1550, *by* the dean of gild, *in presence of* the magistrates[2].

We have seen, that, in England, the chief officer of the gild was usually called *Alderman*, a title also well known to have been applied to certain ordinary town magistrates in that country. In the Statuta Gildæ, the same denomination is used to designate the chief officer of that association[3], and appears to have been borrowed from England, in the same manner as the title of Mayor was derived from that country to designate the chief magistrate of the town of Berwick, where the Statuta Gildæ bear to have been framed, before it was taken by Edward I. in the year 1296. There does not appear to be any trace of this title of Alderman having been applied to the head of the gild in any other Scottish town. The office bearers of the gild, mentioned in the Statuta Gildæ, besides an alderman, are treasurers and a dean[4]. These

[1] In 1474; ib.

[2] '*Per* Fran. Simson, decanum gildæ, *coram* honorabil. viris,' &c. See the records published in Commons' Report 1819, p. 233.

[3] See c. 12, c. 35, c. 6, &c.

[4] Aldermannus Ferthingmanni et Decanus. See c. 6, and c. 14.

statutes do not throw any light on the mode of election of these officers.

The title of Dean of Gild is that which, in later times, we find almost invariably applied to the chief officer of that association in the different towns of Scotland; although the duties of this office have certainly for a long time by no means been exclusively confined to the affairs of the gildry. The dean of gild is one of the officers mentioned in the act 1469, c. 30.

In the year 1518, however, we find authority granted to the merchants and gild brethren of Edinburgh to elect certain other officers to preside over them. In that year, a seal of cause was granted by the magistrates of Edinburgh to the merchants and gild brethren of that town, impowering them to choose 'ane *maister of faculty*, certain officiars and counsalours as y'ai think maist expedient, and yairafter the said 'maister of faculty, counsaloures, and officiars, in all tymes 'cuming, to haif power to cheise ye new maister of facultie, 'counsellors, and membres of ye said fraternitie[1]'. This master of faculty appears to have been elected for the first year at least, as he is mentioned some months after the date of the seal of cause[2]; but this charter had probably soon after gone into disuse. The appointment of this officer is the more remarkable, as a dean of gild occurs as early as the year 1507[3], or several years before the seal of cause.

There appears to be no information from any quarter as to the mode of election of the dean of gild in the different towns of Scotland before the act 1469. By that statute, it was provided, that the dean of gild should be chosen, in the same manner as the other magistrates, by the old and new council. We might indeed conclude, that, before that act,

[1] This charter is printed in the Commons' Report 1819, p. 234.

[2] 'Honorabilis vir Adam Hopner, burgensis burgi de Edinburgh, ac 'magister facultatis predictæ;' Report, p. 235.

[3] Report, p. 233.

this officer would be chosen upon a principle similar to that on which the magistrates themselves were elected; were it not that, from the records of Aberdeen, the deans of gild, of whom there were at first in that town two or more, appear to have been chosen by the magistrates and council, even at a time when the election of the magistrates themselves was still conducted on a popular footing. The first mention of the deans of gild in this town is in the year 1502, but the description of their electors is not given. In the year 1526, they are stated to have been chosen 'be the awyss of the provost, bailies and counsel[1];' and in the year 1536, they are directly elected by the provost and council, although the election took place in the *curia gildæ*[2]. For many years after this, the other magistrates of Aberdeen were chosen by the voice of the burgesses.

In the election clauses which are usually inserted in the royal charters to boroughs subsequently to the act 1469, the dean of gild is frequently mentioned as one of those magistrates or office-bearers whose election is committed to certain classes of the community specified in those grants[3]. These clauses, taken literally, are in general as much at variance with the provisions of the statute 1469, with respect to the election of this officer, as in regard to that of the other magistrates.

At present the dean of gild is, in general, chosen agreeably to the act 1469, upon a principle similar to that on which the other magistrates are elected. In a few boroughs, however, as in Stirling and Dundee, he is elected by the gild brethren; this privilege having been bestowed on the gildry of the former of these towns by the new set obtained by royal warrant in the year 1781, and in the latter town by act of convention in the year 1818, although, in more ancient times, it is said

[1] Report 1793, p. 44. [2] Ib. p. 45.

[3] See the election clauses, Report 1793, App. A.

that the dean of gild of Dundee was then also elected by the gild brethren. By the set of Coupar, also, this officer is chosen by the gild brethren.

In some towns of Scotland, the gildry may probably be viewed in the light of an existing corporation. In the town of Edinburgh, by a judgment of the Lord Ordinary in the year 1820, the gildry of that town were found not to be a corporation [1].

Craftsmen of various descriptions must of course have existed in the Scottish towns as early as the establishment of those towns themselves; but their incorporation into regular societies in Scotland appears to have been the operation of a much later period. There is no trace of such corporate bodies in the Leges Burgorum or Iter Camerarii, although mechanics of various descriptions are mentioned.

In the year 1424, every craft in the different towns was, by an act of the legislature, impowered to choose a 'deakon 'or maisterman, be the laif of that craft, and be consent 'of the officiar of the towne;' which appears to be a step towards incorporation, if there was yet no actual union of that nature among the crafts [2]. In the year 1442, we find the craftsmen of Aberdeen arranged in one of the pageants then common, in nearly the same classes as at the present day, but without any direct evidence of actual incorporation [3].

These societies, as they now exist in the towns of Scotland, have been incorporated, sometimes by royal charter, and sometimes by seals of cause from the magistrates and council. Some of these seals of cause were granted during the 15th century [4]. Incorporations of craftsmen may, however,

[1] Gildry of Edinburgh *v.* the Magistrates, 11th January 1820.

[2] 1424, c. 39.

[3] Kennedy's Annals of Aberdeen, i. p. 95.

[4] The Cordiners of Edinburgh obtained a charter from the Town Council, 28th July 1449, Maitland, p. 305; and many of the other Edinburgh crafts obtained seals of cause before the close of the 15th century.

be also formed by a prescriptive possession of the privileges of a corporate body, although a seal of cause is not extant; it being presumed, in such a case, that a charter once existed, although now lost [1].

When seals of cause have been obtained, they cannot be altered by the corporation itself, without the consent of the town council. Thus it was found, that a seal of cause, or letter of deaconry, obtained by the incorporation of weavers of Rutherglen from the magistrates and town council, and containing several regulations with respect to apprentices, and the qualifications of admission as freemen, could not be rescinded or altered by any act of the corporation, without the consent and authority of the magistrates and council [2].

In a case from the town of Brechin, in which a declarator was brought to have it found, that persons not handicraftsmen of particular incorporations, might, notwithstanding, have all the privileges of such incorporations; and in which it appeared, that such a usage as that contended for had prevailed, contrary to an act of some standing of one of the incorporations,—which, however, had been repealed by another recent act; the court held that such practices would confound the nature of incorporations, and assoilzied the defenders [3].

It has been already mentioned, that, by an act, passed in the year 1424, it was provided that each craft should choose a deacon, or masterman. It appears, afterwards, to have been thought that this office was of dangerous tendency, and a statute [4] was passed two years afterwards, putting a stop to it; but, by a subsequent statute of the same year [5], the office was continued till next parliament, with a limitation of its powers to

[1] Skirving v. Smellie, 19th January 1803; Fac. Wrights of Glasgow v. Crosse, 8th March 1765; Fac.

[2] Crooks, &c. v. Turnbull, &c. 4th December 1776; Fac.

[3] Fotheringham v. Langlands, 13th December 1776; Fac.; and Hailes, p. 732.

[4] 1426, c. 8.

[5] 1426, c. 77.

the mere essaying of the work [1]. In the next parliament, the council of the burgh was ordained, by act 1427, c. 102, to choose a wardane, for a year, for each craft, for the purpose of fixing a price on the work. In 1491, we find another act, c. 43, providing, that all deacons should cease for a year, and have no other power than an examination of the articles manufactured. Subsequently, the statute 1555, c. 52, on the narrative that the choosing of deacons had caused great trouble and commotion in boroughs, entirely forbade the farther election of them, and appointed the magistrates and councillors to choose 'ane honest man of craft,' to visit the crafts, and see that they laboured properly, and made their work of good materials. So little, however, was this act ever observed, that it seems to have died in its very birth. We are informed by Sir George Mackenzie [2], that the very next year, Queen Mary allowed, by special grant, the trades of Edinburgh to choose deacons, on the narrative, as the grant bears, that the act was never in observance, and that since it was passed, it was found that deacons were necessary in towns. A similar permission was given the same year by royal charter to the craftsmen of Perth [3]. A general charter was afterwards granted by James VI., in the year 1581, to the tradesmen of the burghs of Scotland, to have deacons, notwithstanding the act 1555 [4]. The institution of deacons subsequently became well confirmed by usage. These deacons are sometimes chosen by the incorporation, through the intervention of leets sent to, and shortened by, the town-council, as in the case of Edinburgh; and sometimes they are elected by the incorporation, without that intermediate process. In case of an equality of votes, the old deacon, besides

[1] In the printed collections, the last of these acts is printed first; but by referring to the dates of the parliaments, the above is the true order.

[2] Observations on this act, 6th Parl. Mary, c. 52.

[3] Cant's History of Perth, App. p. 55. [4] Ib. p. 57.

his ordinary suffrage, has a casting vote[1]. The deacons of trades, in some boroughs, are *ex officio* councillors; but in others they are not so.

From the account which has been given of these various subordinate societies, we may perceive, that in almost every burgh there are different classes or descriptions of persons amongst the general mass of burgesses. 'There are,' says Lord Kilkerran[2], 'three sorts of *burgesses*; burgesses *in sua* '*arte*, who are members of one or other of the corporations; 'burgesses who are guild-brothers; and a third sort, who are 'simply burgesses, and neither guild-brothers nor members 'of any corporation. Each of these are confined to their 'proper spheres.'

Besides the ordinary burgesses, it is customary to admit honorary burgesses, whose privileges are conferred as a mere matter of favour or courtesy, and who it is not intended shall reside or claim any of the privileges of the town. Such honorary burgesses are in general excluded from voting in borough elections[3].

[1] Herriot and Others v. Ray and Others, 26th February 1735; affirmed on appeal, 30th April 1735. Craigie and Stewart's Cases, i. p. 171.

[2] Page 100.

[3] See *supra*, as to this, p. 308.

# APPENDIX.

# I.

# THE STATUTES AT LARGE,

## RELATING TO THE ELECTION OF PEERS AND COMMONERS FOR SCOTLAND.

### JAMES I. Parliament III. 1425, Cap. 52.

*That all Prelates, Baronnes, and Freehalders, sall compeir personallie in the Parliament.*

Item, it is ordained and statute, that all prelates, erles, baronnes, and freehalders of the king, within the realme, sen they are halden to give presence in the Kingis Parliament, and general councel, fra thine foorth, be halden to compeir in proper person, and not be a procuratour; but gif the procuratour alleage there, and prove, a lauchfull cause of their absence.

### JAMES I. Parl. VII. 1427, Cap. 101.

*That Small Baronnes and Freehalders needis not to come to Parliamentes.*

Item, the King, with consent of the haill councel, generallie hes statute and ordained, that the small baronnes and free tennentes neid not to cum to Parliaments nor general councels; awa that of ilk schirefdome there be send, chosen at the head court of the schirefdome, twa or maa wise men, after the largenes of the schirefdome; outtane the schirefdomes of Clackmannan and Kinrosse, of the quhilkis ane be sende of ilk ane of them, the quhilk sall be called Commissares of the schire; and be their commissares of all the schires sall be chosen an wise man and expert, called the Commoun Speaker of the Parliament, the quhilk sall propone all and sindrie needis and causes perteining to the commounes, in the Parliament or general councel; the quhilkis commissares sall have full and haill power of all the laif of the schirefdome, under the witnessing of the schireffis seale, with the seales of diverse baronnes of the schire, to heare, treate, and finallie to determine all causes to be propened in councel

or Parliament: The quhilkis commissares and speakers sall have costage of them of ilk schire that awe compeirance in Parliament or councel; and of their rents, ilk pound sall be utheris fallow to the contribution of the said costes. All biahoppes, abbottes, priors, dukes, erles, lordes of Parliament, and ban-rentes, the quhilkis the king will, be received and summound to councel and Parliament be his special precept.

## JAMES II. PARL. XIV. 1457, CAP. 75.

*That na Freehalder be constreinxied to the Parliament, bot he be of Twenty Pounds woorth of Land.*

ITEM, the lordes thinkis speedeful, that na freehalder that haldis of the king, under the summe of twentie pounds, be constreinxied to cum to the Parliament, or general councel, as for presence, bot gif he be ane baronne, or els be specially, of the kingis commandement, warned, outher be officiar or be writ.

## JAMES IV. PARL. VI. 1503, CAP. 78.

*That all Freehalders, within ane Hundreth Markes of Extent, send their Procuratoures to the Parliament.*

ITEM, it is statute and ordained, that fra thinefoorth, na baronne, freehalder, nor vassal, quhilk ar within ane hundreth markes of this extent that now is, be compelled to cum personally to the Parliamente, bot gif it be that our soveraine lorde write specially for them; and sa not to be unlawed for their presence, and they send their procuratours to answere for them, with the baronnes of the schire, or the maist famous persons: And all that ar abone the extent of ane hundreth markes to cum to the Parliament, under the paine of the auld unlaw.

## JAMES VI. PARL. XI. 1587, CAP. 114.

*The Commissioners of small Baronnes and Freehalders hes Vote in Parliament.*

OUR Soveraine Lorde, considering the acte of his hienesse Parliament, halden at Linlithcow the tenth day of December, the zeir of God ane thousand five hundreth fourscore five zeires, makand mention how necessar it is to his heinesse, and his estaites, to bee

trewly informed of the needes and causes pertaining to his loving subjectes in all estaites, specially the commounes of the realme, and remembring of ane gude and lovable acte made by his hienesse progenitour King James the First, of worthy memory, in the Parliament halden at Perth the first day of March, the zeir of God ane thousand four hundreth twenty-seven zeirs, anent the commissioners of small baronnes in Parliament, that his majesty, and his said estaites, would ratifie and appreeve the same to have full effect, and to be put to execution in time cumming; and of new statute and ordaine, for the mair full explanation of the same act, and certaine execution thereof, that precepts suld be directed foorth of the chancellary, to ane barron of ilk schire first, to conveene the freehalders within the same schire, for choosing of the commissioners, as is contained in the same acte: Quhilkis commissioners being anis chosen and send to Parliament, the precepts of Parliament for conveening of freehalders, to the effect foresaid, to be directed to the last commissioners of ilk schire, quhilkis sall cause cheise twa wise men, being the kingis freehalders, resident indwellers of the schire, of gude rent, and weill esteemed, as commissioners of the same schire, to have power and to be authorized, as the act proports, under the commissioners seale, in place of the schireffes; and that all freehalders of the king, under the degree of prelates and lords of Parliament, be warned be proclamation, to be present at the choosing of the saids commissioners, and nane to have voit in their election bot sik as hes fourtie shilling land in free-tennendry halden of the king, and hes their actual dwelling and residence within the same schire; quhilk matter being remitted be the said estaites, conveened in the said Parliament at Linlithcow, to the will and good consideration of our said soveraine lord, to do and ordaine therein as his hienesse sould think maist expedient and requisite betuixt and his nixt Parliament: And now his majesty intending, God willing, to take ordour for the finall settling and establishing of that gude forme and ordour maist meete and expedient to stand in perpetuity in this behalfe, according to the effect of the said act of parliament maid at Linlithcow, in consideration of the great decay of the ecclesiastical estait, and uthers maist necessar and weighty considerations moving his hienesse: Therefore his majesty, now after his lawfull and perfite age of xxi. zeirs compleit, sittand in plane Parliament, declaris and decernis the said act, maid be King James the First, to take full effect and execution, and ratifies and apprievis the same be thir presents: And for the better execution thereof, ordainis the commissioners of all the schireffdoms of this realme, according to the number prescrived in the said act of parliament, to be elected be the freehalders foresaids, at the first head court after Michael-mes zeirly, or failzeing thereof, at ony uther time quhen the saids freehalders please conveene to that effect, or that his majesty sall re-

quire them thereto; quhilks conventions his majesty declaris and decernis to be lauchfull: And the saids commissioners being chosen, as said is, for ilk schireffdome, their names to be notified zeirly in write to the director of the chancellary be the commissioners of the zeir preceeding; and thereafter, quhen ony Parliament, or generall convention is to be halden, that the said commissioners be warned at the first be vertew of precepts furth of the chancellary, or be his hienesse missive letters or charges, and in all times thereafter be precepts of the chancellary, as sall be directed to the uther estaites; and that all freehalders be taxt for the expenses of the commissioners of the schires passing to Parliament or generall councelles, and letters of poynding or horning to be direct for payment of the summes taxt to that effect, upon ane simple charge of sex dayes warning allanerly; and that the said commissioners authorized with sufficient commissiones of the schireffdomes fra quhilk they cum, sealed and subscrived with sex at the least of the baronnes and freehalders thereof, sall be equal in number with the commissioners of burrowes on the articles, and have vote in Parliament and generall councelles in time cumming, and that his majesties missives before generall councelles sall be directed to the saids commissioners, or certaine of the maist ewest of them, as to the commissioners of burrowes in time cumming; and that the Lords of Councell and Session sall zeirly direct letters, at the instance of the saids commissioners, for conveening of freehalders to choose the commissioners for the nixt zeir, and making of taxation, to the effect abonewritten; and that the compeirance of the saids commissioners of the schires in Parliaments or generall councelles sall relieve the haill remanent small baronnes and freehalders of the schires of their suites and presence sucht in the saids Parliaments, providing alwayes that the small baronnes observe there promises and conditions maid to his majesty. Upon the quhilk declaration and ordinance, maid and pronunced be our soverane lord sittand in plaine Parliament, as said is, John Murray of Tullibardin asked actes and instruments, and David Earle of Crawfurd, Lord Lindsay, for himselfe, and in name and behalfe of uthers of the nobility, protesting in the contrair.

## JAMES VI. PARL. XV. 1597, CAP. 276.

*Baronnes suld send to the Parliament Commissioners with sufficient Commissiones.*

OUR Soveraine Lord and estates of Parliament statutis and ordainis, That na barronnes be received as commissioners for ony schireffedome within this realme, at ony Parliament to be halden hereafter, except the saids barronnes bring and produce with them suffi-

cient commissions, granted to them in an full convention of the haill barronnes of the said schireffedome; quhilk commission sall be authorized with the subscription of ane great number of the barrons then present, togidder with the clerk of the said convention his subscription; and gif the said commission be not past in dew forme, in manner foresaid, his hieness and estaites discharges the clerk of register, in all time hereafter, of ony receiving of their saids commissiones.

## CHARLES II. PARL. I. 1661, CAP. 35.

*Act concerning the Election and Charges of the Commissioners from Shires to the Parliament.*

THE King's Majesty considering, that diverse debates have formerly occurred, concerning the persons who ought and should have vote in the election of commissioners from the several shires of this kingdom to Parliament, and who are capable to be commissioners to Parliaments, and that it is necessar for the good of his service, that the same be cleared for the future, doth therefore, with advice and consent of his estates of Parliament, statute, enact, and declare, That, beside all heritors who hold a fourty shillings land of the king's majesty *in capite*, that also all heritors, liferenters, and wodsetters holding of the king, and others who held their lands formerly of the bishops or abbots, and now hold of the king, and whose yearly rent doth amount to ten chalders of victual, or one thousand pounds, (all feu-duties being deducted) shall be, and are capable to vote in the election of commissioners of Parliaments, and to be elected commissioners to Parliaments, excepting alwayes from this act all noblemen and their vassals. And it being just, that those who shall be chosen, and accordingly shall attend his majestie's and the kingdom's service in Parliaments, have allowance for their charges, his majestie doth therefore, with advice foresaid, modifie and appoint five pounds Scots, of daily allowance, to every commissioner from any shire, includiug the first and last dayes of the Parliament, together with eight days for their coming, and as much for their return, from the furthest shires of Caithness and Sutherland, and proportionably at nearer distances; and that the whole freeholders, heritors, and liferenters holding of the king and prince shall, according to the proportion of their lands and rents lying within the shire, be lyable and oblidged in the payment of the said allowance, excepting noblemen and their vassals. For payment of which, all execution of horning, poynding, and quartering, is to pass as for raising of the excise, and that according as the time and dayes of the Parliament shall be attested under the clerk of register's hand. And because, at this time, some commissioners of shires have been put to extra-

ordinary expences, in providing of footmantles for the riding of the parliament, it is hereby statute, that the commissioners shall be relieved of the prices thereof, to be given in under their hands; and that the prices of the footmantles be raised in the same way, and by the same execution, with the daily allowance aforesaid, the commissioners alwayes, at the rising of each parliament, making the footmantles forthcoming to the shire, to be disposed as they shall think fit.

## CHARLES II. PARL. III. 1681, CAP. 21.

### *Act concerning the Election of Commissioners for Shires.*

OUR Soveraigne Lord considering the great delay in dispatch of publick affairs in Parliament, and convention of estates, occasioned by the controverted elections of commissioners for shires: For preventing whereof, and for clearing the orderly way of election of the said commissioners in time coming; therefore, his Majesty, with the advice and consent of his estates of Parliament, statutes and ordains, that none shall have vote in the election of commissioners for shires, or stewartries, which have been in use to be represented in Parliament and conventions, but those who at that time shall be publickly infeft in property or superiority, and in possession of a forty shilling land of old extent, holden of the King or Prince, distinct from the few-duties in few-lands; or, where the said old extent appears not, shall be infeft in lands lyable in publick burden, for his majesty's supplies, for four hundred pounds of valued rent, whether kirklands, now holden of the king, or other lands holding few, waird, or blench, off his majesty, as king or prince of Scotland; and that apprisers or adjudgers shall have no vote in the saids elections during the legal reversion; and that, after the expiring thereof, the appriser or adjudger first infeft shall only have vote, and no other appriser or adjudger coming in *pari passu*, till their shares be divided, that the extent or valuation thereof may appear; and that, during the legal, the heritor having right to the reversion shall have vote; and likewise proper wodsetters, having lands of the holding, extent, or valuation foresaid; which rights to vote, proceeding upon expired comprising, adjudication, or proper wodset, shall not be questionable upon pretence of any order of redemption, payment and satisfaction, unless a decreet of declaratour, or volunter redemption, renouncia-tion, or resignation, be produced; and that appeirand heirs, being in possession, by virtue of their predecessors infeftment, of the holding, extent, and valuation foresaid, and likewise liferenters, and husbands, for the freeholds of their wives, or having right to a liferent by the courtesie, if the saids liferenters claime their vote, otherwayes the fiar shall have vote; but that both fiar and liferenter shall not have

vote, unless they have distinct lands, of the holding, extent, or valuation foresaid; but that no person infeft for relief, or payment of sums, shall have vote, but the granters of the saids rights, their heirs or successors. Likeas, his majesty ordains the whole freeholders of each shire and stewartry, having election of commissioners, to meet and conveen at the head burghs thereof, and to make up a roll of all the freeholders within the same, whether lying within stewartries not having commissioners, or bailiaries of royalty, or regality, or without the same, upon the first Tuesday of May next to come, according as the same shall be instructed to be of the holding, extent or valuation foresaid, containing the names and designations of the fiars, liferenters, and husbands, having right to vote for the same, in manner above written, and expressing the extent, or valuations of the saids freeholders, with power to continue or adjourn their meetings, untill the said roll for elections be fully compleat. Likeas, the saids freeholders shall meet and conveen at the head burghs of the said shires and stewartries *respectivè* at the Michaelmas head court, yearly thereafter, and shall revise the said roll for election, and make such alterations therein as have occurred since their last meeting, from time to time; which roll for election shall be insert in the sheriff or stewart books, particularly appointed for that end, according as they shall be stated each Michaelmas court: And at the election of commissioners either at the Michaelmas court, or at the calling of Parliament, or conventions, the saids freeholders shall meet and conveen at the head burgh of the shire, or stewartry, in that room where the sheriff or stewart court useth to be held, betwixt midday and two afternoon; which room shall be patent to them, and all others removed but whom they call; and the first or second commissioner last elected, or, in their absence, the sheriff or stewart clerk, shall ask the votes, Who shall preside? and, Who shall be clerk to the meeting? And in case any alteration have happened in the said roll of elections since the last meeting, the persons then coming to have right to vote shall be insert in the roll; and there shall no objection be admitted against any insert in the said roll, as said is, but what shall be propounded before they begin to vote to election: and if the objectors shall not be cleared, and acquiesce, they shall take instruments, containing their objections against the admitting to, or excluding any person from the foresaid roll. And it is hereby declared, that no other objection shall be competent in Parliament or convention, but what shall be contained in the instruments taken as aforesaid: And in case objections be made when a Parliament or convention is not called, a particular diet shall be appointed by the meeting, and intimat to the parties controverting, to attend the Lords of Session for their determination, who shall determine the same at the said diet summarily, according to law, upon supplication without farther citation. And it is hereby declared, that horn-

ing for a civil cause, or non-residence, shall be no sufficient objection; but that the minority being instantly verified, shall be a sufficient objection, or the not taking the test appointed by the sixth act of this present Parliament, which is hereby ordered to be subscribed by all the voters, in presence of the meeting, before they proceed to the election, and recorded in the sheriff court-books, and so returned, with the commission, to the clerk of register. And if the persons objected against shall appear at the Parliament, or convention, and instruct the right to vote, the objector shall pay their expences, and be farther fined in five hundred merks: And if the objection be sustained in Parliament, the objectors appearing shall have their expences, and the party objected against shall be fined in five hundred merks. And to the effect that sufficient advertisement may be given to all parties having vote in election, who are to elect at the calling of a Parliament, or convention, the sheriffs and stewarts are hereby ordained to make publication of the call, and diet of the said Parliament, and convention, and of the diet appointed for election, and that at the head burgh of the shire or stewartry, upon a mercat-day, betwixt ten and twelve in the forenoon; and also shall make the like intimation at each parech kirk on Sunday immediately thereafter; which diets for election shall, at least, be twelve dayes before the meeting of Parliament, or eight dayes before the meeting of a convention, that the commissioners elected may have sufficiency of time to keep the diet of the Parliament, or convention. Likeas, his majesty, with consent foresaid, statutes and ordains the whole heritors, liferenters, and wodsetters, within each shire and stewartry, to contribute for the charges of the commissioners thereof, according to their valuation, except only those who hold of noblemen or bishops, or lands belonging to burrows royal in burgage; and also to the expences of the foot-mantles.

## QUEEN ANNE, PARL. I. SESS. 4. 1707, CAP. 8.

*Act settling the manner of Electing the Sixteen Peers and Forty-five Commoners, to represent Scotland in the Parliament of Great Britain.*

OUR Sovereign Lady considering, that, by the twenty-second article of the treaty of Union, as the same is ratified by an act past in this session of Parliament, upon the sixteenth of January last, it is provided, that, by virtue of the said treaty, of the peers of Scotland, at the time of the Union, sixteen shall be the number to sit and vote in the House of Lords, and forty-five the number of the representatives of Scotland, in the House of Commons of the Parliament of Great Britain; and that the said sixteen Peers and forty-

five Members in the House of Commons, be named and chosen in such manner, as by a subsequent act in this present session of Parliament in Scotland shall be settled; which act is thereby declared to be as valid as if it were a part of, and ingrossed in, the said treaty: Therefore, her Majesty, with advice and consent of the estates of Parliament, statutes, enacts, and ordains, that the said sixteen peers, who shall have right to sit in the House of Peers, in the Parliament of Great Britain, on the part of Scotland, by virtue of this treaty, shall be named by the said peers of Scotland, whom they represent, their heirs or successors, to their dignities and honours, out of their own number, and that by open election, and plurality of voices of the peers present, and of the proxies for such as shall be absent, the said proxies being peers, and producing a mandate in writing, duly signed before witnesses, and both the constituent and proxy being qualified according to law; declaring also, that such peers as are absent, being qualified as aforesaid, may send to all such meetings lists of the peers whom they judge fittest, validly signed by the said absent peers, which shall be reckoned in the same manner as if the parties had been present, and given in the said list. And, in case of the death or legal incapacity of any of the said sixteen peers, that the foresaid peers of Scotland shall nominate another of their own number in place of the said peer, or peers, in manner before and after mentioned. And that, of the said forty-five representatives of Scotland in the House of Commons, in the Parliament of Great Britain, thirty shall be chosen by the shires or stewartries, and fifteen by the royal borroughs, as follows, viz. one for every shire and stewartry, excepting the shires of Bute and Caithness, which shall choose one by turns, Bute having the first election; the shires of Nairn and Cromarty which shall also choose by turns, Nairn having the first election; and, in like manner, the shires of Clackmannan and Kinross shall choose by turns, Clackmannan having the first election. And, in case of the death, or legal incapacity of any of the said members, from the respective shires or stewartries above mentioned, to sit in the House of Commons, it is enacted and ordained, that the shire or stewartry who elected the said member shall elect another member in his place. And that the said fifteen representatives for the royal boroughs be chosen as follows, viz. that the town of Edinburgh shall have right to elect and send one member to the Parliament of Great Britain; and that each of the other burghs shall elect a commissioner, in the same manner as they are now in use to elect commissioners to the Parliament of Scotland; which commissioners and burghs (Edinburgh excepted) being divided in fourteen classes or districts, shall meet at such time and place, within their respective districts, as her majesty, her heirs, or successors, shall appoint, and elect one for each district, viz. the burghs of Kirkwall, Wick, Dornock, Dingwall, and Tayne, one; the

burghs of Fortrose, Inverness, Nairn, and Forres, one; the burghs of Elgin, Cullen, Bamff, Inverury, and Kintore, one; the burghs of Aberdeen, Inverbervie, Montrose, Aberbrothock, and Brechin, one; the burghs of Forfar, Perth, Dundee, Couper, and St Andrew's, one; the burghs of Crail, Kilrennie, Anstruther-Easter, Anstruther-Wester, and Pittenweem, one; the burghs of Dysart, Kirkcaldie, Kinghorn, and Burntisland, one; the burghs of Inverkeithing, Dumfermling, Queensferry, Culross, and Stirling, one; the burghs of Glasgow, Renfrew, Rutherglen and Dumbarton, one; the burghs of Haddingtoun, Dunbar, North-Berwick, Lawder, and Jedburgh, one; the burghs of Selkirk, Peebles, Linlithgow, and Lanerk, one; the burghs of Dumfries, Sanquhar, Annan, Lochmaben, and Kirkcudbright, one; the burghs of Wigtoun, Newgalloway, Stranrawer, and Whitehorn, one; and the burghs of Air, Irvine, Rothsay, Campbeltoun, and Inverary one. And it is hereby declared and ordained, that, where the votes of the commissioners for the said burghs, met to choose representatives for their several districts to the Parliament of Great Britain, shall be equal, in that case, the president of the meeting shall have a casting or decisive vote, and that by and attour his vote as a commissioner from the burgh from which he is sent; the commissioner from the eldest burgh presiding in the first meeting, and the commissioners from the other burghs in their respective districts, presiding afterwards by turns, in the order as the said burghs are now called in the rolls of the Parliament of Scotland. And in case that any of the said fifteen commissioners from the burgh shall decease, or become legally incapable to sit in the House of Commons, then the town of Edinburgh, or the district which choosed the said member, shall elect a member in his or their place. It is always hereby expressly provided and declared, that none shall be capable to elect, or be elected, for any of the said estates, but such as are twenty-one years of age compleat, and protestant, excluding all papists, or such, who, being suspect of popery, and required, refuse to swear and subscribe the formula contained in the third act, made in the eighth and ninth sessions of King William's Parliament, intituled, 'Act for prevent-'ing the growth of Popery:' And also declaring, that none shall be capable to elect, or be elected, to represent a shire or burgh in the Parliament of Great Britain, for this part of the united kingdom, except such as are now capable, by the laws of this kingdom, to elect or to be elected as commissioners for shires or burghs to the Parliament of Scotland. And, further, her majesty, with advice and consent foresaid, for the effectual and orderly election of the persons to be chosen to sit, vote, and serve in the respective houses of the Parliament of Great Britain, when her majesty, her heirs, and successors, shall declare her or their pleasure for holding the first or any subsequent Parliament of Great Britain, and when for that effect, a writ should be issued out under the great seal of the united kingdom, directed to the privy-council of Scotland, conform to the

said twenty-second article, statutes, enacts, and ordains, that, until the Parliament of Great Britain shall make further provision therein, the said writ shall contain a warrant and command to the said privy-council to issue out a proclamation in her Majesty's name, requiring the peers of Scotland for the time to meet and assemble at such time, and place, within Scotland, as her Majesty and royal successors shall think fit, to make election of the said sixteen peers; and requiring the Lord Clerk Register, or two of the clerks of Session, to attend all such meetings, and to administer the oaths that are, or shall be, by law required, and to ask the votes; and, having made up the lists in presence of the meeting, to return the names of the sixteen peers chosen (certified under the subscription of the said Lord Clerk Register, clerk or clerks of Session attending) to the clerk of the privy-council of Scotland: And, sicklike, requiring and ordaining the several freeholders in the respective shires and stewartries, to meet and conveen at the head burghs of their several shires and sewartries to elect their commissioners, conform to the order above set down; and ordaining the clerks of the said meetings, immediately after the said elections are over, respectively, to return the names of the persons elected to the clerks of the privy council. And, lastly, ordaining the city of Edinburgh to elect their commissioner, and the other royal boroughs to elect each of them a commissioner, as they have been in use to elect commissioners to the Parliament, and to send the said respective commissioners, at such times to such burghs, within their respective districts, as her majesty and successors, by such proclamations, shall appoint; requiring and ordaining the common clerk of the respective burghs, where such elections shall be appointed to be made, to attend the said meetings, and, immediately after the election, to return the name of the persons so elected (certified under his hand) to the clerk of privy council; to the end that the names of the sixteen peers, thirty commissioners for shires, and fifteen commissioners for burghs, being so returned to the privy council, may be returned to the court from whence the writ did issue under the great seal of the United Kingdom, conform to the said twenty-second article. And whereas, by the said twenty-second article, it is agreed, that, if her Majesty shall, on or before the first day of May next, declare, that it is expedient the Lords and Commons of the present Parliament of England should be the members of the respective houses of the first Parliament of Great Britain, for and on the part of England, they shall accordingly be the members of the said respective houses, for and on the part of England; her Majesty, with advice and consent foresaid, in that case only, doth hereby statute and ordain, that the sixteen peers, and forty-five commissioners for shires and burghs, who shall be chosen by the peers, barons, and burghs, respectively, in this present session of Parliament, and out of the members thereof, in the same manner as committees of Parliament are usually now chosen,

shall be the members of the respective houses of the said first Parliament of Great Britain, for, and on the part of Scotland: Which nomination and election being certified by a writ under the Lord Clerk-Register's hand, the persons so nominated and elected shall have right to sit and vote in the House of Lords and in the House of Commons, of the said first Parliament of Great Britain.

## Anno Sexto ANNÆ REGINÆ, CAP. 6.

*An Act for rendering the Union of the Two Kingdoms more entire and complete.*

The two following paragraphs of this act relate to the elections of Members of Parliament for Scotland.

V. And for the more uniform and express method of electing and returning members to Parliament, be it likewise further enacted, by the authority aforesaid, that when any Parliament shall, at any time hereafter, be summoned or called, the forty-five representatives of Scotland in the House of Commons of the Parliament of Great Britain, shall be elected and chosen by authority of the Queen's writs, under the Great Seal of Great Britain, directed to the several sheriffs and stewarts of the respective shires and stewartries; and the said several sheriffs and stewarts shall, on receipt of such writs, forthwith give notice of the time of election for the knights or commissioners for their respective shires or stewartries; and at such time of election, the several freeholders in their respective shires and stewartries shall meet and convene at the head burghs of their several shires and stewartries, and proceed to the election of their respective commissioners or knights for the shire or stewartry; and the clerks of the said meetings, immediately after the said elections are over, shall respectively return the names of the persons elected, to the sheriff or stewart of the shire or stewartry, who shall annex it to his writ, and return it with the same into the court out of which the writ issued: And as to the manner of election of the fifteen representatives of the royal boroughs, the sheriff of the shire of Edinburgh shall, on the receipt of the writ directed to him, forthwith direct his precept to the Lord Provost of Edinburgh, to cause a burgess to be elected for that city; and, on receipt of such precept, the city of Edinburgh shall elect their member, and their common clerk shall certify his name to the sheriff of Edinburgh, who shall annex it to his writ, and return it with the same into the court from whence the writ issued: And as to the other royal burghs, divided into fourteen classes or districts, the sheriffs or stewarts of the several shires and stewartries shall, on receipt of their several writs, forthwith direct their several precepts to every royal borough within their respective shires or stewartries, reciting therein the contents of the writ, and the date thereof, and com-

manding them forthwith to elect each of them a commissioner, as they used formerly to elect commissioners to the Parliament of Scotland, and to order the said respective commissioners to meet at the presiding borough of their respective district, (naming the said presiding borough), upon the thirtieth day after the date of the *teste* of the writ, unless it be upon the Lord's day, commonly called Sunday, and then the next day after, and then to choose their burgess for the Parliament; and the common clerk of the then presiding borough shall, immediately after the election, return the name of the person so elected to the sheriff or stewart of the shire or stewartry wherein such presiding borough is, who shall annex it to his writ, and return it with the same into the court from whence the writ issued; and in case a vacancy shall happen in time of Parliament, by the decease or legal incapacity of any member, a new member shall be elected in his room, conformable to the method herein before appointed; and, in case such vacancy be of a representative for any one of the said fourteen classes or districts of the said royal boroughs, that borough which presided at the election of the deceased or disabled member, shall be the presiding borough at such new election.

VI. Provided always, that, upon the issuing of writs of summons for the electing of a Parliament, if any shire or stewartry wherein a royal borough is, hath not then a turn or right to elect a commissioner or knight of the shire or stewartry for that Parliament, that then it shall be omitted out of the writ directed to such sheriff or stewart, to cause a knight or commissioner for that shire or stewartry to be elected for that Parliament.

## Anno Sexto ANNÆ REGINÆ, CAP. 23.

*An Act to make further Provision for Electing and Summoning Sixteen Peers of Scotland to sit in the House of Peers in the Parliament of Great Britain; and for trying Peers for Offences committed in Scotland; and for the further regulating of Voters in Elections of Members to serve in Parliament.*

WHEREAS, by the two and twentieth article of the Treaty of Union, for uniting the two kingdoms of England and Scotland, ratified and confirmed by the respective Parliaments of each kingdom, it was, amongst other things, provided, that, when her Majesty, her heirs or successors, should declare their pleasure for holding the first or any subsequent Parliament of Great Britain, until the Parliament of Great Britain should make further provision therein, writs should issue under the great seal of the united kingdom of Great Britain, directed to the privy council of Scotland, commanding them to cause sixteen peers, who were to sit in the House of Lords, to be summoned to Parliament, in such manner as, by an act of the then

present session of Parliament of Scotland was or should be settled; in which session of the Parliament in Scotland an act was accordingly passed for that purpose, intituled, 'An act settling the manner of electing the sixteen peers and forty-five members to represent Scotland in the Parliament of Great Britain;' which act was afterwards confirmed by the Parliament of England, and declared to be as valid as if the same had been part of, and ingrossed in, the said articles of union; by which act it is, amongst other things, provided and enacted, that the sixteen peers who should have a right to sit in the House of Peers in the Parliament of Great Britain, on the part of Scotland, by virtue of the said treaty, should be named by the said peers of Scotland, whom they represent, their heirs, or successors to their dignities and honours, out of their own number, and that by open election and plurality of voices of the peers present, and of the proxies for such as should be absent, the said proxies being peers, and producing a mandate in writing, duly signed before witnesses, and both the constituent and proxy being qualified according to law, and that such peers as were absent, being qualified as aforesaid, might send to all such meetings a list of the peers whom they judged fittest, validly signed by the said absent peers, which should be reckoned in the same manner as if the parties had been present, and given in the said list; and in case of the death or legal incapacity of any of the said sixteen peers, that the foresaid peers of Scotland should nominate another of their own number, in place of the said peer or peers, in manner as therein is mentioned: And it was thereby further enacted, that, until the Parliament of Great Britain should make further provision therein, the said writs so to be issued should contain a warrant and command, to command the said privy council to issue out a proclamation in her Majesty's name, requiring the peers of Scotland, for the time, to meet and assemble at such time and place within Scotland as her Majesty and her royal successors should think fit, to make election of the said sixteen peers, and requiring the Lord Clerk Register, or two of the clerks of Session, to attend all such meetings, and to administer the oaths as were or should be by law required, and to ask the votes; and, having made up the list in presence of the meeting, to return the names of the sixteen peers chosen, certified under the subscription of the said Lord Clerk-Register, clerk or clerks of Session attending, to the clerk of the privy council of Scotland, to the end that the names of the sixteen peers, being so returned to the privy council, might be returned to the court from whence the writ did issue, under the great seal of the United Kingdom, conform to the said twenty-second article: And whereas, by an act of this present session, intituled, 'An act for rendering the union of the two kingdoms more entire and complete,' it is declared and enacted, that from and after the first day of May one thousand seven hundred and eight, the privy council of Scotland shall cease and determine, whereby it is become ne-

cessary that some further provision should be made for the electing and returning the said sixteen peers that are to sit in the House of Peers, in the Parliament of Great Britain, pursuant to the said treaty: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in Parliament assembled, and by the authority of the same, that, at all times hereafter, when her Majesty, her heirs and successors, shall declare her or their pleasure for summoning and holding any Parliament of Great Britain, that, in order to the electing and summoning the sixteen peers of Scotland, a proclamation shall be issued under the great seal of Great Britain, commanding all the peers of Scotland to assemble and meet at Edinburgh, or in such other place in Scotland, and at such time as shall be appointed in the said proclamation, to elect, by open election, the sixteen peers to sit and vote in the House of Peers in the Parliament of Great Britain, in such manner as by the before recited act, and herein after, is appointed.

II. And be it farther enacted by the authority aforesaid, that every proclamation issued for the purpose aforesaid, shall be duly published at the market cross at Edinburgh, and in all the county towns of Scotland, five and twenty days at the least before the time thereby appointed for the meeting of the peers to proceed to such election.

III. And be it further enacted, by the authority aforesaid, that all the peers who meet on such proclamation, shall, before they proceed to the election, and in the presence of the peers assembled for such election, take the respective oaths, *videlicet*,

'I A. B. do sincerely promise and swear, that I will be faithful 'and bear true allegiance to her Majesty Queen Anne. So help 'me God.'

'I A. B. do swear, that I do, from my heart, abhor, detest, and 'abjure, as impious and heretical, that damnable doctrine and posi-'tion, that princes excommunicated or deprived by the Pope, or 'any authority of the See of Rome, may be deposed or murdered 'by their subjects, or any other whatsoever. And I do declare, that no 'foreign prince, person, prelate, state, or potentate, hath or ought to 'have any jurisdiction, power, superiority, pre-eminence, or autho-'rity, ecclesiastical or spiritual, within this realm. So help me 'God.'

And shall also make, repeat, and subscribe the declaration following, *videlicet*,

'I A. B. do solemnly and sincerely, in the presence of God, pro-'fess, testifie, and declare, that I do believe, that, in the sacrament 'of the Lord's Supper, there is not any transubstantiation of the 'elements of bread and wine into the body and blood of Christ, at or 'after the consecration thereof, by any person whatsoever; and that 'the invocation or adoration of the Virgin Mary, or any other saint,

'and the sacrifice of the mass, as they are now used in the Church 'of Rome, are superstitious and idolatrous. And I do solemnly, 'in the presence of God, profess, testify, and declare, that I do make 'this declaration, and every part thereof, in the plain and ordinary 'sense of the words read unto me, as they are commonly under- 'stood by English Protestants, without any evasion, equivocation, 'or mental reservation whatsoever, and without any dispensation al- 'ready granted me for this purpose by the Pope, or any other au- 'thority or person whatsoever, or without any hope of any such 'dispensation from any person or authority whatsoever, or without 'thinking that I am, or can be acquitted before God or man, or ab- 'solved of this declaration, or any part thereof, although the Pope, 'or any other person or persons, or power whatsoever, should dis- 'pense with or annul the same, or declare that it was null and void 'from the beginning.'

And also take and subscribe the oath following, *videlicet*,

'I A. B. do truly and sincerely acknowledge, profess, testify, 'and declare in my conscience, before God and the world, that 'our Sovereign Lady Queen Anne is lawful and rightful Queen of this 'realm, and of all other her Majesty's dominions and countries thereun- 'to belonging: And I do solemnly and sincerely declare, that I do be- 'lieve in my conscience, the person pretending to be Prince of Wales, 'during the life of the late King James, and, since his decease, pre- 'tending to be, and taking upon himself the stile and title of King 'of England, by the name of James the Third, or of Scotland, by 'the name of James the Eighth, or the stile and title of King of 'Great Britain, hath not any right or title whatsoever to the Crown of 'this realm, or any other the dominions thereunto belonging: And I 'do renounce, refuse, and abjure any allegiance or obedience to him. 'And I do swear, that I will bear faith and true allegiance to her 'Majesty Queen Anne, and her will defend, to the utmost of my 'power, against all traiterous conspiracies and attempts whatsoever 'which shall be made against her person, crown, or dignity. And 'I will do my best endeavour to disclose and make known to her 'Majesty, and her successors, all treasons and traiterous conspiracies 'which I shall know to be against her, or any of them. And I do 'faithfully promise, to the utmost of my power, to support, maintain, 'and defend the succession of the Crown against him the said James, 'and all other persons whatsoever, as the same is, and stands settled 'by an act, intituled, 'An act declaring the rights and liberties of "the subject, and settling the succession of the Crown to her pre- "sent Majesty, and the heirs of her body, being Protestants;' and as 'the same, by one other act intituled, 'An act for the farther limi- "tation of the Crown, and better securing the rights and liberties "of the subject,' is and stands settled and entailed, after the decease of 'her Majesty, and for default of issue of her majesty, to the Princess Sophia, electress and duchess-dowager of Hanover, and the heirs

'of her body being Protestants. And all these things I do plainly 'and sincerely acknowledge and swear, according to these express 'words by me spoken, and according to the plain and common 'sense and understanding of the same words, without any equivoca- 'tion, mental evasion, or secret reservation whatsoever: And I do 'make this recognition, acknowledgment, abjuration, renunciation, 'and promise heartily, willingly, and truly, upon the true faith of a 'Christian. So help me God.'

IV. And that such peers that live in Scotland, but shall not be present at such meeting so appointed, may take the said oaths, and make and subscribe the said declaration, in any sheriff's court in Scotland; and every sheriff, or his deputy, before whom such oaths and such declaration shall be so made, subscribed and repeated, shall, and is hereby required to return the original subscription of such oath and declaration, signed by the peer who took the same, and make a return in writing, under his hand and seal, to the peers so assembled, of such peers taking the said oaths, and making and subscribing the said oath and declaration, and such peer shall be thereby enabled and qualified to make a proxy, or to send a signed list, containing the names of the sixteen peers of Scotland for whom he giveth his vote; and such of the peers of Scotland as, at the time of issuing such proclamation, reside in England, may take and subscribe the said oaths, and make, repeat, and subscribe the said declaration, in her Majesty's High Court of Chancery in England, her Majesty's Court of Queen's Bench, Common Pleas, or Court of Exchequer in England, which being certified by writ, to the peers in Scotland at their meeting, under the seal of the Court where such oath and declaration shall be made, repeated, and subscribed, shall be sufficient to entitle such peer to make his proxy, and to send a signed list, as aforesaid; and in case any of the said peers of Scotland, who, at any time before the issuing of such proclamation, have taken the said oaths, and made and subscribed the said declaration in England or Scotland, to be certified as aforesaid, and, if taken in Parliament, to be certified under the great seal of Great Britain, shall, at the time of issuing such proclamation, be absent in the service of her Majesty, her heirs or successors, such peer may make his proxy, or send a signed list.

V. Provided always, and be it enacted by the authority aforesaid, that such peers of Scotland as are also peers of England, shall sign their proxies and lists by the title of their peerage in Scotland.

VI. And be it further enacted by the authority aforesaid, that no peer shall be capable of having more than two proxies at one time.

VII. And be it further enacted by the authority aforesaid, that at such meeting of the peers, they shall all give in the names of the persons by them nominated to sit and vote in the House of Peers, in the Parliament of Great Britain, and the Lord Clerk-Register,

or two of the Principal Clerks of the Session, appointed by him to officiate in his name, shall, after the election is made, and duly examined, certify the names of the sixteen peers so elected, and sign and attest the same in the presence of the peers: which certificate, so signed and attested, shall, by the Lord Clerk-Register, or two of the Principal Clerks of the Sessions be returned into her Majesty's High Court of Chancery of Great Britain, before the time appointed for the meeting of the Parliament.

VIII. And be it further enacted, by the authority aforesaid, that the peers shall come to such meetings with their ordinary attendants only, according to, and under the several penalties inflicted by the several laws and statutes now in force in Scotland, which prescribe and direct with what numbers and attendants the subjects there may repair to the publick courts of justice.

IX. And be it further enacted by the authority aforesaid, that it shall not be lawful for the peers so assembled, and met together for the electing sixteen peers to sit and vote in the House of Peers, in the Parliament of Great Britain, to act, propose, debate, or treat, of any other matter or thing whatsoever, except only the election of the said sixteen peers; and that every peer who shall, at such meeting, presume to propose, debate or treat, of any other matter or thing, contrary to the direction of this act, shall incur the penalty of premunire expressed in the statute of the sixteenth year of King Richard the Second.

X. And be it further enacted, by the authority aforesaid, that all and every matter and things for, or concerning the election of sixteen peers of Scotland, to sit and vote in the House of Peers, in the Parliament of Great Britain, directed and appointed to be observed and done by the articles of union, and the said recited act of Parliament in Scotland, intituled, 'Act settling the manner of electing 'the sixteen peers, and forty-five members, to represent Scotland in 'the Parliament of Great Britain,' which act, by an act of Parliament in England, in the fifth year of her Majesty's reign, intituled, 'An act for an Union of the two kingdoms of England and 'Scotland,' was declared to be as valid as if the same had been part of, and engrossed in, the articles of union, thereby ratified and approved, shall be observed and performed, except only wherein this act has further declared and provided.

XI. And be it further enacted by the authority aforesaid, that, in case any of the sixteen peers so chosen shall die, or become otherwise legally disabled to sit in the House of Peers of the Parliament of Great Britain, that her Majesty, her heirs and successors, shall forthwith, after such death or disability, issue a proclamation under the great seal of Great Britain, for electing another peer of Scotland to sit in the House of Peers of the Parliament of Great Britain, in the room of such peer deceased, or otherwise legally disabled; which

proclamation shall be published at such time and places, as is herein enacted, touching proclamations issued upon summoning a Parliament of Great Britain; and the peers of Scotland being qualified as is hereby directed, shall proceed to elect a peer of Scotland, to sit in the House of Peers, of the Parliament of Great Britain, in room of such peer deceased, or otherwise legally disabled, in such manner, and under such restrictions and regulations, as are by this act directed to be observed upon the electing sixteen peers of Scotland to sit in the House of Peers of the Parliament of Great Britain.

XII. And be it further enacted, by the authority aforesaid, that, for the more effectual trial of any peer of Great Britain that hath committed, or shall commit, any high treason, petit-treason, misprision of treason, murder, or other felonies in Scotland, commission or commissions may issue under the great seal of Great Britain, to be directed to such person and persons as shall be therein named, constituting them, and such a number of them, as shall be therein mentioned, justices of the Queen, her heirs and successors, to inquire, by the oaths of good and lawful men, of such county and counties of Scotland as shall be named therein, of all treasons, misprisions of treason, murders, and other felonies, committed in such county by a peer, or peers, of Great Britain; which inquisition shall be taken and made in the same manner as indictments found and taken before justices of oyer and terminer of any county of England, and shall be of the same effect, and proceeded upon in the same method as any inquisition found before justices of oyer and terminer in England, whereby any peer is indicted for any such offence; and such justices shall issue mandates or precepts to the sheriffs of the respective counties of Scotland, to return to them at such day and place as they shall appoint, such and so many good and lawful men of the same county as may be sufficient to inquire of the offences aforesaid, and twelve or more of them, so returned, being sworn, shall be sufficient to make such inquiry, and find any indictment; and, if the sheriff of such county shall not summon a sufficient number of men to make such inquisition, the justices that do proceed upon such commission may impose a fine upon such sheriff, which shall be levied by process out of the Exchequer; and if any of the persons summoned by the sheriff to inquire, as aforesaid, shall not appear, the justices may, in like manner, impose a fine upon such person so making default, to be levied in manner aforesaid.

XIII. And be it further enacted, by the authority aforesaid, that every person who shall refuse to take the oath last herein before recited, or, being a Quaker, shall refuse to declare the effect thereof upon his solemn affirmation, as directed by an act of Parliament made in the seventh year of the reign of his late Majesty King William, intituled, 'An act that the solemn affirmation and declaration 'of the people called Quakers, shall be accepted instead of an oath

' in usual form,' (which oath or declaration the sheriff, president of the meeting, or chief officer taking the poll at any election of members to serve in the House of Commons for any place in Great Britain, or commissioners for choosing burgesses for any place in Scotland, at the request of any candidate, or other person present at such election, are hereby empowered and required to administer), shall not be capable of giving any vote for the election of any such member to serve in the House of Commons for any place in Great Britain, or commissioner to choose a burgess for any place in Scotland.

XIV. Provided always, and be it enacted by the authority aforesaid, that if any person being a Quaker, shall refuse to take the said oath, being tendered to him in pursuance of an act made this present session of Parliament, intituled, ' An act for the better security ' of her Majesty's person and government,' but shall, instead thereof, declare the effect of the said oath, upon his solemn affirmation, as directed by an act of Parliament made in the seventh year of the reign of his late Majesty, King William the Third, intituled, ' An ' act that the solemn affirmation and declaration of the people called ' Quakers, shall be accepted instead of an oath in usual form ;' which affirmation shall be administered to such Quaker instead of the said oath; such Quaker shall not be liable to any the penalties and forfeitures for refusing the said oath, when tendered to him, contained or mentioned in the said act, intituled, ' An act for the better secu- ' rity of her Majesty's person and government.'

## Anno Duodecimo ANNÆ Reginæ, Cap. 6.

*An Act for the better Regulating the Elections of Members to serve in Parliament for that part of Great Britain called Scotland.*

Whereas, of late, several conveyances of estates have been made in trust, or redeemable for elusory sums, no ways adequate to the true value of the lands, on purpose to create and multiply votes in elections of members to serve in Parliament for that part of Great Britain called Scotland, contrary to the true intent and meaning of the laws in that behalf: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that, from and after the determination of this present Parliament, no conveyance, or right whatsoever, whereupon infeoffment is not taken, and seisin registrated, one year before the *teste* of the writs for calling a new Parliament, shall, upon objection made in that behalf, entitle the person, or persons, so infeft, to vote, or to be elected, at that election, in any shire or stewartry in that part of Great Britain called

Scotland; and in case any election happen during the continuance of a Parliament, no conveyance or right whatsoever, whereupon infeoffment is not taken one year before the date of the warrant for making out a new writ for such election, shall, upon objection made in that behalf, entitle the person, or persons, so infeft, to vote, or be elected, at that election; and that from and after the said day, it shall, or may, be lawful to, or for any of the electors present, suspecting, any person, or persons, to have his or their estates in trust, and for the behoof of another, to require the preses of the meeting to tender the following oath to any elector; and the said preses is hereby empowered and required to administer the same in the words following, viz,

'I A. B. do, in the presence of God, declare and swear, that the 'lands and estate of for which I claim to give my 'vote in this election, are not conveyed to me in trust, or for the 'behoof of any other person whatsoever; and I do swear before 'God, that neither I, nor any person to my knowledge, in my name, 'or by my allowance, hath given, or intends to give, any promise, 'obligation, bond, backbond, or other security, for redisponing or 'reconveying the said lands and estate, any manner of way whatso-'ever. And this is the truth, as I shall answer to God.'

And in case such elector refuse to swear, and also to subscribe the said oath, such person or persons shall not be capable of voting, or being elected, at such election.

II. Provided always, that notwithstanding such oath taken, it shall be lawful to make such other objections as are allowed by the laws of Scotland against such electors.

III. And be it further enacted and declared by the authority aforesaid, that no infeoffment taken upon any redeemable right whatsoever, except *proper* wadsets, adjudications, or apprisings, allowed by the act of Parliament, relating to elections, in one thousand six hundred eighty-one, shall entitle the person so infeft to vote, or be elected at any election in any shire or stewartry; and that no person or persons, who have not been enrolled, and voted at former elections, shall, upon any pretence whatsoever, be enrolled, or admitted to vote at any election, except he or they first produce a sufficient right or title to qualifie him or them to vote at that election, to the satisfaction of the freeholders formerly enrolled, or the majority of them present; and the returning officers are hereby ordained to make their returns of the persons elected by the majority of the freeholders enrolled, and those admitted by them, reserving always the liberty of objecting against the persons admitted to or excluded from the roll, as formerly.

IV. And be it further enacted by the authority aforesaid, that all sheriffs of shires, and stewarts of stewarties, shall be obliged, under the pain of fifty pounds sterling, one moiety whereof shall be to the

Queen's most excellent Majesty, her heirs, and successors, and the other moiety to the person or persons who shall sue for the same, to be recovered before the Court of Session, by any action summarily, without abiding the course of the roll, to make the publick intimations required by the laws of Scotland, at the several parish-churches within their respective jurisdictions, at least three days before the diet of elections.

V. Provided always, that the right of apparent heirs in voting at elections by virtue of their predecessors' infeoffments, and the right of husbands by virtue of their wives' infeoffments, be, and is hereby reserved to them as formerly; any thing in this act contained to the contrary notwithstanding.

VI. Provided also, that any conveyance or right, which, by the laws of Scotland, is sufficient to qualify any person to vote in the elections of members to serve in Parliament for shires or stewartries, and whereupon infeoffment is taken on or before the first day of June, in the year of our Lord one thousand seven hundred and thirteen, shall entitle the person, or persons, so infeft, to vote at the elections of members to serve in the next ensuing Parliament; any thing herein contained to the contrary notwithstanding.

VII. Provided always, and it is hereby declared to be the true intent and meaning of this act, that no husbands shall vote at any ensuing election by virtue of their wives' infeoffments, who are not heiresses, or have not right to the property of the lands on account whereof such vote shall be claimed.

## Anno Primo GEORGII Regis, Cap. 13.

*An Act for the further Security of his Majesty's Person and Government, and the Succession of the Crown in the Heirs of the late Princess Sophia, being Protestants; and for extinguishing the Hopes of the pretended Prince of Wales, and his open and secret Abettors.*

(The following clause of this act relates to Elections.)

IV. And whereas certain doubts and scruples have arisen concerning the sense and meaning of the clause following, contained in an act made in the sixth year of her late Majesty Queen Anne, intituled, 'An act to make further provision for electing and summoning sixteen peers of Scotland to sit in the House of Peers in the Parliament of Great Britain; and for trying peers for offences committed in Scotland; and for the further regulating of voters in the elections of members to serve in Parliament;' whereby it is enacted, that every person who shall refuse to take the oath last

therein before recited, or, being a Quaker, shall refuse to declare the effect thereof upon his solemn affirmation, as directed by an act of Parliament made in the seventh year of the reign of his late Majesty King William, intituled, 'An act, that the solemn affirmation 'and declaration of the people called Quakers, shall be accepted in-'stead of an oath in the usual form,' (which oath or declaration the sheriff, president of the meeting, or chief officer taking the poll at any election of members to serve in the House of Commons for any place in Great Britain, or commissioners for choosing burgesses for any place in Scotland, at the request of any candidate, or other person present at such election, are hereby empowered and required to administer); shall not be capable of giving any vote for the election of any such member to serve in the House of Commons for any place in Great Britain, or commissioners to choose a burgess for any place in Scotland: On account of which words, some have pretended to vote in the meetings of free elections in Scotland, at the choosing of the president and clerk of the meeting, without taking the oath mentioned in the last recited act, whereby it has happened that rolls of electors have been unduly made up, and wrong returns made: And also, whereas divers of his Majesty's good subjects, who have given good convincing marks of their loyalty to his royal person and government, have scrupled to take the said oath, apprehending that the reference in the said oath may be construed, in some respect, to be inconsistent with the establishment of the church in Scotland according to law, and to a clause concerning oaths to be imposed in Scotland, after the Union, contained in an act made in the Parliament of Scotland, in the year one thousand seven hundred and seven, intituled, 'An act for securing the Protestant re-'ligion, and Presbyterian church government;' which act is declared to be a fundamental and essential condition of the treaty of union: To the end, therefore, that the said scruples, and all mistakes and divisions on account of the same may cease, be it further enacted and declared, by the authority aforesaid, that every person who shall refuse to take the aforesaid oath of abjuration, or, being a Quaker, shall refuse to declare the effect thereof upon his solemn affirmation, in manner aforesaid, (which oath and declaration the member last elected for any county or stewartry in Scotland, or, in his absence, the sheriff or stewart's clerk, until a person be chosen to preside in the said meeting, according to the directions contained in the twenty-first act of the third Parliament of King Charles the Second, held in Scotland, intituled, 'Act concerning the election of 'commissioners for shires;' and, after such choice, the person so chosen to preside, or any person chosen to preside in any meeting of any county or stewartry, there in which rolls for elections shall happen to be made up, is hereby authorised and required to administer, at the request of any candidate or other person present at

such meeting for election, before or after the choosing of the president of the meeting, or making up of the rolls); shall not be capable of giving any vote for the election of a president of the meeting, making up of the rolls, or of any member to serve in the House of Commons for any place in Scotland, or commissioner to choose a burgess for any place there: And further, that, by no words in the said oath or oaths, formerly imposed, contained, it is or was meant to oblige his Majesty's said subjects to any act or acts any ways inconsistent with the establishment of the Church of Scotland according to law.

## Anno Secundo GEORGII II. Regis, Cap. 24.

*An Act for the more effectual preventing Bribery and Corruption in the Elections of Members to serve in Parliament.*

Whereas it is found by experience, that the laws already in being have not been sufficient to prevent corrupt and illegal practices in the election of members to serve in Parliament; for remedy, therefore, of so great an evil, and to the end that all elections of members to Parliament may hereafter be freely and indifferently made, without charge or expence, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that, from and after the twenty-fourth day of June, in the year of our Lord one thousand seven hundred and twenty-nine, upon every election of any member or members to serve for the Commons in Parliament, every freeholder, citizen, freeman, burgess, or person having, or claiming to have, a right to vote or be polled at such an election, shall, before he is admitted to poll at the same election, take the following oath, (or, being one of the people called Quakers, shall make the solemn affirmation appointed for Quakers), in case the same shall be demanded by either of the candidates, or any two of the electors; that is to say,

'I A. B. do swear, (or, being one of the people called Quakers, I 'A. B. do solemnly affirm) I have not received, or had by myself, or 'any person whatsoever in trust for me, or for my use and benefit, 'directly or indirectly, any sum or sums of money, office, place, or 'employment, gift, or reward, or any promise or security for any 'money, office, employment, or gift, in order to give my vote at 'this election, and that I have not before been polled at this elec-'tion.'

Which oath or affirmation the officer or officers presiding, or taking the poll at such election, is, and are hereby empowered and

required to administer, gratis, if demanded, as aforesaid, upon pain to forfeit the sum of fifty pounds, of lawful money of Great Britain, to any person that shall sue for the same, to be recovered, together with full costs of suit, by action of debt, bill, plaint, or information, in any of his Majesty's courts of record at Westminster, wherein no essoign, protection, wager of law, or more than one imparlance, shall be admitted or allowed; and if the said offence shall be committed in that part of Great Britain called Scotland, then to be recovered, together with full costs of suit, by summary action or complaint before the Court of Session, or by prosecution before the Court of Justiciary there, for every neglect or refusal so to do; and no person shall be admitted to poll, till he has taken and repeated the said oath in a public manner, in case the same shall be demanded, as aforesaid, before the returning officer, or such others as shall be legally deputed by him.

II. And be it further enacted, that if any sheriff, mayor, bailiff, or other returning officer, shall admit any person to be polled, without taking such oath or affirmation, if demanded, as aforesaid, such returning officer shall forfeit the sum of one hundred pounds, to be recovered in manner aforesaid, together with full costs of suit; and that if any person shall vote or poll at such election, without having first taken the oath, or, if a Quaker, having made his affirmation, as aforesaid, if demanded, such person shall incur the same penalty which the officer is subject to for the offence above mentioned.

III. And be it further enacted, by the authority aforesaid, that every sheriff, mayor, bailiff, head-borough, or other person, being the returning officer of any member to serve in Parliament, shall, immediately after the reading the writ or precept for the election of such member, take and subscribe the following oath, viz.

'I A. B. do solemnly swear, that I have not, directly nor indirectly, received any sum or sums of money, office, place, or employment, gratuity or reward, or any bond, bill, or note, or any promise or gratuity whatsoever, either by myself, or any other person to my use, or benefit, or advantage, for making any return at the present election of members to serve in Parliament; and that I will return such person or persons as shall, to the best of my judgment, appear to me to have the majority of legal votes.'

Which oath any justice or justices of the peace of the said county, city, corporation, or borough where such election shall be made, or, in his or their absence, any three of the electors, are hereby required and authorised to administer; and such oath, so taken, shall be entered among the records of the sessions of such county, city, corporation, and borough, as aforesaid.

IV. And be it enacted, by the authority aforesaid, that such votes shall be deemed to be legal, which have been so declared by the last determination in the House of Commons; which last determination

questions, for the future, and for the more effectually preventing returning officers in that part of Great Britain called Scotland, making false and undue returns; May it please your Majesty that it may be enacted, and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that if the clerk of any meeting of freeholders for the election of a commissioner to serve in Parliament for any shire or stewartry in Scotland, after the first day of May, one thousand seven hundred and thirty-four, shall wilfully return to the sheriff or stewart any person, other than him who shall be duly elected, or if any other person pretending to be clerk, though not duly elected, shall presume to act as clerk, and wilfully to return to the sheriff any person as elected, who shall not be duly elected by the major part of such meeting, the party so offending shall, for every such offence, forfeit the sum of five hundred pounds sterling, to be recovered by the candidate so elected, to whose prejudice such false return is made, in such manner as is herein after directed.

II. And be it further enacted, that every freeholder who shall claim to vote at any election of a member to serve in Parliament, for any lands or estate in any county or stewartry in Scotland, or who shall have right to vote in adjusting the rolls of freeholders, instead of the oath appointed to be taken by an act made in the twelfth year of her late Majesty Queen Anne, intituled, 'An act for 'the better regulating elections of members to serve in Parliament 'for that part of Great Britain called Scotland,' shall, upon the request of any freeholder formerly enrolled, before he proceed to vote in the choice of a member, or on adjusting the rolls, take and subscribe, upon a roll of parchment, to be provided and kept by the sheriff, or stewart clerk, for that purpose, the oath following, which the preses or clerk to the meeting either for the enrolment or election, is hereby empowered and required to administer; that is to say,

'I, A. B., do, in the presence of God, declare and swear, that 'the lands and estate of for which I claim a right to 'vote in the election of a member to serve in Parliament for this 'county or stewartry, is actually in my possession, and do really 'and truly belong to me, and is my own proper estate, and is not 'conveyed to me in trust, or for or in behalf of any other per-'son whatsoever; and that neither I nor any person to my know-'ledge, in my name, or on my account, or by my allowance, hath 'given, or intends to give, any promise, obligation, bond, back-'bond, or other security whatsoever, other than appears from the 'tenor and contents of the title upon which I now claim a right to 'vote, directly or indirectly, for redisponing or reconveying the said 'lands and estate in any manner of way whatsoever, or for making

from all penalties and disabilities which he shall then have incurred by any offence against this act.

IX. And for the more effectual observance of this act, be it enacted, that all and every the sheriffs, mayors, bailifs, and other officers to whom the execution of any writ or precept for electing any member or members to serve in Parliament shall belong or appertain, shall, and are hereby required at the time of such election, immediately after the reading such writ or precept, read, or cause to be read, openly before the electors there assembled, this present act, and every clause therein contained; and the same shall also openly be read once in every year at the general quarter sessions of the peace, to be holden next after Easter, for any county or city, and at every election of the chief magistrate in any borough, town corporate, or cinque port, and at the annual election of magistrates and town councillors for every borough within that part of Great Britain called Scotland.

X. And be it further enacted by the authority aforesaid, that every sheriff, under sheriff, mayor, bailiff, and other officer to whom the execution of any writ or precept for the electing of members to serve in Parliament doth belong, for every wilful offence, contrary to this act, shall forfeit the sum of fifty pounds, to be recovered, together with full costs of suit, in the manner before directed.

XI. Provided always, and it is hereby declared and enacted, by the authority aforesaid, that no person shall be made liable to any incapacity, disability, forfeiture, or penalty by this act laid or imposed, unless prosecution be commenced within two years after such incapacity, disability, forfeiture, or penalty shall be incurred, or, in case of a prosecution, the same be carried on without wilful delay; any thing herein contained to the contrary notwithstanding.

## Anno Septimo GEORGII II. Regis, Cap. 16.

*An Act for the better regulating the Election of Members to serve in the House of Commons, for that part of Great Britain called Scotland, and for incapacitating the Judges of the Court of Session, Court of Justiciary, and Barons of the Court of Exchequer in Scotland, to be elected, or to sit or vote as Members of the House of Commons.*

Whereas doubts may arise, whether the acts of Parliament made in England, for preventing false and undue returns of members to serve in Parliament, extend to that part of Great Britain called Scotland; and whereas several questions have arisen concerning the election of commoners to serve in Parliament for that part of Great Britain; therefore, to obviate such doubts, disputes, and

and to the magistrates and counsellors elected and appointed by the majority of the town-council assembled; and if, contrary to the direction of this act, any number of magistrates or counsellors shall, in opposition to the majority, take upon them to make a distinct and separate election of magistrates or counsellors, their act and election shall be *ipso facto* void, and every magistrate or counsellor who concurred therein shall forfeit and lose the sum of one hundred pounds sterling, to be recovered by the magistrates and counsellors from whom they separated, in manner herein after directed.

VII. Provided always, and it is hereby declared and enacted, that it shall and may be lawful to, and for, any magistrate or counsellor of the borough, who apprehends any wrong was done at any annual election, to bring his action before the Court of Session in Scotland, for rectifying such abuse, or for making void the whole election (if illegal) only within the space of eight weeks after such election is over; and the Lords of Session shall, and they are hereby expressly authorized and required to hear and determine the cause summarily, and to allow to the party that shall prevail their full costs of suit.

VIII. And be it further enacted, that every sheriff or stewart in Scotland, who shall wilfully annex to the writ any false or undue return, and every common clerk of any presiding borough, who shall wilfully return to the sheriff or stewart any person other than the person elected, or who shall neglect or refuse to return the person duly elected, shall forfeit the sum of five hundred pounds sterling to the person entitled to have been returned, and not returned, to be recovered from the said sheriff, stewart, or common clerk, their heirs, executors, or administrators, respectively, in a summary way, by action, petition, or summary complaint, before the said Court of Session, upon service of such summons, or of a copy of such petition, or summary complaint, on fifteen days' notice or warning, without abiding the course of any rolls, or further delay whatsoever; which action, petition, or complaint, the judges of the said court are hereby required to judge of, and determine with all convenient speed: Provided always, that such action, petition, or complaint, be commenced, presented, or made within the space of six months after the return is made. And in case the person duly elected, and not returned, shall neglect or omit to sue for the said penalty within the time before mentioned, then any freeholder within the shire or stewartry, or any magistrate, or person bearing office, in any of the boroughs of the district for which the return is unduly made, may sue for and recover the same to his own use, by such action, petition, or complaint, and in such manner as is before mentioned, with double costs of suit; provided always, that such freeholder, magistrate, or person bearing office, shall com-

'the rents or profits thereof forthcoming to the use or benefit of 'the person from whom I have acquired the said estate, or any 'other person whatsoever; and that my title to the said lands and 'estate is not nominal or fictitious, created or reserved in me, in or-'der to enable me to vote for a member to serve in Parliament, but 'that the same is a true and real estate in me, for my own use and 'benefit, and for the use of no other person whatsoever: and that is 'the truth as I shall answer to God.'

III. And that, in case he shall refuse, if required, to take and subscribe the oath aforesaid, his vote shall not be admitted or allowed, and his name shall forthwith be erased out of the roll of freeholders; and in case any person shall presume wilfully and falsely to swear and subscribe the said oath, and shall be thereof lawfully convicted, he shall incur the pains and punishment of perjury, and be prosecuted for the same, according to the laws and forms in use in Scotland.

IV. And be it further enacted, that no judge of the Court of Session, or Justiciary, or baron of the Court of Exchequer in Scotland, shall be capable of being elected, or of sitting or voting as a member of the House of Commons in any Parliament which shall be hereafter summoned and holden.

V. And be it further enacted, by the authority aforesaid, that the several sheriffs and stewarts in Scotland shall, within the space of four days after the writ shall come to their hand, issue their precepts to the several boroughs within their jurisdiction, to elect their delegates, and shall cause the same to be delivered to the chief magistrate of such borough, resiant in the borough for the time being; and that such chief magistrate, to whom such precept shall be delivered, shall, within two days after his receipt of the same, call and summon the council of the borough together, by giving notice personally, or leaving notice at the dwelling-place of every counsellor then resiant in such borough, which council shall then appoint a peremptory day for the election of the delegate; but two free days shall interveen betwixt the meeting of the council which appoints the day of election of the delegate, and the day on which the election of the delegate is to be made.

VI. And to prevent double elections of magistrates in boroughs, which frequently occasion double commissions to delegates, be it enacted, by the authority aforesaid, that, at the annual election of magistrates and counsellors for boroughs, no magistrate or counsellor, or any number of magistrates or counsellors, shall, for the future, upon any pretence whatsoever, take upon him or them to separate from the majority of the magistrates and counsellors, who have been such for the year preceding, and to appoint or elect separate magistrates or counsellors, but shall submit to the election made,

and to the magistrates and counsellors elected and appointed by the majority of the town-council assembled; and if, contrary to the direction of this act, any number of magistrates or counsellors shall, in opposition to the majority, take upon them to make a distinct and separate election of magistrates or counsellors, their act and election shall be *ipso facto* void, and every magistrate or counsellor who concurred therein shall forfeit and lose the sum of one hundred pounds sterling, to be recovered by the magistrates and counsellors from whom they separated, in manner herein after directed.

VII. Provided always, and it is hereby declared and enacted, that it shall and may be lawful to, and for, any magistrate or counsellor of the borough, who apprehends any wrong was done at any annual election, to bring his action before the Court of Session in Scotland, for rectifying such abuse, or for making void the whole election (if illegal) only within the space of eight weeks after such election is over; and the Lords of Session shall, and they are hereby expressly authorized and required to hear and determine the cause summarily, and to allow to the party that shall prevail their full costs of suit.

VIII. And be it further enacted, that every sheriff or stewart in Scotland, who shall wilfully annex to the writ any false or undue return, and every common clerk of any presiding borough, who shall wilfully return to the sheriff or stewart any person other than the person elected, or who shall neglect or refuse to return the person duly elected, shall forfeit the sum of five hundred pounds sterling to the person entitled to have been returned, and not returned, to be recovered from the said sheriff, stewart, or common clerk, their heirs, executors, or administrators, respectively, in a summary way, by action, petition, or summary complaint, before the said Court of Session, upon service of such summons, or of a copy of such petition, or summary complaint, on fifteen days' notice or warning, without abiding the course of any rolls, or further delay whatsoever; which action, petition, or complaint, the judges of the said court are hereby required to judge of, and determine with all convenient speed: Provided always, that such action, petition, or complaint, be commenced, presented, or made within the space of six months after the return is made. And in case the person duly elected, and not returned, shall neglect or omit to sue for the said penalty within the time before mentioned, then any freeholder within the shire or stewartry, or any magistrate, or person bearing office, in any of the boroughs of the district for which the return is unduly made, may sue for and recover the same to his own use, by such action, petition, or complaint, and in such manner as is before mentioned, with double costs of suit; provided always, that such freeholder, magistrate, or person bearing office, shall com-

mence or bring such action within the space of twelve months after the return is made.

IX. And be it enacted by the authority aforesaid, that every penalty by this act imposed with respect to the recovery of which no particular provision is herein before made, shall and may be sued for, and recovered, by way of summary complaint before the Court of Session in Scotland, upon fifteen days' notice to the person complained of, without abiding the course of any roll; which said complaint the Court of Session is hereby authorized and required to determine with all convenient speed.

X. And be it further enacted, that every freeholder in Scotland shall, before he be either enrolled, or admitted to vote at any future election, or meeting for enrolment, in any question for the choice of a clerk or presses, or other question whatsoever, (if required by any freeholder present,) be obliged to take and subscribe the oaths appointed by law to be taken by electors of members to serve in Parliament, when required so to do; which oath the presses or clerk of the meeting is hereby empowered and required to administer.

XI. And whereas there have been some mistakes in the district of the boroughs of Wigtoun, Whitehorn, New Galloway, and Stranrawer, in relation to their presiding at elections of members of Parliament for that district, which may occasion disputes at future elections, for remedying thereof, be it enacted, that the boroughs continue to preside in the course they are now in, and that the borough of Wigtoun shall preside at the election of a member to represent that district in the next Parliament, and that the other boroughs of the district preside afterwards in the method prescribed by the act of Parliament of Scotland, made in the fourth session of the first Parliament of Queen Anne, intituled, 'An act for settling the manner of electing the sixteen peers and forty-five commoners, to represent Scotland in the Parliament of Great Britain.'

## Anno Decimo Sexto GEORGII II. Regis, Cap. 11.

*An Act to explain and amend the Laws touching the Elections of Members to serve for the Commons in Parliament, for that part of Great Britain called Scotland, and to restrain the Partiality, and regulate the Conduct, of Returning Officers at such Elections.*

Whereas many returning officers of members to serve for the Commons in Parliament, for that part of Great Britain called Scotland, have of late presumed to act in a most partial and arbitrary manner, sometimes upon false pretences, that the rolls of electors of commissioners for shires were not regularly made up, or that the

pounds sterling to the person in whose favour the judgment of the Court of Session is given, to be recovered by him or his executors in the manner herein after directed.

VI. And be it further enacted by the authority aforesaid, that if the judgment of the freeholders, refusing to admit, or striking off any person from the said roll, shall be affirmed by the Court of Session, the person so complaining shall forfeit to the objector the sum of thirty pounds sterling, with full costs of suit.

VII. And be it enacted by the authority aforesaid, that, to prevent all surprise at the Michaelmas meetings, every freeholder who intends to claim to be enrolled at any subsequent Michaelmas meeting of the freeholders, shall, for the space of two kalendar months at least before the said Michaelmas meeting, leave with the sheriff or stewart's clerk a copy of his claim, setting forth the names of his lands, and his titles thereto, and dates thereof, with the old extent or valuation, upon which he desires to be enrolled; and in case of his neglect to leave his claim as aforesaid, he shall not be enrolled at such Michaelmas meeting; and in like manner, whoever intends to object to any freeholder who stands upon the roll, on account of the alteration of his circumstances, shall, at least two kalendar months before the Michaelmas meeting, leave his objections in writing with the sheriff or stewart's clerk, as aforesaid, who is hereby required, upon receipt of the aforesaid claim or objections, to indorse on the back thereof the day he received the same, and also to give a copy of the aforesaid claim or objections to any person who shall demand the same, upon paying the legal fee of an ordinary extract of the same length.

VIII. And whereas great difficulties have occurred in making up the rolls of electors of commissioners for shires, by persons claiming to be enrolled, in respect of the old extent of their lands, where the old extent does not appear from proper evidence, and votes have been unduly multiplied, by splitting and dividing the old extent of lands, since the sixteenth day of September one thousand six hundred and eighty-one; for remedy thereof, be it enacted and declared, by the authority aforesaid, that no person is, or shall be, entitled to vote for a commissioner to serve in Parliament for any shire or stewartry in that part of Great Britain called Scotland, or to be enrolled in the roll of electors, in respect of the old extent of his lands, holden of the king or prince, unless such old extent is proved by a retour of the lands, of a date prior to the sixteenth day of September one thousand six hundred and eighty-one, and that no division of the old extent, made since the aforesaid sixteenth day of September one thousand six hundred and eighty-one, or to be made in time coming, by retour, or any other way, is or shall be sustained as sufficient evidence of the old extent.

IX. Provided always, that lands holden of the king or prince

summary complaint to the Court of Session, who shall grant a warrant for summoning such persons, upon thirty days' notice, to answer, and shall proceed, in a summary way, to hear and determine upon such complaint; and if no such complaint shall be exhibited within the time aforesaid, then, and in that case, no freeholder, who at present stands upon the rolls last made up in the said counties and stewartries respectively, shall be struck off, or left out of the roll, except upon sufficient objections arising from the alteration of that right or title in respect of which he was enrolled, sustained by the other freeholders standing upon the said roll.

IV. And be it enacted by the authority aforesaid, that if, at any Michaelmas meeting, or meeting for election, any person claiming to be enrolled shall, by judgment of the freeholders, be refused to be admitted, or if any person who stood upon the roll shall, by like judgment, be struck off, or left out of the roll, it shall and may be lawful for him, or them, who is so refused to be admitted, or whose name is so struck off, or left out of the roll, to apply (so as such application be made within four kalendar months after their being so refused, struck off, or left out) by summary complaint to the Court of Session, who shall grant a warrant for summoning the person or persons upon whose objection or objections he was refused to be admitted, or was struck off, or left out, as aforesaid, upon thirty days' notice, to answer, and shall proceed to hear and determine, in a summary way, on such complaint; and if any person shall be enrolled whose title shall be thought liable to objection, it shall and may be lawful for any freeholder standing upon the said roll, (whether such freeholder was present at the meeting or not), who apprehends that such person had not a right to be enrolled, to apply in like manner by complaint to the Court of Session, so as such application be made within four kalendar months after such enrolment; and the said court, after service of such complaint, on thirty days' notice, upon the person said to be wrongfully admitted to the roll, shall, in manner aforesaid, hear and determine; and if no such complaint shall be exhibited within the time aforesaid, the freeholder enrolled shall stand and continue upon the roll until an alteration of his circumstances be allowed by the freeholders at a subsequent Michaelmas meeting, or meeting for election, as a sufficient cause for striking or leaving him out of the roll.

V. And be it enacted by the authority aforesaid, that if, in any of the aforesaid cases, the judgment of the Court of Session shall alter or reverse the determination of the meeting of the freeholders, by directing that any person shall be added to or expunged from the roll of election, the sheriff or stewart's clerk shall, upon presenting to him the extract of such judgment, forthwith make the alteration thereby directed in the books that are kept by him; and in case of his refusal or delay, he shall forfeit the sum of one hundred

shall, at every subsequent meeting at Michaelmas, or meeting for any election, produce the said books for the use of the freeholders; and in case such sheriff or stewart's clerk shall neglect or refuse to enter the aforesaid rolls of election, or minutes of proceedings, into books so to be kept for that purpose, as aforesaid, or shall neglect or refuse to give copies thereof, extracted and signed, or shall omit to produce the books at any subsequent meeting, as aforesaid, he shall for every such offence forfeit the sum of one hundred pounds sterling, to be recovered by any freeholder, within such shire or stewartry, who shall sue for the same, in such manner as is hereafter directed; and if the aforesaid principal books, containing the rolls and minutes as aforesaid, shall not be produced at the Michaelmas meetings, or meetings for election, a copy of the said roll and minutes, extracted and signed by the sheriff's or stewart's clerk, shall be sufficient; and if the sheriff or stewart's clerk shall give out false copies of the said roll or minutes, extracted and signed by him, he shall for every such offence forfeit the sum of one hundred pounds sterling to the person to whom the false copy is given, to be recovered by him or his executors in the manner herein after directed, and shall be for ever after incapable of holding or enjoying his said office.

XII. And be it further enacted, by the authority aforesaid, that, at every election of a commissioner to serve in Parliament for any shire or stewartry within that part of Great Britain called Scotland, the roll of electors which shall be last made up by the freeholders, whether at the Michaelmas meeting, or at the last election of a member to serve in Parliament, shall be the roll to be called over by the commissioner last elected, or, in his absence, by the sheriff or stewart's clerk, in order to the election of preses and clerk, as also by the preses, after he is chosen, for the choice of the member to serve in Parliament, and for the determination of all the questions that shall arise in the adjusting the roll, and in the course of the election, excepting so far as the said roll shall, after the meeting is duly constituted by the choice of preses and clerk, be altered by judgment of the majority of the freeholders standing on that roll, by leaving out those whose circumstances are altered, and by adding others who produce proper titles.

XIII. And be it further enacted by the authority aforesaid, that at every meeting for an election of a commissioner to serve in Parliament, if the commissioner last elected, or, in his absence, the sheriff or stewart's clerk, shall, in the choice of preses or clerk, receive the vote of any person that does not stand upon the said roll, he shall, for every such offence, forfeit the sum of three hundred pounds sterling to every candidate for the office of preses or clerk respectively, for whom such person shall not have given his vote, to be recovered by him or them, his or their executors respectively, in manner herein after directed; or, if the commissioner last elected, or, in

liable in public burdens for four hundred pounds Scots of valued rent, shall in all cases be a sufficient qualification, whatever be the old extent of the said lands; any law or practice to the contrary notwithstanding.

X. And be it further enacted, by the authority aforesaid, that no purchaser or singular successor shall be enrolled till he be publickly infeoft, and his sasine registered, or charter of confirmation be expede, where confirmation is necessary, one year before the enrolment; and that no heir-apparent shall be enrolled, until his predecessors' titles are produced, and allowed by the freeholders as a sufficient qualification for his voting for a member of Parliament; and that any person may be enrolled, though absent at the time of such enrolment, provided the titles and vouchers of his qualification are produced, and laid before the freeholders: and if any person shall be chosen a member to serve in Parliament for any shire or stewartry within that part of Great Britain called Scotland, who shall not be present at the meeting of election; be it enacted by the authority aforesaid, that the member to serve in Parliament so elected, before he takes his seat in Parliament, shall take the oath appointed to be taken by every freeholder who shall claim to vote at any election of a member to serve in Parliament, by the act of the seventh year of his present majesty, intituled, 'An act for the better regulating the 'election of members to serve in the House of Commons, for that 'part of Great Britain called Scotland; and for incapacitating the 'judges of the Court of Session, Court of Justiciary, and barons of 'the Court of Exchequer in Scotland, to be elected, or to sit or 'vote as members of the House of Commons,' before the Lord Steward of his majesty's household, or any person or persons authorized by him for that effect, which he or they are hereby empowered and required to administer; and if a member to serve in Parliament, so elected, shall neglect or refuse to take the aforesaid oath, such election shall be void.

XI. And be it further enacted, by the authority aforesaid, that, at the annual meetings of the freeholders at Michaelmas, the original constituent members shall be such persons only as shall stand upon the roll that shall have been last made up, whether at a Michaelmas meeting, or at a meeting for an election of a member to serve in Parliament, and that a copy signed and extracted of the roll, made up by the freeholders at their Michaelmas meetings, or meetings for elections, together with the minutes of their proceedings, at their said meetings, shall, by the respective clerks of such meetings, be forthwith delivered to the sheriff or stewart's clerk *gratis*, and shall be inserted in books, to be kept by the said sheriff or stewart's clerk for that purpose, who shall forthwith deliver copies of the same, extracted and signed, to any freeholder who shall desire the same, paying the legal fee for any ordinary extract of the same length, and

ses or clerk, other than those who shall be chosen by the majority as aforesaid, he shall, for every such offence, forfeit the sum of fifty pounds sterling, to the candidate who shall be chosen by the majority of the freeholders from whom such separation was made; to be recovered by him or his executors in the manner herein after directed: And if any person presume to act as preses or clerk who is not chosen by the majority of the freeholders present standing on the said roll, he shall, for every such offence, forfeit the sum of two hundred pounds sterling to the candidate who shall be chosen by the majority of the freeholders, as aforesaid, to be recovered by him or his executors as herein after directed.

XV. And be it further enacted, by the authority aforesaid, that the commissioner last elected, or, in his absence, the sheriff or stewart's clerk, shall sign the minutes of the election of preses and clerk, and deliver the same to the clerk chosen by the majority of the freeholders, as aforesaid; and if the commissioner last elected, or, in his absence, the sheriff or stewart's clerk, shall neglect or refuse to sign the aforesaid minutes of election of preses and clerk, and deliver the same to the clerk chosen as aforesaid, or shall sign false minutes thereof, he shall, for every such offence, forfeit the sum of one hundred pounds sterling to the person elected preses, as aforesaid, to be recovered by him or his executors, in the manner hereafter directed.

XVI. And be it further enacted, by the authority aforesaid, that the clerk chosen by the majority of the freeholders on the aforesaid roll, shall return to the sheriff or stewart, such person as shall be elected by the majority of the freeholders on the roll made up at the meeting for election, in the manner aforesaid; and if the clerk chosen as aforesaid shall refuse or neglect to return the person elected by the majority of the freeholders on the roll made up at the meeting for election, or shall return any person other than him who shall be elected by the majority of the freeholders, as aforesaid, he shall, for every such offence, instead of the penalty or forfeiture to which he is made liable by the aforesaid act, made in the seventh year of his present Majesty, forfeit the sum of five hundred pounds Sterling to the candidate chosen by the majority of the freeholders on the aforesaid roll, to be recovered by him, or his executors, in the manner herein after directed.

XVII. And be it further enacted, by the authority aforesaid, that every sheriff or stewart of any shire or stewartry, within that part of Great Britain called Scotland, upon producing to him a copy of the aforesaid roll last made up by the freeholders at the last Michaelmas meeting, or at the last election of a member to serve in Parliament, extracted and signed by the sheriff or stewart's clerk, and upon producing and shewing to him the original minutes of the election of

his absence, the sheriff or stewart's clerk, shall, in the choice of presses or clerk, not call for, or shall refuse the vote of, any person whose name is upon the said roll, he shall, for every such offence, forfeit the like sum of three hundred pounds sterling to the person whose name shall not be called for, or whose vote shall be refused, to be recovered by him, or his executors, in the manner herein after directed; and if the preses, after he is chosen, shall, in the election of the member to serve in Parliament, receive the vote of any person who does not stand upon the roll duly made up by the said meeting, he shall, for every such offence, forfeit the sum of two hundred pounds sterling to every candidate for whom such person shall not have given his vote, to be recovered by him, or his executors, in the manner herein after directed; or, if the preses, after he is chosen, shall, in the election of the member to serve in Parliament, not call for, or shall refuse the vote of, any person whose name is upon the said roll so made up as aforesaid, he shall, for every such offence, forfeit the like sum of two hundred pounds sterling to the person whose name shall not be called for, or whose vote shall be refused, to be recovered by him or his executors in the manner herein after directed: And it is hereby declared, that, in case of equality of votes in the choice of preses or clerk, the commissioner last elected, and, in his absence, any freeholder present who last represented the shire or stewartry in any former Parliament; and if no such person is present, the freeholder present who presided last at any meeting for any election, and, in his absence, the freeholder who has presided at any Michaelmas meeting; and if none of the said persons shall be present, the freeholder present who stands first on the roll, shall, besides their own votes as freeholders, have the casting and determining vote, and that the preses chosen shall, after his election in the choice of the commissioner to serve in Parliament, and all other questions where the votes are equal, in like manner, besides his own vote as a freeholder, have the casting and determining vote.

XIV. And be it further enacted by the authority aforesaid, that the persons chosen to be preses and clerk by the majority of the freeholders present, standing on the said roll, shall be preses and clerk of the meeting for such election; and it shall not be lawful for any number of freeholders to separate from the majority of the persons present who stand upon the said roll, and set up any person as preses or clerk other than those who shall be chosen by the majority of the freeholders present standing on the said roll, and that it shall not be lawful for any person to act as preses or clerk at any such election, unless they are chosen by the majority of persons standing on the said roll; and every freeholder who shall so separate from the majority of the freeholders on the roll, and set up any person as pre-

ses or clerk, other than those who shall be chosen by the majority as aforesaid, he shall, for every such offence, forfeit the sum of fifty pounds sterling, to the candidate who shall be chosen by the majority of the freeholders from whom such separation was made; to be recovered by him or his executors in the manner herein after directed: And if any person presume to act as preses or clerk who is not chosen by the majority of the freeholders present standing on the said roll, he shall, for every such offence, forfeit the sum of two hundred pounds sterling to the candidate who shall be chosen by the majority of the freeholders, as aforesaid, to be recovered by him or his executors as herein after directed.

XV. And be it further enacted, by the authority aforesaid, that the commissioner last elected, or, in his absence, the sheriff or stewart's clerk, shall sign the minutes of the election of preses and clerk, and deliver the same to the clerk chosen by the majority of the freeholders, as aforesaid; and if the commissioner last elected, or, in his absence, the sheriff or stewart's clerk, shall neglect or refuse to sign the aforesaid minutes of election of preses and clerk, and deliver the same to the clerk chosen as aforesaid, or shall sign false minutes thereof, he shall, for every such offence, forfeit the sum of one hundred pounds sterling to the person elected preses, as aforesaid, to be recovered by him or his executors, in the manner hereafter directed.

XVI. And be it further enacted, by the authority aforesaid, that the clerk chosen by the majority of the freeholders on the aforesaid roll, shall return to the sheriff or stewart, such person as shall be elected by the majority of the freeholders on the roll made up at the meeting for election, in the manner aforesaid; and if the clerk chosen as aforesaid shall refuse or neglect to return the person elected by the majority of the freeholders on the roll made up at the meeting for election, or shall return any person other than him who shall be elected by the majority of the freeholders, as aforesaid, he shall, for every such offence, instead of the penalty or forfeiture to which he is made liable by the aforesaid act, made in the seventh year of his present Majesty, forfeit the sum of five hundred pounds Sterling to the candidate chosen by the majority of the freeholders on the aforesaid roll, to be recovered by him, or his executors, in the manner herein after directed.

XVII. And be it further enacted, by the authority aforesaid, that every sheriff or stewart of any shire or stewartry, within that part of Great Britain called Scotland, upon producing to him a copy of the aforesaid roll last made up by the freeholders at the last Michaelmas meeting, or at the last election of a member to serve in Parliament, extracted and signed by the sheriff or stewart's clerk, and upon producing and shewing to him the original minutes of the election of

presses and clerk, signed by the commissioner last elected, or, in his absence, by the sheriff or stewart's clerk, shall annex to the writ the return made by the clerk chosen by the majority of the freeholders on the aforesaid roll; and if any such sheriff or stewart shall neglect or refuse to annex to the writ such return, or if he shall annex to the writ the return made by any other person pretending to be clerk to the election, he shall, for every such offence, instead of the penalty or forfeiture to which he is made liable by the aforesaid act, made in the seventh year of his present Majesty, forfeit the sum of five hundred pounds Sterling to the person returned by the clerk, and chosen by the majority of the freeholders on the aforesaid roll, to be recovered by him, or his executors, in the manner hereafter directed.

XVIII. And be it further enacted, by the authority aforesaid, that every sheriff or stewart of any shire or stewartry, within that part of Great Britain called Scotland, shall hold the Michaelmas Head Court, in all time to come, on the day on which it shall appear to him to have been most usually held in times past; and, to prevent all uncertainty in time coming, every sheriff or stewart shall, at least fourteen days before Michaelmas next, appoint a precise day for holding his Michaelmas head court, in the year one thousand seven hundred and forty-three, and shall cause intimate the day of holding his court at all the parish churches within his said shire or stewartry, upon a Sunday, at least eight days preceding the next Michaelmas head court: And it is hereby declared, that the day so to be appointed by the said sheriff or stewart before Michaelmas next, shall be the anniversary for holding the Michaelmas head court of the said shire or stewartry in all time coming.

XIX. And whereas, by the constitution of the shire of Sutherland, and by constant usage, the small barons of the said shire have been represented in Parliament, not only by the immediate vassals of the king and prince, but also by those who held their lands of the Earls of Sutherland, or of other subject superiors, and such vassals holding their lands of subject superiors, have been in use to vote at the election of the commissioners for the said shire of Sutherland, as well as the vassals of the king and prince, and that without any restriction as to the quota of the old extent, or of the valued rent of the lands, in respect whereof a right to vote at such elections, or to be elected commissioner for the said shire was claimed, and thereby votes have been unduly multiplied, and several persons have claimed a vote in respect of the superiority and property of the same lands, whereby great confusions are likely to ensue in future elections; for remedy thereof, be it further enacted, by the authority foresaid, that from and after the first day of September, which shall be in the year of our Lord one thousand seven hundred and forty-five, no person

for summoning the magistrates and counsellors elected by the majority, upon thirty days' notice, and shall hear and determine the said complaint summarily, without abiding the course of any roll, and shall allow the party who shall prevail their full costs of suit.

XXV. And whereas the magistrates and counsellors of the royal boroughs in that part of Great Britain called Scotland, by virtue of several laws now in force, are bound to take and subscribe the oath of allegiance, subscribe the assurance, and to take and sign the oath of abjuration, for and on account of their election into their respective offices, and that in his majesty's Courts of Session, Justiciary, or Exchequer, at Edinburgh, or at the quarter sessions of the respective shires and stewartries within which the royal boroughs are situate, which has been found by experience to be attended with great trouble and expence to the said magistrates and counsellors; for remedy thereof, be it enacted, by the authority aforesaid, that it shall and may be lawful to the said magistrates and counsellors to take and subscribe the oath of allegiance, subscribe the assurance, and take and sign the oath of abjuration, before the council of their respective boroughs; and which oaths the chief magistrate, or any other magistrate of the said boroughs, respectively, is hereby empowered and required to administer; and the oaths so taken shall be equal in all respects as if they had been taken in the courts, and before the judges directed by the several acts of parliament above referred to.

XXVI. And be it enacted by the authority foresaid, that at every election of commissioners for choosing burgesses for any district of boroughs in that part of Great Britain called Scotland, the common clerk of each borough within the said district shall make out a commission to the person chosen commissioner by the major part of the magistrates and town-council assembled for that purpose, which magistrates and town-council shall take the oath of allegiance, and sign the same with the assurance, and shall take all the other oaths appointed to be taken at such election, by this or any former act, if required; and the said clerk shall affix the common seal of the borough thereto, and sign such commission, and shall not, on any pretence whatsoever, make out a commission for any person as commissioner, other than him who is chosen by the majority as aforesaid; and if any common clerk of any borough shall neglect or refuse duly to make out and sign a commission to the commissioner elected by the majority as aforesaid, and affix the seal of the borough thereto, or if he shall make out and sign a commission to any other person who is not chosen by the majority, or affix the common seal of the borough thereto, he shall for every such offence forfeit the sum of five hundred pounds sterling, to the person elected commissioner for the said borough as aforesaid, to be recovered by him or his executors, in the manner herein after directed, and shall also suf-

XXII. And whereas at the election of members to serve in Parliament for the districts of boroughs in that part of Great Britain called Scotland, it often happens that more persons than one claim to be admitted to vote as commissioners for the same borough, which furnishes pretences to the clerks of the presiding boroughs for partially making false and undue returns; for remedy thereof, be it enacted by the authority aforesaid, that, at the annual election of magistrates and councillors, and in all the proceedings previous to the election of the magistrates and councillors for the succeeding year, it shall not be lawful for the minority of any meeting for election, either of magistrates or councillors, or deacons, or other persons, who, by the constitution of the respective boroughs, may have votes in the election of magistrates or councillors, to separate from the majority of those having right to act by the constitution of the borough at such meetings, upon any pretext whatsoever; nor to make any separate election of magistrates, counsellors, or electors; but the minority shall, in all cases, submit to the election made by the majority in all parts of election; and if any person elected by the minority of any such meeting, shall presume to vote in the election of magistrates or counsellors, or in leeting the magistrates or counsellors, or in any other step of the election, he shall forfeit the sum of one hundred pounds sterling, to any one of the majority of such meeting, to be recovered by him in the manner hereafter directed.

XXIII. And be it further enacted, by the authority foresaid, that no person elected to be a magistrate or counsellor by a minority of those having right to vote in elections of the magistrates and counsellors, shall, upon any pretext whatsoever, presume to act as magistrate or counsellor; and if any person shall, notwithstanding, presume to act as magistrate or counsellor, he shall, for every such offence, forfeit the sum of one hundred pounds sterling to the magistrates or counsellors elected by the majority, or to any of them who shall sue for the same, to be recovered by him or them in the manner herein after directed.

XXIV. Provided always, and it is hereby declared and enacted, that it shall and may be lawful to and for any constituent member, at any meeting for election of magistrates or counsellors, or of any meeting previous to that for the election of magistrates and counsellors, respectively, who shall apprehend any wrong to have been done by the majority of such meeting, to apply to the said Court of Session, by a summary complaint, for rectifying such abuse, or for making void the whole election made by the said majority, or for declaring and ascertaining the election made by the minority, so as such complaint be presented to the said Court of Session within two kalendar months after the annual election of the magistrates and counsellors; and the said Court shall thereupon grant a warrant

not be engrossed in his commission; any law, custom, or usage to the contrary notwithstanding.

XXX. And be it further enacted, by the authority aforesaid, that, at all meetings of commissioners for choosing burgesses to serve in Parliament, the common clerk of the presiding borough shall allow the votes of such persons only who produce commissions authenticated by the subscription of the common clerk, and the common seal of the respective boroughs within the district, and shall return to the sheriff or stewart the person elected by the major part of the commissioners assembled, whose commissions are authenticated as aforesaid; and if he neglect or refuse to return such persons so elected to the sheriff or stewart; or, if he shall return to the sheriff or stewart any person other than him who is so elected, he shall, for every such offence, instead of the penalty or forfeiture to which he is made liable by the aforesaid act, made in the seventh year of his present majesty, forfeit the sum of five hundred pounds Sterling, to the candidate elected by the majority of the commissioners assembled, whose commissions are authenticated as aforesaid; to be recovered by him or his executors in the manner herein after directed; and he shall also suffer imprisonment for the space of six kalendar months, and be for ever after disabled to hold or enjoy his said office of common clerk of the said presiding borough, as if he was naturally dead.

XXXI. And be it enacted by the authority aforesaid, that every sheriff or stewart, in that part of Great Britain called *Scotland*, shall annex to the writ the return made by the aforesaid clerk of the presiding borough; and if any such sheriff or stewart neglect or refuse to annex to the writ such return, or if he shall annex to the writ any return made by any other person, he shall, for every such offence, instead of the penalty or forfeiture to which he is made liable by the aforesaid act, made in the seventh year of his present majesty, forfeit the sum of five hundred pounds sterling to the candidate returned by the aforesaid clerk of the presiding borough, to be recovered by him or his executors in the manner herein after directed.

XXXII. Provided always, that, if any person to whom no commission is made out, as aforesaid, shall insist that he was duly elected the commissioner from any royal borough, the person so claiming shall be admitted to the meeting of the commissioners for choosing burgesses to serve in Parliament, and may at the said meeting make offer of taking all the oaths required by law, and declare for whom he would have voted had he been duly commissioned; which oaths the clerk of the presiding borough is hereby required and empowered to administer; and the said clerk shall also set down in the minutes of proceedings, the declaration of such person as to the candidate for whom he would have voted, had he been duly com-

fer imprisonment for the space of six kalendar months, and be for ever after disabled to hold or enjoy the said office of common clerk of the said borough, as effectually as if he was naturally dead.

XXVII. And be it further enacted, by the authority aforesaid, that if any other person, who is not the common clerk of the borough, shall take upon himself to act as such in any election of a commissioner for choosing a burgess for any district of boroughs in that part of Great Britain called Scotland, and shall make out a commission for any other person as commissioner, other than the person who was chosen by the majority as aforesaid, and shall sign or affix the common seal of the borough thereto, he shall, for every such offence, forfeit the sum of five hundred pounds sterling to the person elected commissioner for the said borough as aforesaid; to be recovered by him or his executors in the manner herein after directed.

XXVIII. And whereas, by an act passed in that part of Great Britain called Scotland the 5th day of February, in the year one thousand seven hundred and seven, intituled, 'Act settling the manner of electing the sixteen peers, and forty-five commoners, to represent Scotland in the Parliament of Great Britain,' it is, amongst other things, enacted, that, where the votes of the commissioners for the said boroughs, met to choose representatives from their several districts to the Parliament of Great Britain, shall be equal; in that case, the president of the meeting shall have a casting or decisive vote, and that by and attour his vote as a commissioner from the borough from which he is sent; but no provision is made, in case of the absence of the commissioner from the presiding borough, or of his refusing to vote at such election: For remedy thereof, be it enacted, by the authority aforesaid, that, if the commissioner from the presiding borough shall be absent from the meeting of commissioners for choosing burgesses to serve in Parliament, or shall refuse to vote at such election, the commissioner from the borough which was the presiding borough at the last election; and if he also be absent, or shall refuse to vote as aforesaid, the commissioner from the borough which was the presiding borough at the election immediately preceding the last; and in case he shall be likewise absent, or shall refuse to vote as aforesaid, the commissioner from the borough, which was the last presiding borough but two, shall have, in the aforesaid respective cases, besides his own vote, the casting or decisive vote.

XXIX. And be it further declared, by the authority aforesaid, that it is no objection to any commissioner for choosing a burgess, that he is not a residenter within the borough bearing all portable charges with his neighbours, or that he is no trafficking merchant therein, or that he is not in possession of any burgage lands or houses holding of the said borough, and that such qualifications need

'ward, or any bond, bill, or note, or any promise of any sum or 'sums of money, office, place, employment, or gratuity whatsoever, 'either by myself or any other, to my use, or benefit, or advantage, 'to make out any commission for a commissioner for choosing a 'burgess; and that I will duly make out a commission to the com- 'missioner who shall be chosen by the majority of the town council 'assembled, and to no other person. So help me God.'

And that at all meetings of the commissioners for choosing burgesses to serve in Parliament, and before they proceed to the election, the clerk of the presiding borough shall take and subscribe the following oath, which the commissioner for the presiding borough, or, in his absence, any other of the commissioners, is hereby required and empowered to administer.

'I A. B. do solemnly swear, that I have not, directly or indi- 'rectly, by way of loan, or other device whatsoever, received any 'sum or sums of money, office, place, employment, gratuity, or re- 'ward, or any bond, bill, or note, or any promise of any sum or 'sums of money, office, place, employment, or gratuity whatsoever, 'either by myself, or any other to my use, or benefit, or advantage, 'to make any return at this election of a member to serve in Parlia- 'ment; and that I will return to the sheriff *or* stewart the person 'elected by the major part of the commissioners assembled, whose 'commissions are authenticated by the subscription of the common 'clerk, and common seal of the respective boroughs of this district. 'So help me God.'

XXXVI. And be it further enacted by the authority aforesaid, that, if the clerk of the presiding borough shall neglect or refuse to take the oath aforesaid, such clerk so refusing or neglecting shall be incapable to act as clerk to the said meeting, and it shall be lawful to and for the said commissioners, and they are hereby empowered and required to choose another clerk to the meeting for the election, and who shall have all the powers and authorities in the said meeting, and in the returning the member chosen by them, that by law are competent to the clerk of the presiding borough.

XXXVII. And be it further enacted, by the authority aforesaid, that, at all the elections of a member to serve in Parliament for any county or stewartry in that part of Great Britain called Scotland, the clerk chosen by the majority of such persons as stand upon the said roll last made up by the freeholders, whether at the Michaelmas court, or at the last election of a member to serve in Parliament, shall immediately after his election take and subscribe the following oath, which the preses of the meeting is hereby required and empowered to administer.

'I A. B. do solemnly swear, that I have not, directly or indi- 'rectly, by way of loan or other device whatsoever, received any 'sum or sums of money, office, place, or employment, gratuity

'or reward, or any bond, bill, or note, or any promise of any 'sum, or sums of money, office, place, employment, or gratuity 'whatsoever, by myself or any other to my use, or benefit, or ad-'vantage, to make any return at the present election of a member 'to serve in Parliament; and that I will return to the sheriff *or* 'stewart the person elected by the majority of the freeholders upon 'the roll made up at this election, and who shall be present and 'vote at this meeting. So help me God.'

XXXVIII. And whereas, by the said act of Parliament, made in the second year of the reign of his present majesty, it is enacted, that every sheriff, mayor, bailiff, head-borough, or other person being the returning officer of any member to serve in Parliament, shall, immediately after reading the writ or precept for the election of such members, take and subscribe the oath contained in the aforesaid act; be it enacted by the authority aforesaid, that so much of the said act as requires the said oath to be taken by any returning officer within that part of Great Britain called Scotland, shall be, and is hereby repealed.

XXXIX. And be it further enacted, by the authority aforesaid, that if any person shall presume wilfully and falsely to swear and subscribe any of the oaths required to be taken by this act, and shall thereof be lawfully convicted, he shall incur the pains and punishments of perjury, and be prosecuted for the same, according to the laws and forms in use in Scotland.

XL. And be it further enacted, by the authority aforesaid, that when any new Parliament shall at any time hereafter be summoned or called, the lord chancellor, lord keeper, or lords commissioners of the great seal for the time being, shall issue out the writs for election of members to serve in Parliament for that part of Great Britain called Scotland with as much expedition as the same may be done; and that, as well upon the calling or summoning any new Parliament, as also in case of any vacancy during this present, or any future Parliament, the several writs shall be delivered to the sheriff or stewart to whom the execution thereof does belong or appertain, and to no other person whatsoever; and that every such sheriff or stewart, upon the receipt of the writ, shall, upon the back thereof, indorse the day he received the same, and shall forthwith, upon the receipt of the writ, at least within the space of four days after the receipt thereof, make out a precept to each borough within his jurisdiction, to elect a commissioner for choosing a burgess to serve in Parliament, and shall cause the same to be delivered to the chief magistrate of such borough, resient in the borough for the time being; and in case such sheriff or stewart shall neglect to indorse on the back of the writ the day he received the same, or shall neglect to make out his precept and to deliver the same to the chief magistrate within the time, and in the manner above directed, he shall,

'ward, or any bond, bill, or note, or any promise of any sum or 'sums of money, office, place, employment, or gratuity whatsoever, 'either by myself or any other, to my use, or benefit, or advantage, 'to make out any commission for a commissioner for choosing a 'burgess; and that I will duly make out a commission to the com-'missioner who shall be chosen by the majority of the town council 'assembled, and to no other person. So help me God.'

And that at all meetings of the commissioners for choosing burgesses to serve in Parliament, and before they proceed to the election, the clerk of the presiding borough shall take and subscribe the following oath, which the commissioner for the presiding borough, or, in his absence, any other of the commissioners, is hereby required and empowered to administer.

'I A. B. do solemnly swear, that I have not, directly or indi-'rectly, by way of loan, or other device whatsoever, received any 'sum or sums of money, office, place, employment, gratuity, or re-'ward, or any bond, bill, or note, or any promise of any sum or 'sums of money, office, place, employment, or gratuity whatsoever, 'either by myself, or any other to my use, or benefit, or advantage, 'to make any return at this election of a member to serve in Parlia-'ment; and that I will return to the sheriff *or* stewart the person 'elected by the major part of the commissioners assembled, whose 'commissions are authenticated by the subscription of the common 'clerk, and common seal of the respective boroughs of this district. 'So help me God.'

XXXVI. And be it further enacted by the authority aforesaid, that, if the clerk of the presiding borough shall neglect or refuse to take the oath aforesaid, such clerk so refusing or neglecting shall be incapable to act as clerk to the said meeting, and it shall be lawful to and for the said commissioners, and they are hereby empowered and required to choose another clerk to the meeting for the election, and who shall have all the powers and authorities in the said meeting, and in the returning the member chosen by them, that by law are competent to the clerk of the presiding borough.

XXXVII. And be it further enacted, by the authority aforesaid, that, at all the elections of a member to serve in Parliament for any county or stewartry in that part of Great Britain called Scotland, the clerk chosen by the majority of such persons as stand upon the said roll last made up by the freeholders, whether at the Michaelmas court, or at the last election of a member to serve in Parliament, shall immediately after his election take and subscribe the following oath, which the preses of the meeting is hereby required and empowered to administer.

'I A. B. do solemnly swear, that I have not, directly or indi-'rectly, by way of loan or other device whatsoever, received any 'sum or sums of money, office, place, or employment, gratuity

'or reward, or any bond, bill, or note, or any promise of any 'sum, or sums of money, office, place, employment, or gratuity 'whatsoever, by myself or any other to my use, or benefit, or ad- 'vantage, to make any return at the present election of a member 'to serve in Parliament; and that I will return to the sheriff *or* 'stewart the person elected by the majority of the freeholders upon 'the roll made up at this election, and who shall be present and 'vote at this meeting. So help me God.'

XXXVIII. And whereas, by the said act of Parliament, made in the second year of the reign of his present majesty, it is enacted, that every sheriff, mayor, bailiff, head-borough, or other person being the returning officer of any member to serve in Parliament, shall, immediately after reading the writ or precept for the election of such members, take and subscribe the oath contained in the aforesaid act; be it enacted by the authority aforesaid, that so much of the said act as requires the said oath to be taken by any returning officer within that part of Great Britain called Scotland, shall be, and is hereby repealed.

XXXIX. And be it further enacted, by the authority aforesaid, that if any person shall presume wilfully and falsely to swear and subscribe any of the oaths required to be taken by this act, and shall thereof be lawfully convicted, he shall incur the pains and punishments of perjury, and be prosecuted for the same, according to the laws and forms in use in Scotland.

XL. And be it further enacted, by the authority aforesaid, that when any new Parliament shall at any time hereafter be summoned or called, the lord chancellor, lord keeper, or lords commissioners of the great seal for the time being, shall issue out the writs for election of members to serve in Parliament for that part of Great Britain called Scotland with as much expedition as the same may be done; and that, as well upon the calling or summoning any new Parliament, as also in case of any vacancy during this present, or any future Parliament, the several writs shall be delivered to the sheriff or stewart to whom the execution thereof does belong or appertain, and to no other person whatsoever; and that every such sheriff or stewart, upon the receipt of the writ, shall, upon the back thereof, indorse the day he received the same, and shall forthwith, upon the receipt of the writ, at least within the space of four days after the receipt thereof, make out a precept to each borough within his jurisdiction, to elect a commissioner for choosing a burgess to serve in Parliament, and shall cause the same to be delivered to the chief magistrate of such borough, resient in the borough for the time being; and in case such sheriff or stewart shall neglect to indorse on the back of the writ the day he received the same, or shall neglect to make out his precept and to deliver the same to the chief magistrate within the time, and in the manner above directed, he shall,

for every such offence, forfeit the sum of one hundred pounds Sterling to any magistrate of the borough to which the precept is not timeously delivered, who shall sue for the same, to be recovered in manner herein after directed.

XLI. And be it further enacted, by the authority aforesaid, that such chief magistrate to whom the precept shall be delivered in manner above directed, upon the receipt thereof, shall, upon the back of the precept, indorse the day he received the same, and shall, within two days after his receipt of the precept, call and summon the council of the borough together, by giving notice personally, or leaving notice at the dwelling-place of every counsellor then resient in that borough; which council shall then appoint a peremptory day for the election of a commissioner for choosing a burgess to serve in Parliament.

XLII. Provided always, that two free days shall intervene betwixt the meeting of the council which appoints the day of election of the said commissioner, and the day on which the election of the commissioner is to be made; and in case such chief magistrate shall neglect to indorse the day he received the precept on the back thereof, or to summon the council within the time, and in the manner above directed, he shall for every such offence forfeit the sum of one hundred pounds sterling to any magistrate or counsellor of the said borough who shall sue for the same, to be recovered in manner herein after directed.

XLIII. And be it further enacted by the authority aforesaid, that every penalty or forfeiture by this act imposed, in that part of Great Britain called Scotland, shall and may be sued for and recovered by way of summary complaint before the Court of Session, upon thirty days notice to the person complained of, without abiding the course of any roll; which said complaint the Court of Session is hereby authorized and required to determine; as also to declare the disabilities and incapacities, and to direct the imprisonments, as herein provided.

XLIV. Provided always, and it is hereby declared and enacted by the authority foresaid, that no person shall be made liable to any incapacity, disability, forfeiture, or penalty by this act imposed in that part of Great Britain called Scotland, unless prosecution be commenced within one year after such incapacity, disability, forfeiture, or penalty shall be incurred.

## Anno Decimo Quarto GEORGII III. CAP. 81.

*An Act for altering and amending an Act made in the sixteenth year of his late Majesty's reign, intituled,* 'An act to explain 'and amend the laws touching the elections of Members to serve 'for the Commons in Parliament, for that part of Great Britain 'called Scotland, and to restrain the partiality, and regulate the 'conduct of returning officers at such elections,' *by altering the time of notice ordered by the said act to be given in the service of complaints to the Court of Session of wrongs done in elections, and by regulating the manner, and settling the place of election of a burgess to serve in Parliament for a district of boroughs in Scotland, when the election of the magistrates and council of a borough, which ought in course to be the presiding borough at an election, happens to be reduced, and made void by a decree of the Court of Session, and not revived by the crown when such an election is made.*

WHEREAS, by an act made in the 16th year of his late majesty's reign, intituled, 'An act to explain and amend the laws touching 'the elections of members to serve for the Commons in Parliament 'for that part of Great Britain called Scotland, and to restrain the 'partiality, and regulate the conduct of returning officers at such 'elections;' complaints to the Court of Session, for redress of wrongs committed by the enrolling, or refusing to enrol persons claiming to to be enrolled in the roll of freeholders, or in the annual elections of royal boroughs, are ordered to be served upon thirty days' notice; and whereas it is found by experience so long notice is unnecessary, and occasions delay in the summary determination of such complaints, agreeable to the intendment of the said act, may it therefore please your majesty that it may be enacted, and be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that from and after the twelfth day of June, in the year of our Lord one thousand seven hundred and seventy-four, the Court of Session shall grant warrants for the service of all such complaints as aforesaid, upon fifteen days' notice.

II. And whereas the elections of magistrates and counsellors of royal boroughs in Scotland, have sometimes been reduced and made void by decrees of the Court of Session, in actions or complaints brought before the said court for that purpose, by which the corporate powers of such boroughs are, in effect, in a state of non-existence, until restored by the justice and favour of the crown; and whereas no provision is made in the foresaid act of the sixteenth

pable of ever bearing or executing any office, or place of trust whatsoever under his majesty, his heirs and successors.

II. Provided always, and be it enacted, that nothing in this act contained shall extend, or be construed to extend, to any person or persons, for or by reason of his or their being a commissioner, or commissioners, of the land-tax, or for or by reason of his or their acting by or under the appointment of such commissioners of the land-tax, for the purpose of assessing, levying, collecting, receiving or managing, the land-tax, or any other rates or duties already granted or imposed, or which shall hereafter be granted or imposed by authority of Parliament.

III. Provided also, and be it further enacted, that nothing in this act contained shall extend, or be construed to extend, to any office now held, or usually granted to be held, by letters patent, for any estate of inheritance or freehold.

IV. Provided always, and be it enacted by the authority aforesaid, that nothing herein contained shall extend to any person who shall resign his office or employment on or before the said first day of August one thousand seven hundred and eighty-two.

V. Provided also, and be it enacted, that no person shall be liable to any forfeiture or penalty by this act laid or imposed, unless prosecution be commenced within twelve months after such penalty or forfeiture shall be incurred.

## Anno Vicesimo Secundo GEORGII III. Regis, Cap. XLV.

*An Act for restraining any Person concerned in any contract, commission, or agreement made for the public service, from being elected, or sitting and voting as a member of the House of Commons.*

For further securing the freedom and independence of Parliament, be it enacted by the king's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that, from and after the end of this present session of Parliament, any person who shall, directly or indirectly, himself, or by any person whatsoever in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in whole or in part, any contract, agreement, or commission made or entered into with, under, or from the commissioners of his Majesty's treasury, or of the navy or victualling-office, or with the master-general or board of ordnance, or with any one or more of such commissioners, or with any other person or persons whatsoever, for or on account of the public service, or shall knowingly and willingly furnish or provide, in pur-

soever, concerned or employed in the charging, collecting, levying, or managing, the duties of excise, or any branch or part thereof; nor any commissioner, collector, comptroller, searcher, or other officer or person whatsoever, concerned or employed in the charging, collecting, levying or managing the customs, or any branch or part thereof; nor any commissioner, officer or other person concerned or employed in collecting, receiving, or managing, any of the duties on stamped vellum, parchment, and paper; nor any person appointed by the commissioners for distributing of stamps; nor any commissioner, officer, or other person employed in collecting, levying, or managing, any of the duties on salt; nor any surveyor, collector, comptroller, inspector, officer, or other person employed in collecting, managing, or receiving, the duties on windows or houses; nor any postmaster, postmasters general, or his or their deputy, or deputies, or any person employed by or under him or them, in receiving, collecting, or managing the revenue of the post-office, or any part thereof; nor any captain, master, or mate, of any ship, packet, or other vessel, employed by or under the postmaster, or postmasters general, in conveying the mail to and from foreign ports, shall be capable of giving his vote for the election of any knight of the shire, commissioner, citizen, burgess, or baron, to serve in Parliament for any county, stewartry, city, borough or cinque port, or for choosing any delegate in whom the right of electing members to serve in Parliament for that part of Great Britain called Scotland, is vested: And if any person hereby made incapable of voting, as aforesaid, shall nevertheless presume to give his vote during the time he shall hold, or within twelve kalendar months after he shall cease to hold, or execute any of the offices aforesaid, contrary to the true intent and meaning of this act, such votes so given shall be held null and void to all intents and purposes whatsoever, and every person so offending shall forfeit the sum of one hundred pounds, one moiety thereof to the informer, and the other moiety thereof to be immediately paid into the hands of the treasurer of the county, riding, or division, within which such offence shall have been committed, in that part of Great Britain called England; and into the hands of the clerk of the justices of the peace of the counties or stewartries in that part of Great Britain called Scotland, to be applied and disposed of to such purposes as the justices, at the next general quarter session of the peace to be held for such county, stewartry, riding, or division, shall think fit, to be recovered by any person that shall sue for the same, by action of debt, bill, plaint, or information, in any of his majesty's courts of record at Westminster, in which no essoin, protection, privilege, or wager of law, or more than one imparlance, shall be allowed; or by summary complaint before the Court of Session in Scotland; and the person convicted on any such suit shall thereby become disabled and inca-

agreement, or commission shall devolve by descent or limitation, or by marriage, or as devisee, legatee, executor, or administrator, until twelve kalendar months after he shall have been in possession of the same.

VII. Provided also, and be it enacted, that any person who is now a member of the House of Commons, and holds and enjoys any such contract, agreement, or commission, as aforesaid, may be discharged from the execution thereof, on giving twelve months notice to the person or persons with, or from whom such contract, agreement, or commission is made, entered into, or accepted, of his desire that the same shall cease and determine; and such contract, agreement, or commission, after the expiration of the term aforesaid, shall be null and void.

VIII. Provided also, that, if any person, actually possessed of a patent for a new invention, or a prolongation thereof by act of Parliament, and having contracted with Government concerning the object of the said patent before the passing of this act, shall give notice of his intention to dissolve the said contract, the same shall be null and void from the time of giving such notice.

IX. And be it further enacted, by the authority aforesaid, that, if any person, hereby disabled or declared to be incapable to sit or vote in Parliament, shall nevertheless be returned as a member to serve for any county, stewartry, city, borough, town, cinqueport, or place in Parliament, such election and return are hereby enacted and declared to be void: And if any person, disabled and declared incapable by this act to be elected, shall, after the end of this present session of Parliament, presume to sit or vote as a member of the House of Commons, such person, so sitting or voting, shall forfeit the sum of five hundred pounds for every day in which he shall sit or vote in the said House, to any person or persons who shall sue for the same in any of his Majesty's courts at Westminster; and the money so forfeited shall be recovered by the person or persons so suing, with full costs of suit, in any of the said courts, by any action of debt, bill, plaint, or information, in which no essoin, privilege, protection, or wager of law, or more than one imparlance shall be allowed, or by summary complaint before the Court of Session in Scotland: And every person against whom any such penalty or forfeiture shall be recovered by virtue of this act, shall be from thenceforth incapable of taking or holding any contract, agreement, or commission for the public service, or any share thereof, or any benefit or emolument from the same in any manner whatsoever.

X. And be it enacted, that, in every such contract, agreement, or commission to be made, entered into, or accepted as aforesaid, there be inserted an express condition, that no member of the House of Commons be admitted to any share or part of such contract, agreement, or commission, or to any benefit to arise therefrom; and that,

surance of any such agreement, contract, or commission which he or they shall have made or entered into, as aforesaid, any money to be remitted abroad, or any wares or merchandize to be used or employed in the service of the public, shall be incapable of being elected, or of sitting or voting as a member of the House of Commons during the time that he shall execute, hold, or enjoy any such contract, agreement, or commission, or any part or share thereof, or any benefit or emolument arising from the same.

II. And be it further enacted, by the authority aforesaid, that, if any person, being a member of the House of Commons, shall, directly or indirectly, himself, or by any other person whatsoever in trust for him, or for his use or benefit, or on his account, enter into, accept of, agree for, undertake, or execute, in the whole or in part, any such contract, agreement, or commission, as aforesaid, or if any person, being a member of the House of Commons, and having already entered into any such contract, agreement, or commission, or part or share of any such contract, agreement, or commission, by himself, or by any other person whatsoever, in trust for him, or for his use or benefit, or upon his account, shall, after the commencement of the next session of Parliament, continue to hold, execute, or enjoy the same, or any part thereof, the seat of every such person in the House of Commons shall be, and is hereby declared to be void.

III. Provided always, and be it enacted, that nothing herein contained shall extend, or be construed to extend to any contract, agreement, or commission made, entered into, or accepted by any incorporated trading company, in its corporate capacity, nor to any company now existing or established, and consisting of more than ten persons, where such contract, agreement, or commission shall be made, entered into, or accepted, for the general benefit of such incorporation or company.

IV. Provided also, and be it enacted, that nothing in this act contained shall extend, or be construed to extend, to any contract, agreement, or commission made, entered into, or accepted before the passing of this act, the term whereof will expire in the space of one year from the time of making thereof.

V. Provided also, and be it enacted, that, where any contract, agreement, or commission has been made, entered into, or accepted, with a provision that the same shall continue until a year's notice be given of the intended dissolution thereof, the same shall not disable any person from sitting and voting in Parliament, until one year after the said notice shall be actually given for the determination of the said contract, agreement, or commission, or till after twelve kalendar months, to be computed from the time of passing this act.

VI. Provided also, and be it enacted, that nothing herein contained shall extend, or be construed to extend to any person on whom, after the passing of this act, the completion of any contract,

agreement, or commission shall devolve by descent or limitation, or by marriage, or as devisee, legatee, executor, or administrator, until twelve kalendar months after he shall have been in possession of the same.

VII. Provided also, and be it enacted, that any person who is now a member of the House of Commons, and holds and enjoys any such contract, agreement, or commission, as aforesaid, may be discharged from the execution thereof, on giving twelve months notice to the person or persons with, or from whom such contract, agreement, or commission is made, entered into, or accepted, of his desire that the same shall cease and determine; and such contract, agreement, or commission, after the expiration of the term aforesaid, shall be null and void.

VIII. Provided also, that, if any person, actually possessed of a patent for a new invention, or a prolongation thereof by act of Parliament, and having contracted with Government concerning the object of the said patent before the passing of this act, shall give notice of his intention to dissolve the said contract, the same shall be null and void from the time of giving such notice.

IX. And be it further enacted, by the authority aforesaid, that, if any person, hereby disabled or declared to be incapable to sit or vote in Parliament, shall nevertheless be returned as a member to serve for any county, stewartry, city, borough, town, cinqueport, or place in Parliament, such election and return are hereby enacted and declared to be void: And if any person, disabled and declared incapable by this act to be elected, shall, after the end of this present session of Parliament, presume to sit or vote as a member of the House of Commons, such person, so sitting or voting, shall forfeit the sum of five hundred pounds for every day in which he shall sit or vote in the said House, to any person or persons who shall sue for the same in any of his Majesty's courts at Westminster; and the money so forfeited shall be recovered by the person or persons so suing, with full costs of suit, in any of the said courts, by any action of debt, bill, plaint, or information, in which no essoin, privilege, protection, or wager of law, or more than one imparlance shall be allowed, or by summary complaint before the Court of Session in Scotland: And every person against whom any such penalty or forfeiture shall be recovered by virtue of this act, shall be from thenceforth incapable of taking or holding any contract, agreement, or commission for the public service, or any share thereof, or any benefit or emolument from the same in any manner whatsoever.

X. And be it enacted, that, in every such contract, agreement, or commission to be made, entered into, or accepted as aforesaid, there be inserted an express condition, that no member of the House of Commons be admitted to any share or part of such contract, agreement, or commission, or to any benefit to arise therefrom; and that,

in case any person or persons, who hath or have entered into or accepted, or who shall enter into or accept any such contract, agreement, or commission, shall admit any member or members of the House of Commons to any part or share thereof, or to receive any benefit thereby, all and every such person and persons shall, for every such offence, forfeit and pay the sum of five hundred pounds, to be recovered, with full costs of suit, in any of his Majesty's courts of record at Westminster, by any person or persons who shall sue for the same, by any action of debt, bill, plaint, or information, in which no essoin, privilege, protection, or wager of law, or more than one imparlance, shall be allowed, or by summary complaint before the Court of Session in Scotland.

XI. Provided also, and be it enacted, that no person shall be liable to any forfeiture or penalty inflicted by this act, unless a prosecution shall be commenced within twelve kalendar months after such penalty or forfeiture shall be incurred.

## Anno Vigesimo Quinto GEORGII III. Cap. 84.

The following clauses of this act relate to Scotland.

XIV. And be it further enacted, That if any sheriff or returning officer shall wilfully delay, neglect, or refuse duly to return any person who ought to be returned to serve in Parliament for any county, city, borough, or place within *Great Britain*, every such person may, in case it shall have been determined by a select committee, appointed in the manner herein before directed, that such person was entitled to have been returned, sue the sheriff, or other officer or officers, having so wilfully delayed, neglected, or refused duly to make such return, and every or any of them at his election, in any of his Majesty's Courts of Record at *Westminster*, or the Court of Session in *Scotland;* and shall recover double the damages he shall sustain by reason thereof, together with full costs of suit.

XV. Provided always, and be it further enacted, That every indictment, information, or action, for any offence against this act, shall be found, filed, or commenced within one year after commission of the fact on which such indictment, information, or action shall be grounded, or within six months after the conclusion of any proceedings in the House of Commons relating to such election.

## Anno Trigesimo GEORGII III. Cap. 17.

*An Act for altering the time appointed for holding the Summer Session in the Court of Session in Scotland; and for altering Whitsuntide and Lammas terms in the Court of Exchequer in Scotland.*

The following section relates to Elections:

IV. And whereas, by an act passed in the sixteenth year of the reign of his late majesty King George the Second, intituled, 'An 'act to explain and amend the laws touching the elections of mem-'bers to serve for the Commons in Parliament, for that part of 'Great Britain called Scotland, and to restrain the partiality, and 'regulate the conduct of returning officers at such elections,' it is, *inter alia*, enacted, That if, at any Michaelmas meeting, or meeting for election, any person claiming to be enrolled shall, by judgment of the freeholders, be refused to be admitted; or if any person who stood upon the roll shall, by like judgment, be struck off, or left out of the roll; it shall and may be lawful for him, or them, who is so refused to be admitted, or whose name is so struck off, or left out of the roll, to apply (so as such application be made within four kalendar months after their being so refused, struck off, or left out) by summary complaint to the Court of Session, who shall grant a warrant for summoning the person or persons upon whose objection or objections he was refused to be admitted, or was struck off or left out, as aforesaid, upon thirty days' notice to answer, and shall proceed to hear and determine in a summary way on such complaint; and if any person shall be enrolled, whose title shall be thought liable to objection, it shall and may be lawful for any freeholder standing upon the said roll (whether such freeholder was present at the meeting or not) who apprehends that such person had not a right to be enrolled, to apply in like manner by complaint to the Court of Session, so as such application be made within four kalendar months after such enrolment: And whereas it may happen, in consequence of the said alteration in the time of holding the summer session in the Court of Session, that the said four kalendar months may elapse before there is a proper opportunity of applying to the Court of Session by complaint, in the cases provided for by the said act of the sixteenth of his late majesty; be it therefore enacted, that a complaint presented to the Lord Ordinary on the bills in time of vacation, within the said four kalendar months, shall be equivalent to, and have the same effect, for all the purposes provided for by the said act of the sixteenth of his late majesty, as if such complaint had been presented to the Court of Session while

sitting: Provided always, that printed copies of such complaint be lodged, in the usual form, on or before the third sederunt day of the ensuing session.

## Anno Trigesimo Tertio GEORGII III. Cap. 64.

*An Act to explain and amend an Act passed in the Seventh and Eighth years of King William the Third, entituled,* 'An act for 'the further regulating elections of Members to serve in Parlia- 'ment, and for the preventing irregular proceedings of Sheriffs 'and other officers in the electing and returning such members,' *so far as relates to the publication of notices of the time and place of election.* [17*th June* 1793.]

Whereas, by an act made and passed in the seventh and eighth years of the late King William the Third, intituled, 'An act for the 'further regulating elections of members to serve in Parliament, 'and for the preventing irregular proceedings of sheriffs and other 'officers in the electing and returning of such members,' it is enacted, that the proper officers therein mentioned shall, upon the receipt of precepts for the election of members to serve in Parliament, forthwith cause public notice to be given of the time and place of election, and shall proceed to election thereupon, within the time by the said act limited, and give four days notice at least of the day appointed for the election: But it is not in the said act specified at what time, or within what hours of the day, it shall be incumbent on the proper officers to give such public notice as aforesaid: And whereas, by reason of such uncertainty, great inconveniencies may arise from the undue practices of returning officers and others, may it please your majesty, that it may be enacted; and be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That, from and after the passing of this act, all notices to be given of the time and place of any election for members to serve in Parliament, shall be publicly given at the usual place or places, within the hours of eight of the clock in the forenoon, and four of the clock in the afternoon, from the twenty-fifth day of October to the twenty-fifth day of March inclusive, and within the hours of eight of the clock in the forenoon, and six of the clock in the afternoon, from the twenty-fifth day of March to the twenty-fifth day of October inclusive, and not otherwise; and that no notice to be given of the time and place of election of members to serve in Parliament shall be deemed or taken to be a good or valid notice for any purposes, or to any effect whatsoever, which

shall not be made and published in the manner and within the time of day aforesaid; any law, statute, usage, or custom to the contrary notwithstanding.

## Anno Trigesimo Quinto GEORGII III. Cap. 65.

*An Act to prevent unnecessary delay in the execution of Writs for the election of Members to serve in Parliament for that part of Great Britain called Scotland.* [19*th May* 1795.]

Whereas, the execution of writs of election of members to serve for the commons in Parliament, for that part of Great Britain called Scotland, has been often improperly delayed; for remedy whereof, may it please your majesty that it may be enacted, and be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that the sheriff or stewart depute or substitute of any county or stewartry in that part of Great Britain called Scotland shall, within six free days' after receiving the writ or writs for the election of members to serve in Parliament, direct the notices required by law to be given as to the time and place of election of a member for such county or stewartry; and that the day of election, appointed by the sheriff, shall not be sooner than six free days, nor later than fifteen days, after the day of publication at the church doors.

II. And whereas doubts have been entertained by whom the writs for election of members to serve for the commons in Parliament, for that part of Great Britain called Scotland, should be received and executed, when there happens to be a principal or high-sheriff or stewart appointed by his majesty in any county or stewartry, as well as a sheriff-depute or stewart-depute, whose commission is also derived from the crown, and is *ad vitam aut culpam*, in respect, that, by an act passed in the twentieth year of his late majesty, for taking away and abolishing the heritable jurisdictions, these offices, and the powers and authorities belonging to them, were essentially changed; for remedy thereof, and to remove such doubts, be it enacted, that, upon issuing of any writ or writs for the election of a member or members to serve in Parliament for that part of Great Britain called Scotland, the said writ or writs shall be forthwith forwarded and delivered to the sheriff-depute, or stewart-depute, or to the substitute of each, and the principal or high sheriff or stewart shall not officiate, either in receiving or in executing the writ, the whole of this duty being entrusted to the sheriff-depute, or stewart-depute, or, in case of absence, to the substitute of each, and to no other person whatsoever.

III. And be it enacted, by the authority aforesaid, that if any sheriff or stewart-depute, or substitute, shall wilfully refuse, neglect, or delay, to do or perform what is hereby required of him, in any of the particulars aforesaid, he shall, for every offence, forfeit and pay the sum of L. 500 sterling, one-half to the person who shall sue for the same, and the other half to his majesty; to be sued for and recovered in the manner directed by an act of the sixteenth year of the reign of his late majesty King George the Second, intituled, 'An act to explain and amend the laws touching the election of 'members to serve for the commons in Parliament for that part of 'Great Britain called Scotland; and to restrain the partiality, and 'regulate the conduct, of returning officers, at such elections.'

IV. And be it enacted, by the authority aforesaid, that if any principal or high sheriff or stewart, or any person other than the sheriff or stewart depute, or the substitute of each, shall presume, in any respect, to interfere, or take upon himself the execution of writs of election of members to serve in Parliament for that part of Great Britain called Scotland, every such person so offending, in any particular, shall, for every offence, forfeit and pay the sum of one thousand pounds sterling, one-half to the person who shall sue for the same, and the other half to his majesty, his heirs, and successors, to be sued for and recovered in the manner directed by an act of the sixteenth year of the reign of his late majesty King George the Second, intituled, 'An act to explain and amend the laws touching 'the election of members to serve for the commons in Parliament 'for that part of Great Britain called Scotland; and to restrain the 'partiality and regulate the conduct of returning officers at such 'elections.' And further, the person convicted on any suit shall thereby become disabled, and incapable of ever bearing or executing any office or place of trust whatsoever under his majesty, his heirs and successors.

V. Provided always, and be it further enacted, by the authority aforesaid, that every action or suit for any offence against this act shall be commenced within twelve months after commission of the fact on which the same is grounded, or within twelve months after the conclusion of any proceedings in the House of Commons relating to such election.

VI. And whereas, the several parish churches in the stewartry of Orkney and Zetland, are situated upon islands detached and difficult of access; be it therefore enacted, that the writ for the election of a member to serve in Parliament for the said stewartry shall be published at the town of Kirkwall, and the twelve parish churches in the island of Pomona or the main land of Orkney only.

## Anno Trigesimo Septimo GEORGII III. CAP. 138.

*An act to amend an Act made in the 22d Year of the Reign of his present Majesty, intituled* An Act for better securing the freedom of elections of Members to serve in Parliament, by disabling certain Officers employed in the collection or management of his Majesty's revenues, from giving their votes at such elections, *by extending the Provisions thereof to persons voting in any Meeting of Freeholders for Preses or Clerk, or on any question relative to the adjustment of the Roll of Freeholders, in that part of Great Britain called Scotland; and for empowering Freeholders to administer the Oath of Trust and Possession to Persons offering to vote for Preses and Clerk.* [*20th July* 1797.]

WHEREAS an act was made in the twenty-second year of the reign of his present Majesty, intituled, *An act for better securing the freedom of elections of Members to serve in Parliament, by disabling certain Officers employed in the collection or management of his Majesty's revenues, from giving their votes at such elections:* And whereas great inconveniences have arisen, in that part of *Great Britain* called *Scotland*, at the meetings for elections of members to serve in Parliament, by the persons who are declared by the said act incapable of voting at such elections, giving their votes for the choice of preses or clerk to the freeholders, and on questions relative to the adjustment of the roll, not only at such elections, but at other meetings of freeholders, whereby the votes of such persons so incapacitated, although not actually given for any member to serve in Parliament, yet may often be decisive of such election; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That from and after the passing of this act, no person or persons described in the said recited act, and thereby rendered incapable of voting in the election of members to serve in Parliament, shall be capable of voting at any election for the choice of a preses or clerk to the freeholders of any county, in that part of *Great Britain* called *Scotland*, or on any questions relative to the adjustment of the roll of freeholders of any such county, not only at such elections, but at all other meetings of the freeholders of any such county; and if any person hereby made incapable of voting, shall nevertheless presume to give his vote during the time he shall hold, or within twelve kalendar months after, he shall cease to hold or execute any of the offices mentioned in the said act, contrary to the true intent and meaning of this act, such

liament, no person or persons who shall by himself or his deputy, or any other in trust for him, or for his benefit, take, hold, enjoy, or execute, or continue to hold, enjoy, or execute, any of the offices, employments, or places of profit hereinafter mentioned, in or for that part of the united kingdom called Ireland, shall be capable of being elected or chosen a member of, or of sitting or voting as a member of the House of Commons of any Parliament of the said united kingdom of Great Britain and Ireland, in any Parliament which shall hereafter be summoned and holden; (that is to say),

No person who shall be commissioner of customs, excise, or stamps, or who shall be concerned, directly or indirectly, in the farming, collecting, or managing, any of the sums of money, duties, or other aids, heretofore granted, or which shall hereafter be granted by any act of Parliament to his Majesty, his heirs or successors (except the commissioners of the treasury and their secretary):

Nor any person who shall be a commissioner for determining appeals concerning the said duties of customs, excise, or stamps, or for controlling or auditing the account of the said duties (except the auditor-general of the Exchequer):

Nor any person who shall be a commissioner of impreet accounts:

Nor any agent for any regiment:

Nor any person who shall, directly or indirectly, himself, or by any person whatsoever in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, or continue to execute, hold, or enjoy in the whole or in part, any contract, agreement, or commission made or entered into under or from the commissioners of his Majesty's treasury in Ireland, or with any one or more of such commissioners, or with any other person or persons whomsoever, for or on account of the public service in Ireland; or who shall knowingly and willingly furnish or provide, in pursuance of any such agreement, contract or commission, which he or they shall have made or entered into as aforesaid, any money to be remitted abroad, or any wares or merchandise to be used or employed in the service of the public, during the time that he shall execute, hold, or enjoy any such contract, agreement, or commission, or any part or share thereof, or any benefit or employment arising from the same (except persons who shall be members of any incorporated trading company now existing or established in Ireland, and consisting of more than ten persons, so far as relates to any contract, agreement, or commission, which now is or shall or may hereafter be made, entered into, or accepted by such company in its corporate capacity, for the general benefit of such incorporation or company):

Nor any deputies or clerks in any of the several offices following; that is to say, the office of Lord High Treasurer, or the Commis-

sioners of the Treasury, (except the Secretary of the Treasury); or of the Auditor of the receipt of his Majesty's Exchequer, or of the Tellers of the Exchequer, or of the Chancellor of the Exchequer, (except the Secretary of the Chancellor of the Exchequer); or of the Commissioners of Stamps, or of the Commissioners of Appeals.

V. And be it further enacted, That, from and after the Dissolution or other determination of this present Parliament, no person who shall have in his own name, or in the name of any person or persons in trust for him or his benefit, any office or place of profit, from or by the nomination or appointment, or by any appointment subject to the approbation of the Lord Lieutenant, Lord Deputy, Lord Justices, or other chief governor or governors of that part of the united kingdom called Ireland, created or erected at any time after the passing of an act of the Parliament of Ireland, in the thirty-third year of the reign of his present Majesty, intituled 'An Act 'for securing the freedom and independence of the House of Com- 'mons by excluding therefrom persons holding any offices under 'the crown, to be hereafter created, or holding certain offices there- 'in enumerated, or pensions for terms of years, or during his Ma- 'jesty's pleasure,' shall be capable of being elected or chosen a member of, or of sitting or voting as a member of, the House of Commons of any Parliament of the said united kingdom of Great Britain and Ireland, in any Parliament which shall hereafter be summoned and holden.

VI. And be it further enacted, That if any person hereby declared to be disabled from, or rendered incapable of sitting or voting in the House of Commons, shall nevertheless be elected or returned as a member to serve in Parliament for any county, stewartry, city, borough, cinque port, town, or place, in any part of the said united kingdom, such election or return are hereby enacted and declared to be void to all intents and purposes whatsoever; and if any person or persons so hereafter elected or returned, and declared to be disabled or to be rendered incapable by this act to be elected, shall presume to sit or vote as a member of the said House of Commons, such person or persons so sitting or voting shall incur such pains, penalties, and forfeitures, as are inflicted or imposed by the several acts of Parliament heretofore passed in Great Britain or Ireland, for disabling or incapacitating such persons from sitting in the Parliaments of Great Britain or Ireland respectively; and if such person or persons shall be disabled or incapacitated by the having, holding, or accepting of any office, employment, or place of profit, in this act enumerated and particularised, then, and in such case, such person or persons so sitting or voting, shall forfeit the sum of five hundred pounds for every day in which he shall sit or vote in the said House; to be recovered by such person as shall sue for the same in any court of record in any part of the said united kingdom, by action of

liament, no person or persons who shall by himself or his deputy, or any other in trust for him, or for his benefit, take, hold, enjoy, or execute, or continue to hold, enjoy, or execute, any of the offices, employments, or places of profit hereinafter mentioned, in or for that part of the united kingdom called Ireland, shall be capable of being elected or chosen a member of, or of sitting or voting as a member of the House of Commons of any Parliament of the said united kingdom of Great Britain and Ireland, in any Parliament which shall hereafter be summoned and holden; (that is to say),

No person who shall be commissioner of customs, excise, or stamps, or who shall be concerned, directly or indirectly, in the farming, collecting, or managing, any of the sums of money, duties, or other aids, heretofore granted, or which shall hereafter be granted by any act of Parliament to his Majesty, his heirs or successors (except the commissioners of the treasury and their secretary):

Nor any person who shall be a commissioner for determining appeals concerning the said duties of customs, excise, or stamps, or for controlling or auditing the account of the said duties (except the auditor-general of the Exchequer):

Nor any person who shall be a commissioner of imprest accounts:

Nor any agent for any regiment:

Nor any person who shall, directly or indirectly, himself, or by any person whatsoever in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, or continue to execute, hold, or enjoy in the whole or in part, any contract, agreement, or commission made or entered into under or from the commissioners of his Majesty's treasury in Ireland, or with any one or more of such commissioners, or with any other person or persons whomsoever, for or on account of the public service in Ireland; or who shall knowingly and willingly furnish or provide, in pursuance of any such agreement, contract or commission, which he or they shall have made or entered into as aforesaid, any money to be remitted abroad, or any wares or merchandise to be used or employed in the service of the public, during the time that he shall execute, hold, or enjoy any such contract, agreement, or commission, or any part or share thereof, or any benefit or employment arising from the same (except persons who shall be members of any incorporated trading company now existing or established in Ireland, and consisting of more than ten persons, so far as relates to any contract, agreement, or commission, which now is or shall or may hereafter be made, entered into, or accepted by such company in its corporate capacity, for the general benefit of such incorporation or company):

Nor any deputies or clerks in any of the several offices following; that is to say, the office of Lord High Treasurer, or the Commis-

sioners of the Treasury, (except the Secretary of the Treasury); or of the Auditor of the receipt of his Majesty's Exchequer, or of the Tellers of the Exchequer, or of the Chancellor of the Exchequer, (except the Secretary of the Chancellor of the Exchequer); or of the Commissioners of Stamps, or of the Commissioners of Appeals.

V. And be it further enacted, That, from and after the Dissolution or other determination of this present Parliament, no person who shall have in his own name, or in the name of any person or persons in trust for him or his benefit, any office or place of profit, from or by the nomination or appointment, or by any appointment subject to the approbation of the Lord Lieutenant, Lord Deputy, Lord Justices, or other chief governor or governors of that part of the united kingdom called Ireland, created or erected at any time after the passing of an act of the Parliament of Ireland, in the thirty-third year of the reign of his present Majesty, intituled 'An Act 'for securing the freedom and independence of the House of Com- 'mons by excluding therefrom persons holding any offices under 'the crown, to be hereafter created, or holding certain offices there- 'in enumerated, or pensions for terms of years, or during his Ma- 'jesty's pleasure,' shall be capable of being elected or chosen a member of, or of sitting or voting as a member of, the House of Commons of any Parliament of the said united kingdom of Great Britain and Ireland, in any Parliament which shall hereafter be summoned and holden.

VI. And be it further enacted, That if any person hereby declared to be disabled from, or rendered incapable of sitting or voting in the House of Commons, shall nevertheless be elected or returned as a member to serve in Parliament for any county, stewartry, city, borough, cinque port, town, or place, in any part of the said united kingdom, such election or return are hereby enacted and declared to be void to all intents and purposes whatsoever; and if any person or persons so hereafter elected or returned, and declared to be disabled or to be rendered incapable by this act to be elected, shall presume to sit or vote as a member of the said House of Commons, such person or persons so sitting or voting shall incur such pains, penalties, and forfeitures, as are inflicted or imposed by the several acts of Parliament heretofore passed in Great Britain or Ireland, for disabling or incapacitating such persons from sitting in the Parliaments of Great Britain or Ireland respectively; and if such person or persons shall be disabled or incapacitated by the having, holding, or accepting of any office, employment, or place of profit, in this act enumerated and particularised, then, and in such case, such person or persons so sitting or voting, shall forfeit the sum of five hundred pounds for every day in which he shall sit or vote in the said House; to be recovered by such person as shall sue for the same in any court of record in any part of the said united kingdom, by action of

debt, bill, plaint, or information, wherein no essoign, protection, or wager of law shall be allowed, and only one imparlance.

VII. Provided always, and it is hereby enacted and declared, That nothing in this act shall, during the continuance of this present Parliament, extend or be construed to extend or relate to, or shall exclude or disable, any person or persons holding offices or places of profit under the crown of Ireland; so nevertheless, that no greater number than twenty of the persons holding such offices or places as aforesaid, shall be capable of sitting in the said House of Commons; and so that no person holding any such office or place shall be capable of being elected, or of sitting in the said House, while there are twenty persons holding such offices or places sitting in the said House.

VIII. Provided also, and it is hereby further enacted and declared, That nothing in this act shall extend or be construed to exclude any person having or holding any office, place, or employment for life, or for so long as he shall behave himself well in his office, (other than and except the Commissioners of Imprest Accounts, and all persons concerned in the managing, collecting, or farming of any sums of money, duties, or other aids, granted or to be granted to his Majesty, his heirs or successors); any thing herein contained to the contrary notwithstanding.

IX. Provided always, That if any person being chosen a member of the House of Commons shall, from and after the passing of this act, accept of any office of profit whatever, immediately and directly from the crown of the said united kingdom, or by the nomination or appointment, or by any other appointment subject to the approbation of the Lord Lieutenant, Lord Deputy, Lord Justices, or other chief governor or governors of that part of the said united kingdom called Ireland, his seat shall thereupon become vacant, and a writ shall issue for a new election: Provided nevertheless, that such person (if he be not incapacitated by any thing herein before contained) shall be capable of being again elected to be a member of the House of Commons for the place for which he had been a member, or for any other place sending members to the House of Commons.

## Anno Quadragesimo Nono GEORGII III. Regis, Cap. 118.

*An Act for better securing the Independence and Purity of Parliament, by preventing the procuring or obtaining of Seats in Parliament by corrupt Practices.* [19*th June* 1809.]

Whereas it is expedient to make further Provision for preventing corrupt Practices in the procuring of Elections and Returns of

Members to sit in the House of Commons: And whereas the giving, or procuring to be given, or promising to give or to procure to be given, any sum of money, gift, or reward, or any office, place, employment, or gratuity, in order to procure the return of any member to serve in Parliament, if not given to or for the use of some person having a right or claiming to have a right to act as returning officer, or to vote at such election, is not bribery within the meaning of an act passed in the second year of King *George* the Second, intituled, *An act for the more effectual preventing bribery and corruption in the election of members to serve in Parliament*, but such gifts or promises are contrary to the ancient usage, right, and freedom of elections, and contrary to the laws and constitution of this realm; be it declared and enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That if any person or persons shall, from and after the passing of this act, either by himself, herself, or themselves, or by any other person or persons for or on his, her, or their behalf, give, or cause to be given, directly or indirectly, or promise or agree to give any sum of money, gift, or reward, to any person or persons, upon any engagement, contract, or agreement, that such person or persons to whom, to whose use, or on whose behalf, such gift or promise shall be made, shall, by himself, herself, or themselves, or by any other person or persons whatsoever, at his, her, or their solicitation, request or command, procure, or endeavour to procure, the return of any person to serve in Parliament for any county, stewartry, city, town, borough, cinque port, or place, every person so having given, or promised to give, if not returned himself to Parliament for such county, stewartry, city, town, borough, cinque port, or place, shall for every such gift or promise, forfeit the sum of one thousand pounds, to be recovered in such manner as is herein-after provided, with respect to the sum of five hundred pounds; and every such person so returned, and so having given, or so having promised to give, or knowing of and consenting to such gifts or promises, upon any such engagement, contract, or agreement, shall be, and is hereby declared and enacted to be disabled and incapacitated to serve in that Parliament for such county, stewartry, city, town, borough, cinque port, or place; and that such person shall be deemed and taken, and is hereby declared and enacted to be deemed and taken, to be no member of Parliament; and enacted to be, to all intents, constructions, and purposes, as if he had never been returned or elected a member in Parliament; and any person or persons who shall receive or accept of, by himself, herself, or themselves, or by any other person or persons in trust for or to the use or on the behalf of him, her, or them, any such sum of money, gift, or reward, or any such promise upon any such

engagement, contract, or agreement, shall forfeit to his Majesty the value and amount of such sum of money, gift, or reward, over and above the sum of five hundred pounds, which said sum of five hundred pounds he, she, or they shall forfeit to any person who shall sue for the same, to be recovered with such costs of suit by action of debt, bill, plaint, or information, in any of his Majesty's courts of record at *Westminster*, if the offence be committed in that part of the united kingdom called *England* and *Wales*, and in any of his Majesty's courts of record at *Dublin*, if the offence be committed in *Ireland*, wherein respectively no essoign or wager of law, or more than one imparlance, shall be allowed; and if the offence be committed in *Scotland*, then to be recovered, with full costs of suit, by summary action or complaint before the Court of Session, or by prosecution before the Court of Justiciary there.

II. Provided always, and be it farther enacted, That nothing in this act contained shall extend, or be construed to extend, to any money paid, or agreed to be paid, to or by any person, for any legal expence *bonâ fide* incurred at or concerning any election.

III. And be it further enacted, That if any person or persons shall, from and after the passing of this act, by himself, herself, or themselves, or by any other person or persons for or on his, her, or their behalf, give, or procure to be given, or promise to give, or procure to be given, any office, place, or employment, to any person or persons whatsoever, upon any express contract or agreement that such person or persons, to whom or to whose use, or on whose behalf, such gift or promise shall be made, shall by himself, herself, or themselves, or by any other person or persons at his, her, or their solicitation, request, or command, procure, or endeavour to procure, the return of any person to serve in Parliament, for any county, stewartry, city, town, borough, cinque port, or place, such person so returned, and so having given or procured to be given, or so having promised to give or procure to be given, or knowing of and consenting to such gift or promise upon any such express contract or agreement, shall be and is hereby declared and enacted to be disabled and incapacitated to serve in that Parliament for such county, stewartry, city, town, borough, cinque port, or place, and that such person shall be deemed and taken, and is hereby declared and enacted to be deemed and taken to be no member of Parliament, and enacted to be to all intents, constructions, and purposes, as if he had never been returned or elected a member in Parliament; and any person who shall receive or accept of, by himself, herself, or themselves, or by any other person or persons in trust for or to the use or on the behalf of such persons, any such office, place, or employment, upon such express contract or agreement, shall forfeit such office, place, or employment, and be incapacitated for holding the same, and shall forfeit the sum of five hundred pounds, which said

sum of five hundred pounds shall be recovered as is herein-before enacted; and any person holding any office under his Majesty, who shall give such office, appointment, or place, upon any such express contract or agreement, that the person to whom or for whose use such office, appointment, or place shall have been given, shall so procure or endeavour to procure the return of any person to serve in Parliament, shall forfeit the sum of one thousand pounds, to be recovered in such manner as is herein-before provided.

IV. And be it further enacted, That no person shall be made liable to any forfeiture or penalty by this act created or imposed, unless some prosecution, action, or suit, for the offence committed, shall be actually and legally commenced against such person within the space of two years next after such offence against this act shall be committed, and unless such person shall be actually and legally arrested, summoned, or otherwise served with any original or other writ or process within the same space of time, so as such arrest, summons, or service of any original or other writ or process shall not be prevented by such person absconding or withdrawing out of the jurisdiction of the court out of which such original or other writ or process shall have issued; and in case of any such prosecution, suit, or process as aforesaid, the same shall be proceeded in and carried on without any wilful delay; and that all statutes of jeofails and amendments of the law whatever, shall and may be construed to extend to all proceedings in any such prosecution, action, or suit.

## II.

*Proclamation for Electing and Summoning the Sixteen Peers of Scotland.*

G. R.

WHEREAS we have, in our council, thought fit to declare our pleasure for summoning and holding a Parliament of Great Britain on the day of next ensuing the date hereof; In order, therefore, to the electing and summoning the Sixteen Peers of Scotland, who are to sit in the House of Peers in the said Parliament, we do, by the advice of our privy council, issue forth this our royal proclamation, strictly charging and commanding all the Peers of Scotland to assemble and meet at Holyroodhouse, in Edinburgh, on the day of next ensuing, between the hours of twelve and two in the afternoon, to nominate and choose the Sixteen Peers to sit and vote in the House of Peers in the said ensuing Parliament, by open election, and plurality of voices of the peers that shall be there present, and of the proxies of such as shall be absent, (such proxies being peers,) and

producing a mandate in writing, duly signed before witnesses, and both the constituent and proxy being qualified according to law. And the Lord Clerk Register, or such two of the principal clerks of the session as shall be appointed by him to officiate in his name, are hereby respectively required to attend such meeting, and to administer the oaths required by law to be taken there by the said peers, and to take their votes; and, immediately after such election made, and duly examined, to certify the names of the Sixteen Peers so elected, and sign and attest the same in presence of the said peers, the electors, and return such certificate into our high court of Chancery of Great Britain. And we do, by this our proclamation, strictly command and require the Provost of Edinburgh, and all other the magistrates of the said city, to take special care to preserve the peace thereof during the time of the said election, and to prevent all manner of riots, tumults, disorder, and violence. And we strictly charge and command, that this our royal proclamation be duly published at the market-cross of Edinburgh, and in all the county towns of Scotland, twenty-five days at least before the time hereby appointed for the meeting of the said peers to proceed to such election.

Witness ourself at Westminster, the day of in the year of our reign.

GOD SAVE THE KING!

## III.

*Proclamation, on the death of one of the Sixteen Peers, for electing another.*

G. R.

WHEREAS Earl of who was duly elected and returned, to be one of the Sixteen Peers of Scotland, to sit in the House of Peers, in the present Parliament of Great Britain, is since deceased: In order to the electing another peer of Scotland to sit in his room, we do, by the advice of our privy-council, issue forth this proclamation, strictly charging and commanding all the peers of Scotland to assemble and meet at Holyroodhouse, in Edinburgh, on the day of next, between the hours of twelve and two in the afternoon, to nominate and choose another peer of Scotland to sit and vote in the House of Peers of this present Parliament of Great Britain, in room of by open election, &c. as in the other.

## IV.

*Form of a Proxy by a Peer.*

I, by virtue of the power allowed by act of Parliament to the peers of Scotland, to make proxies for nominating and appointing peers whom they shall judge fittest to sit and vote in the House of Peers of the Parliament of Great Britain, and in obedience to his Majesty's proclamation, charging and commanding all the peers of Scotland to meet at Holyroodhouse, in Edinburgh, on next, to nominate and choose the sixteen peers for Scotland, to sit and vote in the House of Peers of the ensuing Parliament of Great Britain, do, by these presents, nominate and appoint to be my proxy or attorney, to the effect under written, giving, granting, and committing full power and commission to my said proxy, for me, and in my name, to appear at the ensuing meeting of the peers of Scotland, at Holyroodhouse aforesaid, for electing sixteen peers of Scotland to sit and vote in the House of Peers of the ensuing Parliament of Great Britain, and to do every thing relating thereto, as fully, and in every respect, as I might or could do myself, were I personally present. In witness whereof, I have subscribed these presents, wrote on stampt paper by at the day of before these witnesses, &c.

## V.

*Form of a Signed List by a Peer.*

I, , by virtue of the powers allowed by act of Parliament to the peers of Scotland, to send lists of peers whom they shall judge fittest to sit and vote in the House of Peers of the Parliament of Great Britain, and in obedience to his Majesty's proclamation, charging and commanding all the peers of Scotland to meet at Holyroodhouse, in Edinburgh, on next, to nominate and choose the sixteen peers for Scotland, to sit and vote in the House of Peers, in the ensuing Parliament of Great Britain, do, by this my list, name (here the list of sixteen peers are inserted) to sit and vote in the House of Peers of the ensuing Parliament of Great Britain. In witness whereof, I have signed and sealed these presents, at the day of before these witnesses, &c.

Addressed thus :

To the Lord Clerk Register in that part of Great Britain called Scotland, or to his deputy or deputies, officiating at the ensuing meeting of the peers of Scotland, at Holyroodhouse, for choosing sixteen peers for Scotland.

## VI.

*Certificate by a Sheriff of a Peer's having qualified himself to grant a Proxy, or send a Signed List.*

I Esq. advocate, sheriff-depute of the sheriffdom of do certify and declare to the peers of Scotland, to be assembled in his Majesty's palace of Holyroodhouse, at Edinburgh, upon the day of next, betwixt the hours of twelve and two in the afternoon, to nominate and choose the Sixteen Peers to sit and vote in the House of Peers, in the ensuing Parliament of Great Britain, that the Right Honourable appeared before me, in a fenced court held by me, at this day, where I did tender to him the oaths of allegiance and supremacy, and declaration against Popery, on paper, and oath of abjuration on parchment, which oaths and declaration the said did repeat, swear, and subscribe; and I have herewith returned the said oaths and declaration, so taken and subscribed, as said is, as by the act of Parliament, made in that behalf, is directed and appointed. In witness whereof, I have signed and sealed these presents, at the day of and of his Majesty's reign, the year.

## No. VII.

*List of the Peerage of the North Part of Great Britain, called Scotland, entered on the Roll of Peers, as it stood the 1st of May 1707 years.*

### DUKES.

| | | |
|---|---|---|
| Duke of Hamilton | Duke of Queensberry | Duke of Atholl |
| Buccleugh | Argyle | Montrose |
| Lennox | Douglas | Roxburghe |
| Gordon | | |

## MARQUISES.

Marquis of Tweeddale. Marquis of Lothian. Marquis of Annandale.

## EARLS.

| Earl of Craufurd | Earl of Lauderdale | Earl of Newburgh |
|---|---|---|
| Errol | Seaforth | Kilmarnock |
| Marischall | Kinnoul | Dundonald |
| Sutherland | Loudoun | Dumbarton |
| Mar | Dumfries | Kintore |
| Monteith | Stirling | Breadalbane |
| Rothes | Elgin | Aberdeen |
| Morton | Southesk | Dunmore |
| Buchan | Traquair | Melville |
| Glencairn | Ancrum | Orkney |
| Eglintoune | Wemyss | Buglen |
| Cassillis | Dalhousie | March |
| Caithness | Airlie | Marchmont |
| Moray | Findlater | Seafield |
| Nithsdale | Carnwath | Hyndford |
| Wintoun | Callender | Cromartie |
| Linlithgow | Leven | Stair |
| Home | Dysart | Roseberrie |
| Perth | Panmure | Glasgow |
| Wigtoune | Selkirk | Portmore |
| Strathmore | Northesk | Bute |
| Abercorn | Kincardin | Hopetoun |
| Kellie | Balcarras | De Loraine |
| Hadinton | Forfar | Solway |
| Galloway | Aboyne | Ilay |

## VISCOUNTS.

| Viscount of Falkland | Viscount of Oxfurd | Viscount Strathallan |
|---|---|---|
| Dunbar | Irwin | Teviott |
| Stormont | Kilsyth | Duplin |
| Kenmore | Dumblane | Garnock |
| Arbuthnot | Preston | Primerose |
| Kingston | Newhaven | |

LORDS.

| | | |
|---|---|---|
| Lord Forbes | Lord Blantyre | Lord Elibank |
| Saltoun | Cardross | Halkertoun |
| Gray | Cranstoun | Belhaven |
| Ochiltree | Burleigh | Abercrombie |
| Cathcart | Jedburgh | Duffus |
| Sinclair | Maddertie | Rollo |
| Mordington | Coupar | Colvill |
| Sempill | Napier | Ruthven |
| Elphinston | Cameron | Rutherfurd |
| Oliphant | Cramond | Ballenden |
| Lovat | Reay | Newark |
| Borthwick | Forrester | Nairn |
| Rosse | Pitsligo | Aymouth |
| Torphichen | Kirkcudbright | Kinnaird |
| Spynie | Fraser | Glasford |
| Lindores | Bargany | |
| Balmerino | Banff | |

'This is attested by me Sir James Murray of Philiphaugh, one of 'the Senators of the College of Justice, clerk to her Majesty's Councils' 'Registers and Rolls.' 'JA. MURRAY, *Clk. Reg.*'

*Robertson's Proceedings*, p. 12; *Journals of House of Lords*, vol. xviii. p. 458.

## VIII.

*Certificate or Return, by the Clerk-Register, or Clerks of Session, of the Sixteen Peers chosen.*

AT Holyroodhouse, the day of in obedience to his Majesty's royal proclamation, of the date at St James's, the day of commanding all the peers of Scotland to assemble and meet at this place this day, between the hours of twelve and two in the afternoon, to nominate and choose the sixteen peers to sit and vote in the ensuing Parliament of Great Britain, which is to be held on the day of next: We and Esqs. two of the principal clerks of Session, by virtue of the commission granted to us by the Right Honourable Clerk-Register of Scotland, dated and registered in the books of Council and Session appointing us to officiate in his name at the said meeting of the peers, do hereby certify and attest, that after the oaths and declaration required by law to be taken by the

peers present were administered to them, and their votes, with those of the proxies, and signed lists of the absent peers, collected and examined (here the names of the sixteen peers are inserted) were elected to sit and vote in the House of Peers in the ensuing Parliament of Great Britain. In witness whereof, we have signed and sealed these presents with our hands, in presence of the peers electors, place and time above mentioned.

## IX.

### *Form of the Writ to the Sheriffs upon the Calling of a Parliament.*

GEORGIUS, Dei gratia, Magnae Britanniae, Franciae, et Hiberniae, Rex, fidei defensor, vicecomiti comitatus de salutem. Quia de avisamento et assensu concilii nostri, pro quibusdam arduis et urgentibus negotiis, nos, statum et defensionem regni nostri Magnae Britanniae, et ecclesiae, concernentibus, quoddam, Parliamentum nostrum, apud civitatem nostram Westminster · die proximo futuri, teneri ordinavimus; et ibidem, cum praelatis, magnatibus, et proceribus, dicti regni nostri, colloquium habere, et tractatum; tibi praecipimus, firmiter injungendo, quod immediate, post debitam notitiam prius inde dandam, unum militem, gladio cinctum, magis idoneum et discretum comitatus praedict. per liberetenentes ejusdem comitatus, qui electioni hujusmodi interereunt, secundum formam statuti in eadem casu editi et provisi; eligi facias. Tibi etiam praecipimus quod de quolibet regali burgo comitatus praedict. unum commissionarium, ad elegendum unum burgensum, pro classe, sive districtu, de discretioribus, et magis sufficientibus, libere et indifferenter, juxta formam statuti inde editi et provisi, eligi facias. Et nomina eorundem militis et burgensis, qui tibi forent retornati per clericos ad inde appunctuatos, in quibusdam indenturis inter te et illos respective conficiendis, licet hujusmodi elegentes praesentes fuerint, vel absentes, inseri, eosque ad dictos diem et locum venire facias. Ita quod idem miles et burgensis plenam et sufficientem potestatem habeant ad faciendum et consentiendum his, quæ tunc ibidem, de communi concilio dicti regni nostri (favente Deo), contigerint ordinari super negotiis antedictis. Ita quod, per defectum potestatis hujusmodi, seu propter improvidam electionem militis et burgensis praedictorum, dicta negotia infecta non remaneant quovis modo. Nolumus autem quod tu, nec aliquis alius vicecomes dicti regni nostri, aliqualiter sit electus. Et electiones illas, que tibi forent certificatae et retornatae, ut praefertur, nobis in cancellariam nostram ad dictos diem et locum, certifices juxta formam statuti, una cum hoc breve. Teste meipso apud

Westminster die anno regni nostri.

Written on the tagg thus :

Vicecomiti comitatus de pro elegendo ad Parliamentum die proximo tenendum *.

* When a writ issues for supplying a vacancy during the course of a Parliament, it mentions how the vacancy was occasioned, and is confined to the single election then to be made, whether of a knight of a shire, or of a burgess.

## X.

### *Form of Sheriff's Precept intimating day of Election.*

A. B. his Majesty's Sheriff-depute of the shire of Whereas there is a writ come to my hand, bearing date at Westminster, the day of current, whereby I am notified that his Majesty, by advice and assent of his council, for certain arduous and urgent affairs concerning his Majesty, the state and defence of his united kingdom of Great Britain and Ireland, and the church, hath ordered a certain Parliament to be holden at the city of Westminster, on the day of next, ensuing, and there to treat and have conference with the prelates, great men, and peers of his Majesty's realm ; and by which writ I am strictly enjoined and commanded, that immediately after due notice thereof first given, I cause one knight of the most fit and discreet of the county of (girt with a sword) to be elected by the freeholders of the same county, who shall be present at such election according to the form of the statutes in that case made and provided : These are therefore intimating and making known to the whole freeholders of the shire of to meet and convene at in on the day of current, at the hour of twelve noon, in order to elect a commissioner for said shire, to sit and vote in the said Parliament. And I ordain these presents to be publicly read and intimated by my officers at the market-cross of head burgh of the shire of upon the day of being a market-day, betwixt the hours of eight forenoon and six afternoon *, and at the several parish churches within this shire, upon the day of being the next Lord's day, by the several precentors, immediately after divine service in the forenoon ; and

* Or between eight forenoon and four afternoon, if between twenty-fifth October and twenty-fifth March : 33d Geo. III. c. 64.

copies hereof, immediately after such readings respectively, to be affixed on the said market-cross, and upon the most patent doors of the several parish churches. And the several precentors, or ministers, or elders, or others in their absence, on receiving this precept, are hereby required and ordained to give a receipt to the bearer, under a penalty of five pounds sterling.

Given at the day of
one thousand eight hundred and in the
year of his Majesty's reign.

(Signed) A. B.

XI.

*Form of Execution of the above Intimation.*

Upon the day of eighteen hundred and years, being a market-day, I A. B. sheriff-officer, in obedience to the within precept, passed to the market-cross of head burgh of the sheriffdom of and thereat, between the hours of and in open market time, and after crying three several oyesses, did publicly read the said precept, and immediately thereafter I affixed and left at and upon the said market-cross, a printed copy thereof. These things were so done and acted by me betwixt the hours foresaid of the said day, before and in presence of and witnesses specially called to the premisses, and hereto with me subscribing.

(Signed) A. B.

Signed witness.
witness.

*Form of Execution by the Precentor.*

I precentor in the parish church of hereby certify, that I read the prefixed precept, in said church, on Sunday after divine service in the forenoon; and that I immediately thereafter affixed a copy of said precept on the most patent door of said church.

*N. B.* If there is no sermon, the precept ought to be affixed to the church door, and the fact so certified.

## XII.

*Form of the Sheriff's annexing to the Writ the Return made by the Clerk to the Freeholders.*

THE return is made in the form of an indenture between the sheriff and clerk in the following manner :

This indenture, made at in a full court, or meeting of the sheriffdom thereof, holden the day of in the year of the reign of our Sovereign Lord, George the Third, by the grace of God, King of Great Britain, France, and Ireland, betwixt an honourable man, A. B., Esquire, sheriff-depute (or substitute) of the said shire, upon the one part, and Mr C. D., clerk elected, to the effect under written, by the electors or freeholders of the said shire, on the other part, witnesseth, That, according to the form and tenor of the brieve, or writ, of our Sovereign Lord the King annexed to this indenture, proclamation having been lawfully made at the market-cross of the borough of head borough of the said shire of and at the respective parish churches within the same, as the custom is, the electors and freeholders of the said sheriffdom being met the day above mentioned, in the of and those who were there present being sworn or examined, according to the form, strength, and effect, of the several statutes made and provided thereanent, they unanimously (or by plurality of voices) elected and chose F. G., of H., knight, girt with a sword, habile, fit, and discreet, giving and granting to the aforesaid knight full and sufficient power, for himself, and the whole commonalty of the said county, to do and consent to those things which, in the present Parliament, by the common council of the said united kingdom, (by God's assistance) shall happen to be ordained upon the affairs aforesaid, specified in the said writ. In testimony whereof, to the one part of this indenture, remaining with the said A. B., to be annexed to and returned with the writ, he, the said A. B. and C. D., have set their hands and seals; and to the other part of the said indenture, remaining with the said C. D. for the use of the before mentioned shire, the said A. B. has also set his hand and seal, place, day, month, and year of God, and King's reign, aforesaid.

When there is only a return made to the sheriff of a member to represent the shire, there is wrote and signed by him, upon the back of the writ, as follows, 'The execution of the within writ is con-'tained in an indenture hereto annexed.' If there is likewise a return of a burgess, the indorsement is in these words, 'The execu-'tion of the within writ is contained in certain indentures herein 'annexed.'

## XIII.

*List of all the Royal Boroughs in Scotland, as divided into their several Classes or Districts; in which the Precedence of the Boroughs of each District is observed, according to the order in which they were called in the Rolls of the Parliament of Scotland.*

### EDINBURGH.

| | | | |
|---|---|---|---|
| District 1. | Tain | Coupar | Dunbar |
| | Dingwall | Forfar | North Berwick |
| | Dornoch | 6. Anstruther Easter | Lauder |
| | Wick | Pittenweem | 11. Linlithgow |
| | Kirkwall | Crail | Selkirk |
| 2. | Inverness | Anstruther Wester | Lanark |
| | Nairn | Kilrenny | Peebles |
| | Forres | 7. Dysart | 12. Dumfries |
| | Fortrose | Kirkcaldie | Kirkcudbright |
| 3. | Elgin | Burntisland | Annan |
| | Banff | Kinghorn | Lochmaben |
| | Cullen | 8. Stirling | Sanquhar |
| | Kintore | Inverkeithing | 13. Wigton |
| | Inverury | Dunfermline | Withorn |
| 4. | Aberdeen | Culross | New Galloway |
| | Montrose | Queensferry | Stranrawer |
| | Brechin | 9. Glasgow | 14. Ayr |
| | Aberbrothock | Dumbarton | Irvine |
| | Inverbervie | Renfrew | Rothsay |
| 5. | Perth | Rutherglen | Inverary |
| | Dundee | 10. Haddington | Campbelton |
| | St Andrews | Jedburgh | |

## XIV.

*Precept from a Sheriff to a Borough.*

I, A. B., sheriff-depute (or substitute) of the county of , to , provost, the magistrates and town council of the burgh of . Whereas, by a writ of election to the Parliament, to be holden at Westminster, on the day of next, directed to me, and bearing teste the day of last, I am com-

manded that, of every royal burgh of the aforesaid county, I freely and indifferently cause to be elected one commissioner, to elect one burgess, of the most discreet and sufficient, for the class or district, according to the form of the statutes thereupon made and provided, as in the said writ at more length is contained. Herefore I require and ordain you that, with all convenient speed, ye freely and indifferently elect one commissioner (in the same manner as you was in use to elect commissioners to the Parliament of Scotland), in order to elect a burgess for the class or district of burghs whereunto your burgh does belong, of the more discreet and substantial men, and that ye order the said commissioner so to be elected by you, to repair to , the presiding burgh of the said class or district, upon the day of , (being the thirtieth day from the teste of the said writ), and then and there to elect the said burgess to Parliament, according to the form of the statutes thereupon made and provided, and in terms of the said writ. Given under my hand and seal at , the day of one thousand eight hundred and years, and of his Majesty's reign the year. (Signed) A. B.

## XV.

*Commission from a Borough to a Delegate.*

In a council of the burgh of holden in the thereof, being the ordinary place where the council uses to sit, the day of one thousand eight hundred and years; the which day the magistrates and council of the said burgh of being convened in obedience to a precept directed to them by A. B., his Majesty's sheriff-depute of the county of of date the day of one thousand eight hundred and , requiring them to elect one commissioner for the said burgh, in order to elect one burgess of the most discreet and sufficient for the district or class of burghs to which this burgh belongs, and to order the said commissioner to repair to the presiding burgh of the said class or district, upon the day of current, being the thirtieth day from the teste of the writ, and then and there to elect a burgess, according to the form of the statutes thereupon made and provided, to represent the said district in the ensuing Parliament of the united kingdom of Great Britain and Ireland, to be holden at the city of Westminster, on the day of next, by a writ directed to the sheriff of the shire of bearing teste at Westminster, the

day of last; the said magistrates and council being all qualified conform to law, and having heard read the act of Parliament against bribery and corruption, did unanimously elect and choose, and hereby elect and choose, C D, whom they testify to be a man fearing God, of the true Protestant religion, now publicly professed and authorised by the laws of this realm, expert in the common affairs of this burgh, and a burgess thereof, their very lawful and undoubted commissioner; and did, and hereby do give and grant to C. D. commission and full power for them, and in their names, and on their behalf, to meet and convene within the of , as the presiding burgh of the class or district of burghs whereof this burgh is one, upon the said day of , with the rest of the commissioners chosen for the several burghs of this district, and to vote for and elect a burgess of the said class or district, of the most discreet and sufficient freely and indifferently to represent the said district in the Parliament of the united kingdom of Great Britain and Ireland, appointed to be held at Westminster on the said day of , promising to hold firm all and whatever things their said commissioner does in the premises; and ordain the common clerk to give out extracts of the above commission to the said C. D., and to affix the seal of the said burgh of thereto. Extracted forth of the council record; and the sale of the burgh is hereto affixed by me.

(Signed) E. F. *Clerk.*

## XVI.

### *Indenture between the Sheriff and the Clerk of the presiding Burgh.*

This indenture made at the burgh of , the day of one thousand eight hundred and years, and of the reign of our Sovereign Lord George the Fourth, by the grace of God of the united kingdom of Great Britain and Ireland, King, Defender of the Faith, the year, betwixt A. B., sheriff-depute or substitute of the shire of on the one part, and C. D. common-clerk of the burgh of , and clerk to the election of a burgess to serve in Parliament for the class or district after mentioned, specially appointed to make the return of the said election, conform to the statutes made on that behalf, on the other part, witnesseth, That by virtue of writs of election, bearing teste the day of , directed to the sheriff of the said shire of , and to the sheriffs of the shires of

; and of the said sheriffs, their several precepts thereupon, directed to the burghs of , for choosing each of them a commissioner or delegate to the effect underwritten, and ordering the respective commissioners to meet at the said burgh of , as the presiding burgh for the time, of the class or district of burghs above mentioned, upon the day and date of these presents, being the thirtieth day after the teste of the writs of election aforesaid, and to choose a burgess for the said district to represent them in the ensuing Parliament to be holden at the city of Westminster, upon the day of next. The commissioners chosen for the burghs aforesaid, being this day met in the of the said burgh of, the presiding burgh at the said election did, by an unanimous vote (or by a majority of votes) of the said commissioners, who produced commissions duly authenticated, freely and indifferently choose and elect a burgess of the said burgh of to attend and serve in the ensuing Parliament of the united kingdom of Great Britain and Ireland for the said class or district of burghs above mentioned, giving and granting to the said full and sufficient power for and on behalf of the said class or district of burghs and communities thereof, to do and consent to those things which then and there shall happen, by the common council of the kingdom, (by the blessing of God) to be ordained upon the affairs mentioned in the said writ. In witness whereof to the one part of these presents remaining with the said A. B., to be annexed to and returned with the writ of election, directed to the sheriff of the said shire of he the said A. B. and C. D. have set their hands and seals; and to the other part remaining with the said C. D. for the use of the district of burghs before mentioned, the said A. B. has also set his hand and seal, place, day, month, year of God, and King's reign aforesaid.

## XVII.

*Opinions of the Court in the case of Mackenzie* v. *Macleod, 9th February* 1768, *taken from the Session Papers of Sir Ilay Campbell;* (*see p.* 84.)

*President.* Doubt of competency of freeholders. Attestation of proper officer. Suppose objection to sasine; objector comes prepared with witnesses, other party not.—*Gardenston.* Same opinion. No end to such questions, if enter into proof.—*Monboddo.* Same opinion as to competency. Resolves into an improbation. As to other

point, incline to think that sasine must be engrossed.—*Pitfour.* As to competency, difficult to ascertain precise boundary. May take nullities (into account), but not proofs. As to registration, of opinion that since 1693, which makes date of registration the rule, minute-book the rule. Must depend not on diligence of a copiator, but on party. Made a legal part of the register by that act. Must be marked by presenter as well as keeper. Preference depends on this marking. The rest is all operation. Act 1617 no doubt meant engrossing in register, but no minute-book then. Few sasines then; few sales; little commerce. Cannot be done in forty-eight hours now. Minute-book introduced in 1672, and brought to perfection in 1693. As to question of sixty-days, this not a clear point. Would not have people trust to it. Inhibition takes no place at all, if not registered in forty-days. Every thing safe if rule observed of presenter signing, &c. Proper to enforce by an act of sederunt, under penalty of deprivation. No harm though not marked immediately, if another not marked before. Another erroneous practice to mark it as of date of presenting; this ought to be corrected. *Res gestæ* here to be attended to. General erroneous practice may support it. Besides holding it of the 21st, this sufficient.—*Kaimes.* If require proof, must put him upon roll. This difficult in law, but utility requires it. Similar to justiciary as to forgery; but, upon complaint, the Court of Session may put him off upon evidence, because have jurisdiction. Saw the sasines in the record.—*Affleck.* Freeholders judge of what is laid before them. Not a court now, only a meeting. Where court formerly when had sheriff with them. Highly irregular to take oaths. Marking by presenter the proper check. If all kept in same order no difference. Tortious proceedings of other side at Inverness.—*Colstoun.* Freeholders cannot take proofs; and doubt if we can take proofs here, which were not before freeholders. In some cases have; *e. g.* questions of possession. Practice has varied. Clear as to registration that entering in minute book is sufficient. Called upon to make regulation.—*Montboddo.* Act 1696 clear. No practice contrary to it. As to act 1693, view then that entry in minute-book should determine preferences. (Act 1696) corrects or makes an addition to act 1693. Action of damages given; no use for this, if entry in minute-book sufficient. Says nothing of registering in sixty days. Suppose a man who has after a sasine is marked, and gets sasine first recorded in the other register, and protests that his preferable, would prefer him.—*Kennet.* Always against interlocutor *, because knew practice. The acts 1693 and 1696 not inconsistent. Act 1693 a very proper regulation. Act 1696 also. The attestation must be inserted *ad longum*; but then sufficient that *in cursu* to do so, and in

* This interlocutor had sustained the objection.

mean time has the sasine in his hand, and the lieges at no loss. Must be in his hands till then, because cannot give attestation of the leaves, &c. till recorded.—*President.* Possession and minority may be subject of proof, but where resolves into reason of reduction (different). As to other point, do not like conduct of the people at Inverness. Clear now that minute-book the rule and act of sederunt proper. Security of purchasers the foundation of the law. Act of sederunt in 1692 puts the matter out of doubt. Sasine then in practice registered after sixty days. Marking by the presenter required to remedy. Act of Parliament next year gives the authority of law to it. Minute-book made the notification. At same time ought to transcribe without delay. Liable to deprivation, if omitted. Act 1696 the only thing that strikes me; but all that required by it, that shall be registered, but do not say within sixty days. Would even repel respondent's plea *personali exceptione.*—*Barjarg.* Same opinion.—' Alter interlocutor, and repel objections.'

## XVIII.

*Proclamation for Dissolving a Parliament of Great Britain, and declaring the Calling of another.*

GEORGE R.

WHEREAS we have thought fit, by and with the advice of our privy council, to dissolve this present Parliament, which stands prorogued to the day of we do for that end publish this our royal proclamation, and hereby dissolve the said Parliament accordingly; and the Lords Spiritual and Temporal, and the knights, citizens, and burgesses, and the commissioners for shires and boroughs, of the House of Commons, are discharged from their meeting and attendance on the said day of : And we being desirous and resolved, as soon as may be, to meet our people, and have their advice in Parliament, do hereby make known to all our loving subjects, our royal will and pleasure to call a new Parliament; and do hereby further declare, that, with the advice of our privy council, we have this day given order to our Chancellor of Great Britain to issue out writs in due form for calling a new Parliament, which writs are to bear *teste* on the day of , and to be returnable on the day of next.

Given at our court, &c. the day of ; &c.

## XIX.

*De tenemento infra burgum de Suthberwyk pertinenti Episcop. Moravien.* (P. 454.)

UNIVERSIS Christi fidelibus hoc scriptum visuris vel audituris, Petrus filius quondam Johis filii Aliciae de Lynlithku, salutem in D'no sempiternam. Noverit universitas vestra me concessisse, vendidisse et titulo vendicionis perpetuo tradidisse, venerabili patri D'no Arach (Arch' *), Dei gratia Ep'o Moravien., nomine Eccli'ae sue Moravien. totam illam terram meam quam habui infra villam de Suthberwyk. cum omnibus aedificiis in eadem constructis et singulis pertinenciis suis, libertatibus et asiamentis, sine aliquo retinemento, una cum omni jure et clamio quod habui in eadem, pro centum lib. sterlingorum legalium, quas idem Ep'us mihi in summa necessitate mea pre manibus plene numeravit et tradidit, de qua me teneo bene pagatum et quietum, attendens in hoc meam utilitatem fuisse factam. Quaequidem terra jacet super le Nysse in longum, et in latum inter terram Roberti de Kingorn, ex parte aquilonali, et terram Adae de Seleby ex parte australi; quam vero terram habui ex dono et collacione patris mei predicti, et ad vendendum optuli in tolbotha de Suthberwyk ad tria placita capitalia, secundum legem et assisam burgi: Tenendam et habendam dicto Ep'o et Eccli'ae sue Moravien. sive assignatis suis, in perpetuum, libere, quiete, plenarie et *honorifice et* pacifice: Reddendo de singulis annis D'no Regi pro omni servicio, consuetudine, exaccione, et demanda, secularibus ad consuetos terminos burgi, vii denarios et obol. In cujus rei testimonium presenti scripto sigillum meum apposui. Testibus, &c.—*Chartular. Moravien. Vetust.* fol. xlvi. Archibald was Bishop of Moray from 1253 to 1298; *Keith.*

## XX.

*Charta Willielmi de Bonkel venditionis burgagii de le Ratonraw in Glasgw.* (P. 454.)

PATEAT universis praesentes litteras inspecturis, quod ego Willielmus de Bonkel, burgensis de Glasgw, pro me et *heredibus meis* concessi et vendidi, Religiosis viris Abbati et Conventui Monasterii de Passeleto, totam terram meam, cum pertinentiis, jacentem infra burgum de Glasgw, in vico qui vocatur Ratonraw, inter terram Domini Mauritij Starive Cappellani ex parte occidentali, et stratam regiam quae dicitur Le Wynde, ex parte orientali, pro quadam sum-

* Chart. Recentius, fol. 43.

ma pecuniae mihi per dictos religiosos prae manibus totaliter persoluta. Quam quidem terram, cum pertinentiis, Gilbertus de Camera, paupertate secundum legem burgorum probata, coactus, obtulit propinquioribus parentibus et amicis ad tria placita capitalia vendendam, et quam terram, cum pertinentiis, idem Gilbertus in defectu parentum et amicorum mihi vendidit, ad opus meum, et heredum meorum, et assignatorum meorum: Cujus quidem terrae cum pertinentiis saisinam recepi, pro me et heredibus meis, et assignatis meis, de consensu dicti Gilberti, per Præpositum et Ballivos dicti burgi, hora diei legitima, cum in Tolle et ante Tolle, in præsentia duodecem burgensium et vicinorum dicti burgi ad hoc specialiter vocatorum, et ipsa saisina gavisus fui pacifice per annum unum et diem sine clamio alicujus; et ego Willielmus, et haeredes mei, dictam terram cum pertinentijs dictis religiosis, secundum quod lex burgorum exigit et requirit, contra omnes homines et feminas warrantisabimus et defendemus. Praeterea obligo me et haeredes meos, et successores meos quoscunq., solvere fabricae majoris Ecclesiae Glasgwensis decem libras Sterlingorum, nomine poenae, et dictis Religiosis alias decem libras Sterlingorum, nomine damnorum suorum, et interesse, absq. aliquo strepitu judiciali, nullo proponendo obstante, quotiescunq. contigerit nos, vel aliquem nostrum, contra praesentem venditionem, sive contra aliquem articulum in praesentibus litteris contentum, in foro ecclesiastico vel civili, in toto vel in parte, movere seu moveri, seu facere quaestionem, praesenti nihilominus venditione mea in sua robore duratura; Renunciando pro me, et haeredibus meis et successoribus nostris quibuscunq., omni prosecutioni et actioni, exceptioni, cavillationi, regiae prohibitioni litteris regiis impetratis seu impetrandis; omni privilegio, cruce signato vel cruce signandis, indulto vel indulgendo, et omni juris remedio, tam canonici quam civilis, quae nobis vel alicui nostrum in praemissis, vel aliquo praemissorum prodesse, et dictis religiosis obesse poterunt in futurum. Et ad omnia et singula in praesentibus litteris contenta fideliter et integre tenenda et perimplenda, fidem pro me et haeredibus meis, et successoribus nostris quibuscunq. prestiti corporalem, subjiciendo nos et quemlibet nostrum cohertioni officialis curiae Glasgwensis, qui pro tempore fuerit, quod possit nos et quemlibet nostrum legitima admonitione praemissa compellere ad tenenda et implenda omnia et singula quae in praesentibus litteris continentur. In cujus rei testimonium, sigillum meum una cum communi sigillo dicti burgi, et sigillo officialitatis curiae supradictae, ad requisitionem meam, causa majoris evidentiae, est appensum. Teste communitate burgi supradicti.—*Hay's Vet. Diplom.* vol. iii. p. 286. From a confirmation of this grant in the year 1321, *ib.* p. 287, it appears that this deed must have been written about that period.

## XXI.

*Confirmacio David Regis de Regalitate quatuor burgorum.*
(P. 468.)

David, Dei gracia, Rex Scotorum, omnibus probis hominibus tocius terre sue, clericis et laicis, salutem. Sciatis nos, per inspeccionem cartarum quas de progenitoribus nostris Regibus Scocie habent, religiosi viri abbas et conventus monasterii de Dunfermlyne, jura et libertates regalitatis sue, ac eciam burgorum suorum, plenius intellexisse. Nos eciam, pro salute anime nostre, et animabus omnium antecessorum nostrorum et successorum, dedisse, concessisse, et hac presenti carta nostra per modum perpetue declaracionis predictis religiosis confirmasse, quod videlicet burgenses et mercatores burgorum eorundem, in singulis burgis suis, scilicet Dunfermlyn, Kirkaldy, Muskilburgh, et Passagio Reginae, licite et libere emere valeant et vendere, ac eciam in ipsis burgis suis de quibuscunq. bonis et undecunq. venientibus, et infra omnes metas, fines, et terminos tocius regalitatis ipsorum religiosorum, per totum regnum nostrum, mercaturas suas juste exercere, tam de lanis, corijs, et pellibus, quam de aliis mercimonijs quibuscunq. absq. impedimento ministrarum nostrorum seu burgensium nostrorum quorumcunq.; ita tamen quod metas et terminos dictorum burgorum suorum vel regalitatis sue antedicte, in premissis non excedant; salva nobis semper magna custuma de lanis, corijs et pellibus, et ceteris mercaturis crescentibus, extra metas et bondas dictorum burgorum et regalitatis supradicte; Inhibentes firmiter ne aliqui homines nostri, burgenses vel mercatores de quibuscunq. burgis nostris, seu quive alij homines burgenses aut mercatores aliorum quorumcunq., in prejudicium dictorum religiosorum aut suorum burgensium vel burgorum, aut enervationem presentis declaracionis nostre et confirmacionis infra terminos regalitatis eorundem jus vel potestatem mercandi seu premissa exercendi in futurum, sibi presumat aliqualiter usurpare. In cujus rei testimonium presenti carte nostre sigillum nostrum precepimus apponi. Testibus venerabilibus in Christo patribus Will'mo Episcopo Sancti Andree, et Patricio Episcopo Brechinensi, Cancellario nostro; Roberto Senescall. Scotie, comite de Stratherne, nepote nostro; Will'mo Comite de Douglas; Roberto de Erskyn, Camerario nostro; Archibaldo de Douglas, et Johanne Heris, militibus, apud Edinburgh, vicessimo quarto die Octobris, anno regni nostri tricesimo quarto.—*Chart. Dunferm.* fol. lx [b].

## XXII.

*Inter Abbatem et Conventum et Communitatem de Dunfermlyn.*
(P. 490.)

Haec indentura apud Dunfermlyn confecta, decimo die mensis Octobris, anno Dni mill'mo ccc° nonagesimo quinto, inter venerabilem patrem Johannem, abbatem monasterij de Dunfermlyn, ipsiusq. conventum ex parte una, et Aldirmannum ac communitatem burgi de Dunferm. ex altera, plene testatur, Quod dicti D'ni Abbas et conventus locaverunt, et ad firmam dimiserunt, in perpetuum, prefatis Aldirmanno et Communitati, omnes reditus dicti burgi ad eorum scacarium pertinentes, cum parvis custumis, stallagijs et exitibus curiarum, ac totum burgum in plena libertate, cum omnibus suis commoditatibus, rectitudinibus, juribus et aysiamentis quibuscunq. ad eundem burgum spectantibus, seu spectare valentibus, quoquomodo in futurum, adeo libere in omnibus et per omnia, sicut aliqui burgenses D'ni regis aliquem burgum in regno de dicto Dn'o Rege ad feodi firmam tenent, habent, aut possident, salvis dictis D'nis abbati et conventui terris in dicto burgo lucratis sive lucrandis, itinere camerarii, annuis pensionibus de diversis terris dicti burgi monasterio debitis, ac correctione ballivorum quociens contigerit eos aut eorum quemlibet in jure seu in justitia facienda sive exequenda delinquere. Pro quibus quidem superius concessis predicti Aldirmannus et Communitas solvent annuatim in perpetuum memoratis religiosis x et tres marcas usualis monete ad quatuor anni terminos consuetos, per æquales porciones, sine dilatione, cavillacione, dolo, seu malo ingenio, et si contingat eos in aliquo terminorum prenotatorum de prescripta summa, ut premittitur, in parte vel in toto deficere, quod absit, obligarunt se, omnia bona eorum communia, quibus pro parte vel pro toto non sufficientibus, omnia bona eorum specialia, ac eorum possessiones, ad voluntatem prefatorum religiosorum fore namanda capienda et distringenda, donec fuerit eis de dicta summa dampnisque et expensis, si que vel quas prelibati D'ni Religiosi sustinuerint vel fecerint, occasione pretacte solucionis in aliquo terminorum prenotatorum ut premittitur non facte, plenarie satisfactum. In quorum omnium testimonium parti hujus indenture penes religiosos D'nos abbatem et conventum remanenti, sigillum commune burgi de Dunferm. est appensum, parti vero remanenti predictis Aldirmanno et Communitati sigillum commune capituli præfatorum religiosorum est appensum, die et loco et anno supradictis.—*Chartular. Dunferm.* fol. cxii.

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