No 116. A reclaiming petition was afterwards preferred, and followed with answers, but the Court adhered.

Act. *Rolland, Macleod-Bannatyne.* Alt. *C. Hay.* Clerk, *Sinclair.*

C. *Fol. Dic. v.* 3. *p.* 413. *Fac. Col. No* 129. *p.* 250.

1792. *January* 24.

LORD DAER, eldest Son of the Earl of Selkirk, *against* The Honourable KEITH STEWART, and Others, Freeholders of the County of Wigton. *

No 117.
The eldest son of a Peer of Scotland has not a right to be enrolled a freeholder to vote in the election of Members of Parliament for counties in Scotland. Affirmed upon appeal.

AT the Michaelmas meeting of the county of Wigton, held upon 6th October 1789, Basil William Douglas, commonly called Lord Daer, eldest son of the Earl of Selkirk, presented a claim to be admitted on the roll of freeholders, upon certain titles therewith produced.

To the titles upon which the claimant desired to be enrolled, no objection whatever was stated; but the minutes of the meeting bear, "That a vote having been put, Whether the claimant, as the eldest son of a Peer, be capable to be enrolled as a freeholder, or not? all the freeholders present voted not, except Sir William Maxwell, who voted enrol, and the Reverend Dr William Boyd, who declined to vote. The meeting, therefore, refused to enrol the claimant."

Against this determination of the freeholders, Lord Daer presented a complaint to the Court of Session, under the authority of the statutes of the 16th of the late King, and of the 14th of his present Majesty. The Court ordered a hearing in presence, and the cause was argued for several days.

Upon the part of Lord Daer, it was *stated*, That the fact of his being possessed of lands holding of the Crown, fully entitling him to be enrolled a freeholder of the county of Wigton, was not disputed; but notwithstanding this, it was maintained, that by being the eldest son of a Peer of Scotland, he was precluded from that right which the same property would give to any other person; and therefore the subject of enquiry was, by what law, or by what authority, this exclusion could be supported.

In following out this enquiry, it was proper to take a view of the constitution of the Parliament of Scotland, in so far as it respected the rights of the eldest sons of Peers, from the earliest periods to which it can with any certainty be traced, down to the time of the treaty of Union in 1707; and this came naturally to divide itself into two different branches: The *first*, comprehending the ancient period down to the year 1587, when representation was introduced;

* The circumstance of this being a question regarding the Constitution of the Ancient Parliament of Scotland, and necessarily depending upon a variety of historical facts and deductions, will, it is hoped, prove a sufficient apology for stating the argument at so much length.

and the *second*, comprising the period from 1587 down to the act 1707, under the authority of which the present question is to be tried. No 117.

With respect to the *first* of these periods, it was not necessary to engage in any disquisition respecting the original form and constitution of Parliament; for, without attempting to investigate a subject so involved in obscurity, it was sufficient to begin at a period where more certain light might be discovered; and it might safely be affirmed, that as far back as laws and records furnish information, the Parliament of Scotland was the Great Council of the King, composed of all those who held lands of the Crown *in capite*, together with representatives from the Royal Boroughs. At what period these last were introduced, is an enquiry of no moment in the present question; but that every vassal holding lands immediately of the Crown, whatever the extent of these might be, was a constituent member, and bound, as such, to give attendance to the King in Parliament, seems to be a fact of which no doubt can be entertained, Lord Stair's Inst. b. 2. tit. 3. § 4.; Lord Kames's Essays, Brit. Antiq. p. 25.

It was needless, however, to go any farther than our statute-book, which afforded the fullest evidence of every vassal of the Crown being obliged to attend in Parliament, and of that being only afterwards dispensed with, upon condition of the lesser Barons sending represensatives. When, from the alienation and sub-division of land-property, the vassals of the Crown came to multiply, so those who possessed inconsiderable estates, although they regarded their right to sit in the National Council as a privilege, which they would not entirely relinquish, yet considered it also as a burden, which they were desirous of being subjected to, upon extraordinary occasions only. In an age, likewise, when force was more prevalent than laws, they found themselves of little consequence in comparison with the great and more powerful Barons; and in this way it happened that they came to be extremely remiss and irregular in their attendance in Parliament.

Matters appear to have been in this situation in Scotland, when James I. returning from his captivity, ascended the throne. Finding his power circumscribed by the great Nobles, it was natural for him to court the lesses Barons, whose influence was no way dangerous to him, and who being exposed to oppression from their powerful neighbours, would be disposed to seek his protection.

With this view was passed the act 1425, c. 52. ordaining, 'That all prelates, 'erles, baronnes, and freeholders of the King within the realme, sen they are 'halden to give presence in the King's Parliament and General Counsel, fra 'thincfoorth be halden to compeir in proper person, and not be a procuratour; 'but gif the procuratour alleage there and prove a lauchful cause of their ab-'sence.'

This act, however, does not seem to have produced the desired effect. Many of the lesser Barons, either dreading the power of the Nobles, or conscious of

No 117. their own want of importance, still with-held their attendance; and the King therefore resolved to try another experiment, and to accomplish his purpose by relieving them of personal attendance, upon condition of their sending representatives.

Accordingly, this was attempted by the act 1427. c. 101.; by which it would seem to have been intended to establish something similar to the House of Commons in England; for, after providing, that the 'small baronnes and free tennentes, need not cum to Parliaments nor General Councels; swa that of ilk scherifdome there be send, chosen at the head-court of the scherifdome, twa or mae wise men, after the largeness of the scherifdome,' it goes on and says, 'The quhilk sall be called Commissares of the Schere; and be thir Commissares of all the schires sall be chosen an wise man and expert, called the Common Speaker of the Parliament, the quihilk sall propone all and sundrie needis and causes pertaining to the commounes in the Parliament or General Councel.'

Here it seems plain, that the English House of Commons was in the King's view; and the act proceeds thus: 'The quhilkis Commissaries sall have full and haill power of all the laif of the scherifdome, under the witnessing of the schireffis seale. with the seales of diverse Baronnes of the schire, to hear, treete, and finallie to determine all causes to be proponed in Councel or Parliament. The quhilkis Commissaries 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.'

The act concludes with these words: 'All Bishoppes, Abbotes, Priores, Dukes, Earles, Lordes of Parliament, and Banrentes, the quhilkis the King will, be received and summoned to Councel and Parliament be his special precept.'

The calling the Prelates and Great Barons to Parliament by a special precept to each, had been introduced in England by the *Magna Charta* of King John, before the representation of counties was established; and James I. by the act 1427, adopting a similar form, even when attempting to introduce representation in Scotland; and it continued the same afterwards, because his endeavours to introduce representation proved ineffectual. This is the first Scots statute, in which the distinction between the Greater Barons and Lesser Barons is to be met with; and it fully shows, that besides ecclesiastics and the commissioners of burghs, the only other constituent Members of Parliament were those who held lands of the Crown *in capite*. As to *Banrentes*, in place of being a class of persons not holding lands of the Crown *in capite*, but called at the pleasure of the King, they were, on the contrary, of the highest degree of Great Barons and Lords of Parliament, to be called by special precept; as is proved by Skene *de verb. signif.* under the word *Banrentes*; by Du Cange, in his Glossary, under the word *Banneret*, and by Selden, *Titles of Honour*, part 2. c. 5. § 25. &c.

In this particular, of calling all the lesser Barons and freeholders by edictal citation, while the great Barons were to be called by special precept, this act of Parliament seems to have been carried into execution: But, with regard to the introducing representation, and the forming the representatives of the lesser Barons into a separate body, with a common speaker, which would seem to have been the two other objects in view, it does not appear that the statute ever took effect. That the intended representation of counties did not at all take place, is proved by the preamble to the statutes of the Parliament held 12th July 1428, to be found in the Black Acts, fol. 15. 17. 19. No 117.

The attempt thus made by the act 1427 having been unsuccessful, so thirty years thereafter, another method of obtaining the attendance of the lesser Barons was thought of in the reign of James II. and which was, to constrain none but freeholders, who held of the King a twenty pound land, to come to Parliament, and to leave all holding under that sum, to come or not, as they pleased; and accordingly this was established by the act 1457, c. 75.

Upon this statute Sir George Mackenzie observes, 'by this act no freeholder 'can be forced to come to Parliament, except he hold a twenty-pound land of 'the King; but none can be now compelled; and this was only in the time 'when all freeholders were obliged to compear in Parliament, as the King's 'head-court.'

That the constituent Members of Parliament were all those freeholders who held immediately of the Crown, is likewise proved by the acts 1449, c. 26. and 1489, c. 16. By the former it was enacted, 'That where regalities fall in the 'King's hands, the freeholders within the same shall compear in Parliaments 'and General Councils, as the freeholders of the royalty do. By the latter it was enacted, 'That free tenants who hold of the Prince, as Duke of Rothesay 'and Steward of Scotland, shall be holden to compear and answer in Parlia-'ment, until the King have a son to answer for them in Parliament.' And upon this statute Sir George Mackenzie observes, 'by this act it is ordained, 'That when there is no Prince, the vassals of the principality shall come to 'Parliament; and none can come to Parliament but such as hold of the King.'

Nothing further occurs in the statute-book till the act of James IV. 1503, c. 78. by which it was provided, that 'Barons, freeholders, and vassals, whose 'lands are within the extent of 100 merks, should be exempted from personal 'attendance in Parliament, unless specially called by the King's writ, provided 'they send their procurators to answer for them.' This act was meant as a favour to the lesser Barons, and to dispense with the attendance of those who held lands within 100 merks of new extent provided they sent a procurator to answer for them; but with regard to such as held lands above that extent, the law was left to stand as it was before. James IV. lived in such friendship with his nobles, that he had no occasion to be solicitous about the attendance of the lesser vassals of the Crown in Parliament. He was disposed, therefore, to relieve from that burden those who were of inferior estates, leaving the obligation

No 117. upon those above 100 merks of new extent, to be enforced by nothing further than the old penalty.

While this act relieved such as were within 100 merks of new extent, from personal attendance, it was with this exception, 'bot gif it be that our Sove-'raine Lord write specially for them;' and in the former act 1457, there was an exception of the same kind: But it is a most erroneous idea to suppose from this, that the King had a power, at his pleasure, to call to Parliament any person within his dominions, whether such person was or was not a Baron or freeholder of the Crown *in capite*. The acts 1457 and 1503, in which this power was reserved to the King, were passed, in order to relieve the lesser vassals of the Crown from the necessity of attendance; and therefore the power of calling, here reserved, was only meant to apply to those whose constant presence was thus dispensed with; and it would have been adverse to the very idea of Parliament, as well as an insult to the dignity and privileges of those who sat there, to introduce amongst them any person who was not a tenant *in capite* of the Crown. See this well illustrated by Sir George Mackenzie, in his Observations on this part of the act 1503.

To show still further, that, beside Prelates, Lords of Parliament, and Commissioners of burghs, the only other constituent Members of that Assembly were the *libere tenentes*, or vassals of the Crown *in capite*, reference was made to the form of the act or ordinance made by the King, as the warrant for the Director of Chancery to issue out precepts or brieves for convening Parliaments; copies of which are given by Lord Kames in his Essay on the Constitution of Parliament, p. 60. 61. Further, it was stated, there was good reason to believe, that the constitution of Parliament had been the same at a still more early period; Stat. Rob. III. Pr.; Stat. prima, Rob. I. Pr.; Stat. Alex. II. c. 3. 4.; Fordun, lib. 8. &c. 73.; Annals of Scotland, v. 1. p. 139.

At the same time, without going further back than the reign of James I. and taking a view of the statutes from that time down to the reign of James VI. it was submitted to be evident, that no vassal of the Crown was excluded from a seat in Parliament. On the contrary, every tenant of the Crown *in capite* was bound to give suit and presence in Parliament; and the several statutes that were enacted, instead of aiming at any exclusion of such as held immediately of the King, were passed either to enforce the attendance of all, or afterwards to relieve from the constraint or necessity of coming there, those who, from their inconsiderable property, were unable to bear that expense.

While such was the constitution of Parliament, it is utterly impossible to suppose, that the eldest son of any Lord of Parliament, or of any Baron whatever, if he himself held land immediately of the Crown, could be excluded from the right of giving suit and presence in the King's Great Council. On the contrary, it was a duty incumbent on him, by the very tenure upon which he held his lands; and there is not a single word in any of the statutes, nor in any

of the writs for calling Parliaments, nor in any existing record or document, which can support such an exception. No 117.

Even if the matter were left to rest upon these general principles, the conclusion would be sufficiently certain; but to go further, there is, in the *next* place, unquestionable evidence, that the eldest sons of Peers, not only did come to Parliament, but sat there as constituent Members, in virtue of their freeholds as vassals of the Crown.

During the reigns of James I. and James II. no rolls of Parliament are now extant. The first roll that has yet been discovered, is that of the Parliament which was held at Edinburgh upon the 12th October 1467, in the reign of James III.; it mentions, as present, 25 Ecclesiastics, 24 of the Nobility, and 12 of the lesser Barons. The next roll is that of the Parliament held 20th November 1469, at which there appear to have been present, 23 Ecclesiastics, 2 Officers of State, 33 of the Nobility, 21 lesser Barons, and 22 Commissioners of burghs. Both these rolls, however, are incomplete, and bear at the end, *et quampluribus aliis*

Besides these, there are rolls of most of the Parliaments held during this reign. In the Parliament 1471, there appear 30 Ecclesiastics, 29 of the Nobility, 10 lesser Barons, and 23 Commissioners for burghs. In the Parliament 1471-2, there are 15 Churchmen, 20 of the Nobility, 34 lesser Barons, and 11 Commissioners for burghs. In the Parliament 1476, there appear 17 Churchmen, 32 of the Nobility; but no lesser Barons nor Commissioners of burghs are mentioned.

In the Parliament 1478, there appear 14 Churchmen, 14 of the Nobility, 7 lesser Barons, and 20 Commissioners of burghs; and this is the first roll in which the names are set down in columns. It is very distinctly written in columns, first the *Bishops*, then the *Abbots*, then the *Comites et Barones*, then the *Domini Parliamenti*, next the *Barones*, and lastly the *Burgorum Commissarii*. In the class of the *Barones* are placed the *Magister de Halis* and the *Magister de Erskyn*. In the roll of the Parliament 1481 the names are not set down in columns; but amongst the *Barones* are placed the *Magister de Erskine* and the *Magister de Halis*.

Of the Parliament held 1481-2, the roll has the names set down in columns. There is one column with a common title for all the Barons. In this, after the *Domini*, there is a blank space; after which are the eldest sons of Peers; and immediately after them, without any blank space, the other lesser Barons. These eldest sons are, the Magister Crawford, Magister Keith, Magister Morton, Magister Erskine, Magister Sommerville.

In the roll of the Parliament 1484, there are three eldest sons of Peers, Magister Crawford, Magister Erskine, and Magister Kilmaurs. In the Parliament 1484-5, in that held 1485, in that of 1487, and in that of 1487-8, there appear also some of the eldest sons of Peers.

No 117. Thus, in *nine* of the Parliaments held during the reign of James III. the rolls show eldest sons of Peers to have been present, and marked as constituent members; and of the other Parliaments held in this reign, the rolls of some of them are lost, and others incomplete.

The same thing appears from the rolls of the Parliaments held during succeeding reigns. Thus, during the reign of James IV. there appear to have been held fourteen Parliaments, of seven of which there are no rolls extant; and in the remaining seven, of which we have rolls, there are to be found eldest sons of Peers sitting in no fewer than five of them.

During the reign of James V. there appear to have been held seventeen Parliaments, of five of which no rolls are to be found; and of the remaing twelve which have rolls, there appear eldest sons of Peers in five of them. During the reign of Queen Mary, there appear to have been held fourteen Parliaments, of four of which there are no rolls; but in every one of those of which we have rolls, there are found the eldest sons of Peers.

Of the two first Parliaments of James VI. the first held 15th December 1567, and the other held 18th August 1568, the rolls have been only recently discovered, and they are found to contain the names of four eldest sons of Peers. From that time, down to the year 1587, there do not appear, in the rolls of Parliament, any eldest sons of Peers, nor indeed any lesser Barons whatever.

The attendance, or the neglect of attendance of the lesser Barons in Parliament, may be in a great measure explained, by taking a view of the situation and circumstances of each particular period.

During the turbulent and busy reign of James III. there is seldom a Parliament, in which the attendance of a considerable number of the lesser Barons does not occur. In times of public commotion, and when the spirit of opposition to the Crown rose to any considerable height, numbers of the lesser Barons came to Parliament, and probably were brought there by the Nobles; for by that time, the King had perceived it of little consequence to command the attendance of the lesser Barons, because he found that any resolution, though taken by the majority, could not be executed, if it opposed the will of the more powerful minority. The Commissioners of Burghs likewise appear to have attended in Parliament, during this reign, in considerable numbers, more especially after the act 1469, c. 29. obtained during the King's minority, and which changed the mode of electing the Magistrates and Council of Burghs, and thereby enabled the Nobles to acquire great power over them.

During the reign of James IV. there being no struggle between the King and his Nobles, few of the lesser Barons, and still fewer of the Representatives of Burghs, appear to have attended. Some of the eldest sons of Peers however, are, during this reign, to be found in every Parliament of which there remains any roll.

In the reign of James V. very few of the lesser Barons seem to have attended; although, when they did, we always find some eldest sons of Peers amongst

them. In the rolls of several of these Parliaments, it would seem as if there had not been even a single lesser Baron present; but at the same time, there is some reason to suspect the accuracy of the rolls, because we find lesser Barons mentioned as members of the Committee of Articles, even when their names are not to be found in the roll. Few, likewise, of the Commissioners of Burghs seem to have attended; and indeed it was not in Parliament that there was any struggle at this period. It was in the field; it was in the camp at Fala; in the after refusal to march into England; and, finally, in the rout at Solway Moss, that the Nobles, too fatally, convinced the King of their power and independence. No 117.

In every one of the Parliaments of Queen Mary of which rolls remain, there appear several of the eldest sons of Peers, but very few of the other lesser Barons, and few of the Commissioners of Burghs. The Reformation had now begun to make considerable progress in Scotland; but matters were not yet ripe for bringing it into Parliament. This did not happen till 1560, when there came upwards of an hundred lesser Barons, and a considerable number of the Representatives of Burghs.

From the circumstances already explained, the lesser Barons had, in a great measure, neglected and given up attendance in Parliament; but it required only some extraordinary conjuncture to rouse them from their inactivity. Whenever such presented itself, they were ready to stand forth; and a remarkable instance of this had already occurred in the year 1555, when Mary of Guise, the Queen Regent, having proposed in Parliament to register the value of lands throughout the kingdom, to impose on them a small tax, and to apply that revenue towards maintaining a body of regular troops in constant pay, about 300 of the lesser Barons immediately assembled, remonstrated with the most determined boldness, and, alarmed at this, the Regent prudently abandoned her scheme. Buchanan. Hist. lib. xvi. c. 8.

The lesser Barons had so long neglected their attendance, that when they came in such numbers to the well-known Convention in Parliament in August 1560, they thought it necessary to present a petition, asserting their ancient right, and praying that 'their advice, counsel, and vote should be taken;' and this act 'passed without contradiction.' Robertson's Hist. App. No 4.

Whatever the circumstances were, which had made the lesser Barons neglect coming to Parliament, the rolls afford full evidence, that frequently at least a few of them were present; and, in particular, upon many occasions, some of the eldest sons of Peers. And, together with the great number of these instances vouched by the rolls of Parliament, there are several examples of their sitting in Conventions of the Estates; between which and Parliaments there does not seem to have been much distinction. Sir George Mackenzie, Observ. p. 302. Spottiswoode, Hist. p. 509, 510.

It had been said, that upon all these occasions the eldest sons of Peers attended in Parliaments or Conventions, not in their own right, as holding lands im-

No 117. mediately of the Crown, but as proxies for their fathers, or as summoned by special precept from the King, in virtue of the power reserved to him by the statutes 1457 and 1503. Both these suppositions, however, it is easy to show, were without any foundation.

As to their sitting as proxies for their fathers, this is completely refuted by the rolls, which furnish clear evidence of the father and the son sitting together in Parliament at one and the same time. Of this a number of instances were given; and farther, it was remarked, that whenever any person appeared as proxy for another, he was set down as such in the roll of Parliament; whereas these *Magistri*, whether eldest sons, or heirs apparent of Peers, were evidently set down as sitting there in their own right, without the addition of proxy, and are placed amongst the lesser Barons.

As to their having been called by special precept from the King, it was remarked in the *first* place, That if there had been only a few instances of the eldest son of a Peer being found in Parliament, there might be some pretence for supposing its having been occasioned by some unusual cause; but when there are such a variety of instances, in so many different Parliaments, in so many different reigns, and frequently also during the minority of our Kings, it must be impossible to account for this in any other way, than by holding, that they came there in virtue of their own right, as possessed of lands holding immediately of the Crown. In the *second* place, it has been fully shown, That in virtue of the power reserved by the acts 1457 and 1503, the King could, by special precept, call those only who, by being immediate vassals of the Crown had not merely a right, but were bound to attend in Parliament.

And in the *third* place, Evidence was produced to show that these *Magistri*, prior to the time of their appearing in Parliament, were actually possesssed of estates belonging to them in their own right, and giving them therefore an unquestionable title to sit in Parliament. See Lord Kames's Essays, Brit. Antiq. p. 98.

The *second* branch respects the period between 1587 and the treaty of Union in 1707; and under this head, the first thing which occurs, is the well-known statute 1587, c. 114. in which there certainly is not a single word that even points at placing the eldest sons of Peers in a different situation from what they were before. If, when possessing lands as vassals of the Crown, they had a right to sit in Parliament before this time, there does not occur any thing in the act taking away that right, or putting them in a worse condition. Indeed it specially refers to, and revives the prior act 1427; and, as it has been clearly shown, that the said act 1427 did not diminish their right, but that, on the contrary, they enjoyed and exercised it from that time downwards; so neither can it be supposed, that the statute now in question meant to make the smallest change.

This statute directs a precept forth of the Chancellary, to convene the freeholders for choosing Commissioners, as is contained in the same act 1427. It

No 117.

'ordains all freeholders of the King, under the degree of Prelates and Lords of 'Parliament, to be present at the choosing of the said Commissioners.' It ordains all freeholders to be taxed for the expense of the Commissioners; and it provides, that the compearance of the said Commissioners 'sall relieve the haill 'remanent freeholders and small Barons of the said schires of their suits and 'presence aucht in the said Parliaments.' Thus, there is not only a most express reference to the act 1427, but in every part, there is constant mention made of all freeholders under the degree of Prelates and Lords of Parliament, without any other distinction or exception whatever. That the eldest son of any Baron, whether greater or lesser, did not come under the description of a Prelate or Lord of Parliament, is indisputably clear; and therefore, when holding lands in their own right immediately of the Crown, they assuredly fell under the denomination of freeholders of the King, as expressed in this statute. Indeed it is utterly inconceivable, that there could have been any purpose or intention of excepting them; and if there had, surely, in place of being left to implication, it would have been expressed in terms the most explicit and unambiguous. It neither was the interest, nor could it be the view of the young King, then hardly of age, to irritate a powerful nobility, by encroaching upon the then acknowledged rights of their eldest sons; and therefore, the idea of excluding them has as little support from probability, as it has any foundation in the words of the act of Parliament.

It is remarkable, that a statute deemed so important with respect to the constitution of the Scots Parliament, is scarcely mentioned by the historians who wrote near that period. Neither Calderwood nor Johnston take any notice of it whatever; and even Archbishop Spottiswoode speaks of it in the slightest manner. Indeed, it is not a little singular, that the King himself, in his Basilicon Doron, written but a few years afterwards, and wherein he speaks fully of the Scottish Parliament, takes no notice whatever of the change introduced by this statute. The truth seems to be, that the act was the result of an application from the lesser Barons, to be relieved of their obligation of attendance in Parliament, upon their observing certain promises and conditions made to his Majesty, which could be no other than their engaging to send Commissioners, and to bear their expense; and, if this was the case, there seem to be grounds for believing, that the act proceeded less from any views of policy in the King, than from a proposition on the part of the lesser Barons, to obtain, upon these terms, relief from a burden which, by law, might otherwise be imposed on them.

The next statute is the act 1661, c. 35. concerning the persons entitled to elect and be elected Commissioners of shires to Parliament, and which enacts that all heritors holding of the King, and whose yearly rent amounts to ten chalders of victual, or L. 1000 Scots, shall be capable of electing and of being elected, excepting always all Noblemen and their vassals. What persons the Legislature here comprehended under the word Noblemen, is fully explained

No 117. by two unprinted acts, passed in 1662. The one is an act 'for settling the orders of the Parliament House;' and it expressly distinguishes between Noblemen themselves on the one hand, and their eldest sons and appearand airs-male on the other, and assigns a separate place for these last; while the Noblemen themselves have the benches appropriated to them and the Archbishops and Bishops. In like manner, the other act, which regards enforcing attendance, mentions the penalty upon a Nobleman as being a constituent Member of Parliament, and could not possibly comprehend any others but those who, in virtue of being actually Peers at the time, had a seat in that Assembly. In short, the term Noblemen is used as synonymous to Lords of Parliament; and the eldest sons of Noblemen are mentioned as altogether a different order.

With regard to the act 1681, c. 21. it, like all the former, is perfectly general and comprehensive; and, by declaring, that none shall have a right to vote but those possessing a 40 shilling land of old extent, or L. 400 of valued rent, it equally declares, that all those shall have a vote who are possessed of such qualifications. It may likewise be remarked, that the act contains various restrictions and exceptions, particularly relating to the objection of minority; and had it then been supposed or understood, that the circumstance of being the eldest son of a Peer, formed any objection, there cannot be a doubt, that it would have been carefully mentioned by the Legislature. This statute, therefore, instead of excluding, clearly comprehends the eldest sons of Peers possessing the qualifications thereby required; for it confers the right of voting upon all freeholders of a certain extent of property, without any such exception.

From this time down to the Union, there is no statute making any variation, either with regard to the rights of those entitled to be elected, or entitled to vote in the election of members to the Parliament of Scotland. And after this review of the statutes, if it shall be said that the right, which it must be acknowledged the eldest sons of Peers did once possess, was taken away by law, let these Objectors point out that law, or that statute, which imposed so unjust and so severe a forfeiture; let them explain those circumstances which could warrant such a deprivation; and let them say by what authority, and at what period, that right was taken away. Mere assertion, unsupported by evidence, will not be listened to; and the statutes, in place of furnishing any aid to their plea, afford the most satisfactory proofs, that it was neither the intention nor the view of the Legislature, to strip the eldest sons of peers of their right, nor to place them in a worse situation than any other vassals of the Crown.

In the *next* place, with regard to the usage and practice during this period, it having been alleged, that there is no instance of a peer's eldest son being elected into Parliament; so it is, in the *first* place, to be considered, How far there is any sufficient evidence of this alleged disuse; and in the *second* place, How far that disuse can be reasonably accounted for, so as to exclude any supposition of the right itself having been taken away.

No 117.

As to the fact, it in the *first* place merits attention, that although from 1587 to 1612, there were no fewer than seven Parliaments held by James VI. yet the whole rolls of these Parliaments are lost. During the remainder of this reign only three Parliaments were held, one in 1612, another in 1617, and a third in 1621. Of these the rolls still remain; and there is not mentioned in them the name of any of the eldest sons of peers.

During the reign of Charles I. there is extant only the roll of the Parliament held 18th June 1633. The Parliaments 1638 and 1640 were called indeed by royal authority; but the whole acts passed in them were at the Restoration rescinded, and no rolls nor minutes of their proceedings remain. Another Parliament was called in 1644, and continued by different sessions till 1646; and in 1648, a Parliament was held, of which there were three sessions, held in that and the following year 1649; but these Parliaments met without royal authority, and no rolls nor record of their proceedings remain.

In the reign of Charles II. three Parliaments were held, one in 1661, another in 1669, and a third in 1681. Of the first of these there were three sessions, one in 1661, another in 1662, and a third in 1663; of the second there were four sessions, one in 1669, another in 1670, a third in 1672, and a fourth in 1673; of the third, held in 1681, there was only one session. There were also three Conventions of Estates, one held in 1665, another in 1667, and a third in 1678; and of all these Parliaments and Conventions the rolls remain.

In the reign of James VII. there was only one Parlirment, of which there were two sessions, the one in 1685, and the other in 1686.

During the reign of William and Mary, the Convention of Estates held upon 14th March 1689, was upon 5th June that year declared a Parliament. It was continued for no fewer than ten different sessions, and till after the accession of Queen Anne.

In 1703, Queen Anne called a new Parliament, which met 6th May that year, held a second session 16th July 1704, a third session 18th June 1705, and a fourth session 3d October 1706. This Parliament concluded the treaty of Union, and was the last Parliament of Scotland. Of all these Parliaments the rolls remain, and no eldest son of a Peer occurs in them.

Thus, from the period of the Restoration down to that of the Union, there were no more than six Parliaments, only three in the reign of Charles II. only one in the reign of James, only one in the reign of William, and only one in the reign of Queen Anne. Although therefore the rolls of these Parliaments remain, and contain not the name of any Peers eldest son, yet it will be kept in view, that there were only six general elections; and with regard to the period before the Restoration, it has already been shewn, that the rolls of only four of the Parliaments remain; the rolls of all the other twelve Parliaments which were held during that period, being now lost. In short, during a period of no less than one hundred and twenty years, which passed between 1587 and 1707, although there were twenty-one Parliaments, yet the rolls of only ten of

No 117. them are extant to the present day. And when it thus appears that more than one half of the rolls of the Parliaments held during this long period are now lost, it will be considered, whether the circumstance of the name of no Peer's eldest son being found in those that remain, can be held sufficient to prove, that during all that period they never once excercised their right.

But, in the *next* place, when it is considered, that there is no evidence of the right itself being taken away; so, unless the contrary should be clearly shewn throughout every part of this long period, the presumption should rather be, that they did exercise that right, and that their not happening to appear in the rolls which remain, has been occasioned by other causes than any abandonment or any forfeiture of their right. And there are a variety of circumstances which may serve to account for the neglect of the exercise of their right.

The ideas and the motives of men must be measured by the times in which they lived, and by the circumstances in which they were placed. Various circumstances in the ancient situation and constitution of Parliament, naturally contributed to dispose the lesser Barons to view attendance upon it as a burden, which, on the other hand, there was no advantage to compensate. In a martial age, when military enterprises were the chief occupation, the civil transactions of Parliament were little interesting. Taxes were then almost unknown, and the framing of any laws or regulations respecting property and civil rights, were left almost entirely to the Ecclesiastics. Even the great Barons attended, more from its being a service, which they owed to the King as their feudal superior, and a duty which it became their own dignity to perform, than from any share which they took in the ordinary business that might occur. And it need not be wondered at, therefore, that the inferior vassals of the Crown should deem it a hardship to be obliged to attend an Assembly, in the usual proceedings of which they were so little interested, and where they felt themselves to be of so little importance.

This was very nearly the state of Parliament, from the time when James I. ascended the Throne in 1424, till the period of the Reformation in the reign of Queen Mary. During a turbulent reign, or during some public commotion, the lesser Barons might be excited, and brought to come to Parliament, in unusual numbers; but excepting upon such extraordinary conjunctures, they were glad to decline that burden, and anxious to obtain an exemption from it. Even in the reign of James III. the number of lesser Barons in Parliament never exceed thirty-four; in the reign of James IV. their number never exceeded fifteen; and in the reigns of James V. and Queen Mary, they never exceeded seven, and these almost entirely the eldest sons of Peers.

Gradually, however, the alienation of property operated a considerable change. The exorbitant estates of the great Barons came, in progress of time, to be shared out into more hands; and the lesser Barons multiplying greatly in number, soon advanced into a more respectable situation. Still, however, there were circumstances peculiar to the situation and constitution of the Scottish Par-

liament, which prevented them from viewing their presence in that Assembly as of any importance, and which constantly led them to consider their attendance as a grievance to be shunned, rather than a privilege which they should wish for, and court opportunities of exercising. No 117.

In the *first* place, The Committee distinguished by the name of Lords of the Articles, was peculiar to the Parliament of Scotland, and had very signal effects upon its constitution. It put it in the power of the King to control Parliament, and necessarily precluded all deliberation and freedom of debate. See Kames's Ess. Brit. Antiq. p. 51.

In the *second* place, The short time which Parliament continued to sit, is another circumstance meriting attention, and it chiefly arose from that very institution of the Lords of the Articles, upon whom the whole load of the business was devolved; so that the Parliament met the first day to choose that committee, and having then adjourned, usually met again only on the last day, to receive and to vote what were called the conclusions of the Lords of the Articles, after which they separated. Bishop Burnet's Hist. own Times, vol. 1. p. 115. fol. edit. See also Calderwood's Hist. p. 730. 731, &c. which furnishes a most striking picture of the situation of the Parliament of Scotland.

In the *third* place, The Parliament of Scotland consisted only of one House, in which the whole estates assembled together, held their deliberations in common, and voted promiscuously, each individual member being entitled to an equal voice. No circumstance, perhaps, contributed more to exalt the importance of the Parliament of England, than that of its being divided into two Houses. The union of the representatives from counties with the representatives from burghs, formed a distinct order in the state, and their separation from the spiritual and temporal Lords, drew after it the most signal consequenses, and may justly be deemed the chief cause of the high authority of the English House of Commons. In Scotland again, they assembled together in one House, and the Commons acquired none of those privileges which would have been the result of a separation, and which gave such importance and authority to the same order of men in the neighbouring kingdom.

A *fourth* circumstance, which contributed to keep the representatives of the Commons of Scotland in a low and dependent condition, was the vast accession of power, which the King derived from his succession to the English Throne. This, while it gave him great authority with his Nobles, necessarily encreased his influence in Parliament; and against a powerful Prince and his proud Nobles, the small Barons could be of little account. Even before his accession to the Crown of England, James held the small Barons of no consequence. See King James's Works, p. 162, 163. After the reign of James, and about the middle of the last century, the Commons of Scotland rose into some greater consideration, but still they were of little consequence in Parliament till after the Revolution; and the interval between that period and the Union, was of too short du-

No 117. ration to afford sufficient opportunity for letting the Commons feel their consequence, and establish their independence.

In the *fifth* place, Till after the Revolution, few taxes were imposed by the Parliament of Scotland. It was the power of taxation that in England first gave importance to the representatives of the people; and it is the important privilege of granting or of refusing supplies, which at the present day maintains the independence of the House of Commons, and is the true palladium of our excellent constitution. In Scotland, the parliamentary taxes were so few, as well as so light and inconsiderable, that it may easily be conceived how little the nation would upon that account be excited to resist the authority of the Crown, or be engaged to give attendance in Parliament. See Sinclair's Hist. Pub. Rev. Part 3d.

These various circumstances exhibit too faithful a picture of the condition of our Parliament, from the Union of the Crowns to the period of the Revolution. A Monarch possessed of exorbitant power; a proud and numerous, but corrupt Nobility; and small Barons of mean fortune, with Representatives for burghs, where arts and commerce were hardly known, and had not yet given birth to wealth and independence. These, in one joint body, formed the Estates of Parliament, where the King, by his own power, and by the Lords of the Articles, had almost boundless influence. Their sittings were short; the business being already prepared, was voted with dispatch; and no freedom of debate, nor time for deliberation, were allowed. Such were our Parliaments: And the Commons, oppressed equally by the arbitrary severity of the Government, and by the power of the Nobles, sunk into the most abject despair; and had it not been that religious zeal kept alive the flame, every spark of civil liberty must have suffered a total extinction.

In the ancient Parliaments of Scotland before the Reformation, to distinguish themselves in the Court, and in the Councils of their Sovereign, equally suited the rank, and became the dignity of, the eldest sons of the Nobles. To be in his Court, was the necessary consequence of their birth and fashion; and when they held lands as his immediate vassals, to sit in his Parliament was what they owed to him of right. They sat there with those to whom they were equal in blood, and to whom they were nearly equal in rank; for few of inferior condition attended; and they came there, not sent by, nor at the charge of others, but of themselves, and at their own expense.

But after representation was established, and after large estates had, by frequent partitions, been dealt out into many small parcels amongst the lesser Barons, to be the delegated deputies and hired messengers of such inferior persons, could but ill befit the gallant sons of proud and independent Nobles. They would not deign even to submit to the burden; for, as a burden, and not as a privilege, it was considered. It was a trust from which no profit nor honour was to be derived, and consequently was every where shunned, in place of

No. 117.

being courted. When afterwards the Commons, in progress of time, rose to some greater importance, the power of the Crown, and the peculiar constitution of Parliament, still checked their advancement, and rendered them of little o no account in that assembly. If they discovered any ardour for freedom, it was quickly repressed; and in a tyrannical Government, and an enslaved Parliament, there was nothing that could allure the eldest son of a Peer to claim his right to be a representative of the people. No wonder, then, that during this period, we do not discover them sitting in that assembly, where, in place of having any opportunity of displaying abilities, all freedom was banished, and every symptom of a spirit of liberty crushed by the strong hand of arbitrary power.

Thus the right of the eldest sons of Peers had not been taken from them, but they had forborne to use it, while they deemed it of little value. The long neglect of the right, however, seems to have produced a notion, that any pretensions to it were relinquished; and there is little wonder that such an idea should have come to be eagerly cherished by a people irritated by manifold oppressions from an arbitrary government and a powerful aristocracy. It was an erroneous notion, but it had come to prevail; and in this situation were the minds of men in this country at the accession of James VII. in 1685, and when new oppressions were dreaded from the known disposition of that bigotted and infatuated Prince.

Upon 23d April 1685, the first and only Parliament of James was held at Edinburgh, and Sir George Mackenzie of Tarbat, who was Clerk Register, and who had gone to London upon the accession of the King, came down, intrusted with his Majesty's instructions for managing the Parliament, and honoured with a patent of Peerage creating him Viscount of Tarbat. The character and history of this Noble Lord are well known. In 1681, he was high in trust and favour with the Duke of York, when Commissioner to the Parliament of Scotland; and he was not only a chief promoter, but defended, with indecent keenness, all the violent and illegal proceedings of that tyrannical administration. He became, upon this account, deservedly unpopular, and obnoxious to the nation, who were now still farther provoked at seeing him advanced to Honours by their new Sovereign, and sent down to lead on a prostitute Parliament to the most unprincipled measures, and to a total resignation of their liberties, both civil and religious.

It happened, that before being advanced to the peerage, his eldest son had been elected one of the Representatives to Parliament from the County of Ross; and it naturally occurred, as a very difficult and delicate matter, in what way the Viscount of Tarbat should act upon this occasion. It was not a time for urging an unpopular topic, nor was that of the son of a hated and obnoxious minister of the Crown the case in which the question could be expected to be discussed and tried with any fairness and candour; and, in short, having no alternative, but either to try the question, or to withdraw his son from Parliament, he wisely chose the latter; and accordingly, upon 23d April 1685, the

No 117. very first day of the session, there appears a short minute, by which warrant was given to the freeholders of the shire of Ross, to meet and elect another Representative, " in respect the Viscount of Tarbat's eldest son, by reason that his his father is now nobilitate, cannot now represent that shire."

That this is the true account of the case of Tarbat receives the strongest confirmation from what afterwards happened in the Convention Parliament 1689, in the question between William Higgins, and the Lord Livingston, eldest son of the Earl of Linlithgow, with regard to the election of the burgh of Linlithgow. The clerk of that burgh having given a commission to Lord Livingston, as duly elected; Mr Higgins complained of this, and offered a memorial in his behalf, which was remitted to the committee for elections.

In this memorial for Mr Higgins, there is not the least mention whatever of there being any objection against Lord Livingston upon account of his being the eldest son of a Peer; but, on the contrary, it enters into a very full and anxious investigation, as to the numbers and validity of the different votes, in order to show that Higgins carried his election by a clear and decided majority. Had it been understood, that his being the eldest son of a Peer rendered Lord Livingston incapable of being elected, or that the case of Tarbat in 1685 had been a fair decision of that question, it is impossible to believe, that this could have been forgot so recently after as the year 1689, or that the committee would have gone any farther, than to rest upon that conclusive objection, or that they would ever have entered upon the other branch of the cause, respecting the legality and validity of the particular votes. Instead of this, however, the committee, although they did not choose to overlook altogether that popular objection, yet, not inclining to trust to that alone, they added, in the second place, " in respect William Higgins was more legally and formally elected by the plurality of the votes of the burgesses."

All this is strongly confirmed by what passed in the Parliament of Scotland at the important period of the treaty of Union in 1707, only eighteen years after the case of Livingston, and only twenty-two years after that of Tarbat, and when these transactions must have been in the remembrance of many Members of the House.

Upon 24th January 1707, when the fixing the number of Representatives from the shires and burghs of Scotland was taken into consideration, a clause was proposed, " That no Peer, nor the eldest son of any Peer, can be chosen to represent either shire or burgh in this part of the United Kingdoms, in the House of Commons."

This clause came not from those who affirmed the right of the eldest sons of Peers, but from those who were desirous to have them excluded; and had they already stood excluded by law, there could have been no necessity for any such clause; but, on the contrary, an opposite clause would have come from the other side, to the effect of making them eligible. No such motion however was made, because their right was held to be good, and it was therefore suffi-

cient to prevent a clause that would now exclude them, and to leave their right to stand upon its former footing. In consequence of this, a clause to that purpose was opposed to that which had been moved for, and was accordingly carried by a majority of 14, the numbers being 86 for the second clause against 72 for the first. No 117.

If it had been then law, that the eldest sons of Peers were not eligible, and that the cases of Tarbat and of Livingston had been founded in law, it would have been an extraordinary circumstance to have found a majority of the Scottish Parliament, and among these the Lord Chancellor, as well as many of the most respectable and eminent men of the country, presuming openly and avowedly to contest and to resist a proposition warranted by law, and confirmed by two recent precedents of the High Court of Parliament. It is more reasonable to presume, that the movers and supporters of the clause which was rejected, were actuated by popular opinion, and by notions of political expediency, rather than by any cool and dispassionate judgment of the legal merits of the question; and indeed this is confirmed by Defoe, in his History of the Union, p. 212.

That the clause which actually carried was understood by the Peers to be in effect a declaration of the eligibility of their eldest sons, is demonstrated by what happened immediately after the Union; for, upon occasion of the general election for the Parliament called by Queen Anne in 1708, no fewer than eight eldest sons of Peers offered themselves as candidates for counties and burghs in Scotland; and such a number starting so immediately after, seems to afford irresistible proof of the sense in which the clause in the treaty of Union had been understood.

By the act 1707, settling the manner of electing the 16 Peers and 45 commoners for Scotland, it was enacted, '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.'

This act was solemnly declared to be of the same force and effect as if it had been engrossed in the treaty of Union itself; and it is the clause just now recited which must guide the determination of the present question. The law of Scotland is to be considered as it then stood. We are to pay that regard to the minute in the case of Tarbat, and to the report of the Committee in the case of Livingston, which would have been due to them at that time; and because they happen to be now fourscore years old, we are not to give them any farther credit upon that account. Even when these cases were but recent, they had no weight with a decided majority of the Union Parliament; and surely we cannot pay more regard to them at this day, than was given to them then, by those who were best acquainted with them, and had the most indubitable

No 117. access to know by what authority, or by what private views they had been occasioned, and upon what grounds in law they had been founded.

As to the argument founded upon disuse, there are to be considered, *1mo*, The evidence of the alleged fact; *2do*, The legal effect of that fact; and, *3tio*, viewing it as any presumption of the right having been legally taken away, How far the disuse can be accounted for, so as to exclude any supposition of that kind. The first and the last of these have been already considered, and it remains only to say a few words as to the second.

By the law of Scotland, there is no doubt that certain private rights may, *non utendo*, be lost by the negative prescription; but at the same time these must be rights in which two parties are interested, and where, while the one loses his claim, the other obtains an immunity from it. In all cases, however, where the right is of a different kind, and concerns the privileged person only, without directly affecting others, or, in other words, when it is what is termed *res meræ facultatis*, no lapse of time can diminish or take away the right. This principle is well explained by Lord Kames in his Elucidations, art. 33. p. 248. See also Mr Erskine, book 1. tit. 1. § 46.

In England, there have occurred many instances of burghs claiming and being allowed to send members to Parliament, although they had neglected to exercise that right for a very long course of years. The burgh of Ashburton in Devonshire, made its first election and return of burgesses 27th Edward I. in the year 1299; but thereafter neglected their right till 8th Henry V. in the year 1420, when they again returned burgesses, after a disuse of 120 years. The burghs of Agmondesham, of Wendover, and of Great Marlow, did each of them repeatedly send representatives to Parliament before 3d Edward II. but thereafter discontinued to exercise their right for no less than four hundred years; and after this, they were, upon their petition, *anno* 21. *Jac.* I. admitted to their right. The burgh of Cockermouth sent burgesses *anno* 23d Edward I. but thereafter sent none till the year 1640, in the reign of Charles I.; *Prynne's Brev. Parl. Rediv. p.* 225, 226, *&c. Willis Notitia, Parl. Pref. p.* 15.

In Scotland, the greater part of the lesser Barons had so long neglected their right of coming to Parliament, that when, in 1560, they came to claim their seats, they deemed it necessary to present a petition to the Peers, asserting their ancient right, and desiring to be admitted; and accordingly the justice of their claim was acknowledged, and they were received, as Randolph expresses it, without any contradiction. The county of Kinross had, for a long course of years, neglected to send a representative to Parliament; but in 1681 they resumed their right, and their Commissioner was immediately admitted; Wight's Elect. Law, p. 468.

The eldest sons of the Peers in England had so very long neglected their right of sitting in Parliament, that, in 1549, it seems to have occurred as a doubt, how far Sir Francis Russel, upon his father becoming Earl of Bedford,

could continue to sit; but the Commons determined that he should abide in the House, in the state he was before; Hartsell's Preced. p. 12. 13. There is reason to believe, that, after anciently exercising their right, the eldest sons of Peers had come to neglect it, when sitting in the House of Commons was yet of little value; but by the year 1549, the Commons had come to be of considerable importance; See *Prynne's Brev. Parl. Rediv. p.* 23, 48, 58. &c. No 117.

If the evidence and the arguments which have been stated, would, in the year 1707, have been sufficient to establish the right of the eldest sons of Peers, it may with safety be affirmed, that since that period there has nothing passed which can take away that right, nor which can be allowed to weigh with a court of law in determining the question. There has occurred, neither any statute, nor any decision of a court of law, precluding the eldest sons of Peers from their right; and with regard to the vote or resolution of the House of Commons in 1708, it was attended with circumstances extremely peculiar. If the question had been discussed with dispassionate candour, and if the evidence which the present investigation has brought to light, had been then laid before that Honourable House, there is little doubt that the resolution would have been the reverse of what it was.

It has been already mentioned, that, at the general election after the Union, no fewer than eight eldest sons of Peers offered themselves as candidates for counties and districts of burghs in Scotland. Of these, four were successful; and being returned Members, petitions against the returns were presented. In these petitions, it is remarkable that not a law was pointed out, nor even alleged, against the right of the eldest sons of peers, nor any evidence either offered, or so much as alluded to, excepting the suspicious entry in the case of Tarbat in 1685, and the very dubious report of the committee in the case of Livingston in 1689. Indeed, the petitioners, upon that occasion, sufficiently knew the prejudices then generally entertained against the Nobility of Scotland; and they trusted therefore, more to their cry against the Scottish Aristocracy, than to any legal and solid arguments which they could advance; Chandler's Deb. vol. iv. p. 103.

At that time, the Union had produced the most serious discontents in Scotland, and this encouraged the friends of the exiled family to make an attempt for recovering the throne. With this view, an invasion was threatened; and accordingly the French fleet, with the Son of the Pretender on board, together with 5000 soldiers, and a great quantity of arms, did actually sail from Dunkirk, upon 6th March 1708, for the coast of Scotland, with a design to make a landing in the frith of Forth. This armament soon reached the frith; and, had the Son of the Pretender, with the force which accompanied him, been landed, it might have been attended with the most serious consequences; for, the Nobles and Gentry ready to support his cause, were numerous and powerful; and the people, partly from attachment to the exiled family, partly from resentment at the Union, were every where impatient to rise in arms. And,

No 117. after possessing himself of Scotland, the concerted plan was, that the Pretender should, with a numerous army, immediately invade England.

Together with all this, Scotland was, at that time, almost without troops, and in a very defenceless condition; but notwithstanding all these circumstances, it fortunately happened, that the enterprise did not succeed. The French fleet returned to Dunkirk, without making any landing in Scotland; and soon after, a new Parliament was called, and which met in the middle of November 1708. Bishop Burnet says, 'the just fears and visible dangers, to which the 'attempt of the invasion had exposed the nation, produced very good effects; 'for the elections did, for the most part, fall on men well affected to the Go-'vernment, and zealously set against the Pretender.' Bp Burnet, Hist. Own Times, vol. 5. p. 997, and vol. 6. p. 1026.

Such was the state of matters in the end of the year 1708; and when such was the situation of Scotland, and so many of the Nobles known to be in correspondence with the Court of St Germains, it may easily be judged, how far, at that time. the question as to the rights of their eldest sons, could be discused with candour and coolness, in a House filled with Whigs, and under a Whig administration.

Bishop Burnet says, 'Things went on in both Houses according to the direc-'tions given at Court; for, the Court being now joined with the Whigs, they 'had a clear majority in every thing; all elections were judged in favours of 'Whigs and Courtiers, but with so much partiality, that those who had for-'merly made loud complaints of the injustice of the Tories, in determining 'elections when they were a majority, were not so much as out of countenance 'when they were reproached for the same thing. They pretended they were 'in a state of war with the Tories; so that it was reasonable to retaliate this to 'them, on the account of their former proceedings; but this did not satisfy 'just and upright men, who would not do to others that which they had com-'plained of, when it was done to them or to their friends.' Hist. Own Times, vol. 6. p. 1026, 1027.

Such was the complexion of this Parliament, and such the view in which their proceedings, regarding election-questions, were held, even by those of the Whig party who lived at the time, and were disposed to look on their measures with a friendly, and even a partial eye.

Indeed, in general, much cannot be said in favour of the determination in election-causes, before the late institution of Committees under Mr Grenville's act. A respectable author says, 'every principle of decency and justice was 'notoriously and openly prostituted,' Hatsel's Preced. p. 13. And indeed such an Assembly, from its very constitution, must necessarily be unfit for deliberately investigating and candidly determining questions of right, especially when attended with any intricacy and nicety. Party influence, political prejudices, and various other circumstances, are ever apt to interfere; and if super-

No 117.

added to these, there occur some peculiar situation at the time, agitating the passions of men, and exciting a national alarm, the vote of such an assembly, in cases where these can operate, must not be entitled to much authority or respect.

The resolution of either House of Parliament, however it may determine the case of the particular individual before them, cannot make law, and much less a resolution passed at such a period, and when the House neither were, nor could be possesssd of that evidence, and of those grounds, upon which to form a judgment, that later researches and more diligent investigations have since brought to light. Similar to this resolution in the House of Commons in 1708, there passed, not long afterwards, in the House of Lords, the well-known resolution with regard to the title of Duke of Brandon, then conferred by the Queen upon the Duke of Hamilton. The same fears and jealousies having found their way into the House of Lords, had the effect of carrying this resolution; but, after a course of years, when all these prejudices and fears had subsided, and when able to judge with dispassionate calmness, that Most Honourable House did, with dignified and becoming candour, hear the question again, called the Twelve Judges of England to assist them, and, agreeable to the unanimous opinion of the Judges, gave their determination in favour of the claim of the Duke. And surely, if the resolution of the House of Lords in 1711 has been so justly disregarded, the resolution of the House of Commons in 1708 cannot be entitled to any greater weight.

As to the case of Lord Charles Douglass in 1755, or that of Lord Elcho in 1787, it is hardly necessary to say any thing; for they both passed without any inquiry or discussion, and were rested upon no other ground than the authority of the resolution 1708.

Upon the whole, from viewing the constitution and history of Parliament, during the different periods above mentioned, it appears, with respect to the first period, that, from the most ancient times, every vassal holding lands immediately of the Crown had not only a right, but was expressly bound to give his attendance there. The very exceptions introduced by the acts 1457 and 1503 confirm this, without there being the least idea of any exclusion of the eldest son of a Peer, providing he had the requisite qualification in lands. From all this, their right to sit there may be conclusively inferred; and to remove every doubt, there is farther invincible evidence of their having actually sat in Parliament, from as far back as any rolls are extant, down till after the accession of James VI.; and that they sat there in virtue of freeholds, which they possessed in their own right, is fully established by the record of charters.

If the complainer has been successful in showing this, it is not easy to suppose, that the eldest sons of Peers could be disfranchised of so honourable and valuable a privilege, without some express and solemn act of the Legislature; and yet, during all the second period, no such forfeiture of their right is to be discovered, either in the act 1587, or in the act 1669, or in that of 1681. On

No 117. the contrary, the statutes do all and each of them clearly comprehend the eldest sons of Peers, under the just and legal description of Freeholders of the Crown, entitled to elect and to be elected Representatives to Parliament. And as to the alleged disuse during this period, it has been fully explained and accounted for in such a manner, as to show that their right was never taken away, but only neglected to be used when it was deemed of little value.

In short, the right remained perfectly entire at the period of the Union; and this was clearly the sense and understanding of the Parliament of Scotland in 1707, when they passed the act by which the present question is to be tried. They justly disregarded the cases of Tarbat and of Livingston; and if such was held the law in 1707, there surely has passed nothing since, that can possibly be suffered to affect it. The right must be held at the present day entire; and it only now remains to restore their just rights to the eldest sons of the Nobles of this country, and to place them on an equal footing with those of the same rank in the other part of the island.

In answer to all this, it was *contended* on the part of the Freeholders, That although anciently, agreeable to the general plan of the feudal system which had been introduced into Scotland, every person who held his lands immediately of the Crown was bound to attend in Parliament; yet, even from the earliest times, there appears the dawn of a distinction between the Prelates and Nobles, and the ordinary *libere tenentes* or freeholders, who came afterwards to be more particularly described under the appellation of the small Barons or freeholders.

With regard to the Peers, or *Barones Majores*, it is well known, that, in ancient times, all honours and dignities were annexed either to lands or to offices; and that earldoms and lordships in Scotland were for a long time territorial, and passed with the lands erected into a *comitatus* or *dominium*, is indisputable. While matters remained in that state, it is not unreasonable to suppose, that the Peers gave their attendance in Parliament, not in respect of their dignities, but in consequence of their holding their earldoms or lordships immediately of the Crown; but although in those days they were not in that respect to be distinguished from other freeholders; yet after the introduction of personal honours or dignities, independent of lands, which happened in Scotland at least as early as the reign of James I. a considerable alteration in the model of Parliament must of necessity have taken place.

The Sovereign could be under no obligation to confer such personal dignity, except upon those who were possessed of landed property; but even supposing none to have been created Lords of Parliament who were not possessed of landed estates at the time, there is no ground for concluding, that the heirs were to be deprived, either of the title, or of any of the privileges attending it, upon their disposing of the estate which their ancestor held when he was ennobled. Those who were in this situation would, therefore, sit in virtue of their personal honours.

alone; and hence all the other Peers, although their dignities were at first territorial, would in time come to be blended with the Lords of Parliament, and to be considered as sitting in respect of their dignities, which there is some reason to believe was always the case with the dignified Clergy. This idea must, indeed, have been most palatable to themselves, and would, therefore, be cherished by them, as calculated to create a more marked distinction between them and the smaller Barons, who sat only in respect of their lands. No 117.

The eldest sons of Peers, connected as they were with their fathers' dignities would, of course, cease to be ranked as part of the small Barons, *libere tenentes*, or freeholders; and it would be reckoned sufficient, that Parliament was attended by their fathers, who were in immediate possession of the honours, and, of course, would answer for them. In a small tract, written by Chalmers of Ormond, who had been a Lord of Session in the time of Queen Mary, and which was published by him at Paris in the year 1579, there is a remarkable passage, in which he describes the Noblesse of Scotland, and wherein he says, 'Et combien que en parlant ou escrivant precisement de la Noblesse Escossoise, 'on l'entend comprendre seulement ceux dicts Ducs, Comtes, & Seigneurs, 'dicts *my Lords*, avec *leur fils aisnez*, (appelle en Escossois *Masters*,) excepte 'le fils aisne du Comte de Huntly, nomme *my Lord Gordon*, et le fils aisne du 'Comte d'Argil, dit *my Lord Lorne*, toutes fois, leur freres puisnex, et les au-'tres Barrons, avec tous descendus d'iceux, s'ils sont vertueux, et ayent suffi-'samment pour s'entretenir, sont appellez du commun peuple en Escossois '*Noble Gentil-men*, en Francois *Nobles gentils hommes*.' From this it would appear, that, in the time of this author, the *eldest* sons of Peers were classed with the *Noblemen*, and that the younger sons were classed with those Barons who were not Peers.

While the lesser Barons, who held lands immediately of the Crown, were but few in number, and those few were possessed of considerable estates, their occasional attendance for a few days in Parliament would not be felt as a grievous burden; but when, in progress of time, the larger estates came to be split amongst several owners, the burden became more severe. It accordingly appears to have been customary, for many of those who were bound to personal attendance, to name procurators or deputies to act for them; and this practice was, to a certain degree, checked by the statute 1425, cap. 52. which enacted, 'That all Prelates, Erles, Baronnes, and Freehalders of the King within the 'realme, sen they are halden to give presence in the King's Parliament and 'General Council, fra thinefoorth be halden to compeir in proper persone, and 'not be a procuratour, but gif the procuratour alledge there and prove a lauch-'full cause of their absence.'

It was soon afterwards perceived, that, as there was great hardship in compelling the attendance of the lesser Barons from every part of the kingdom, and as it was next to impossible to enforce it, so a meeting composed in that manner would be too numerous for expediting business: An act, therefore,

No 117. passed in 1427, by which the small Barons and free tenants (the old *libere tenentes*) were to be relieved of the burden of attending in Parliament, on condition of their sending two or more wise men from each shire, according to its size; and that all the Commissioners should have costage from those of their respective shires, who owed attendance in Parliament.

It is highly probable, that, in passing this act, James I. who had received his education in England, intended to put the Parliament of Scotland upon the same footing with the English Parliament, and to render the Commons a separate House. This, however, did not take effect, and the statute seems to have been entirely disregarded. The small Barons neglected to elect Commissioners, and were, of course, still bound to give personal attendance. A new act accordingly passed, 1457, c. 75. providing, 'That no freeholder under L. 20 should be constrained to come to Parliament, as for presence, except he were a Baron, or were specially called by the King's officer, or by writ.' And in the reign of James IV. another act passed, 1503, c. 78. relieving all Barons and freeholders, whose estates were within 100 merks of new extent, unless specially written for by the King; but enjoining all those of a higher extent to come to the Parliament, under the pain of the old fine.

Notwithstanding these statutes, the small Barons continued very remiss in their attendance. During the reign of James III. the number of those who went to Parliament never but once exceeded thirty, and was often much less. In the reign of James IV. ten was the highest number; and in some of the Parliaments of that Prince, not one appeared. In the time of James V. we find six or seven, and still fewer during the reign of Mary. These, it is likely, attended in consequence of special writs from the Crown.—See Robertson's History, vol. I. p. 202.—Keith's History, p. 147.

It accordingly appears, that, when the zeal with which the country was, in general, then actuated towards establishing a Reformation in matters of a religious concern, produced a Convention of all the different orders of the State, a doubt was entertained with regard to the lesser Barons having a right to sit in that National Assembly; and, from a letter written by Thomas Randolph to Sir William Cecil, the Minister of Queen Elizabeth, upon the 10th of August 1560, it appears that they, on that occasion, presented a petition to the Lords, the tenor of which sufficiently shows their being apprehensive, that, from the neglect of their predecessors, they might have lost the right they formerly had of sitting in Parliament.—Wight, Appendix, p. 421.

In a subsequent letter, Randolph gives the following account of the success of the petition: 'The matters concluded and past by common consent, on Saturday last, in such solemn sort as the first day they assembled, are these, *first*, That the Barons, according to an old act of Parliament, made in the time of James I. in the year of God 1427, shall have a free voice in Parliament. This passed without contradiction.'

But although a great number of lesser Barons attended this Convention, which was held without the authority of the Sovereign, they seem to have been afterwards as remiss as ever; for, from the year 1560 down to 1587, hardly any of the lesser Barons are to be found attending in Parliament. However they might be roused and excited upon particular conjunctures, yet, in general, and upon ordinary occasions, the lesser Barons found themselves of too little account, to be at the expense of attending an Assembly, where the whole authority and power were exclusively possessed by the great Nobles and Ecclesiastics. No 117.

In the proceedings of Parliaments in ancient times, it is in vain we are to look for either regularity or accuracy. They were assembled only occasionally, when the King found their aid and advice necessary; and although, according to strict feudal principles, the immediate vassals of the Crown were the only proper constituent members; yet this does not seem to have been either uniformly or regularly attended to in practice, and while many neglected altogether giving their attendance, so, on the other hand, the King seems to have exercised a power of calling occasionally others, whose counsel and assistance he wished, although not holding lands of the Crown.

In the rolls which still remain of the Parliaments held in the 15th and 16th centuries, frequent instances occur of persons mentioned there, who could have no right to sit in that Assembly, unless in consequence of having been specially called by the King. Thus Crawford, in his Lives of the Officers of State, in speaking of Bishop Elphinston, in the reign of James III. says, p. 48. 'Upon 'the reputation of his parts and learning, the King called him to his Great 'Council the Parliament, where we frequently find him a sitting Member, 'sure not in the character of his office, as Official of Glasgow or of Lothian, 'but allenarly by virtue of the King's calling him there by his Royal letter 'or summons: A prerogative we see the Crown reserved to itself, when King 'James II. thought fit, in the case of the Barons, to dispense with their attendance in Parliament. That the Sovereign exerted this power of calling what 'Barons or inferior Clergymen he pleased to the Parliament, manifestly appears from our public archives throughout the whole of the reign of James 'III. and James IV.; for there we find not only Bishops, Abbots, Priors, Earls, 'Barons, and the *Commissarii Burgorum*, as the burroughs are called, sitting 'and voting in Parliaments, but even Gentlemen who never pretended to a 'peerage; yea, and sometimes, as in the present case, the Official of Glasgow, 'sometimes the Dean, and the Archdeacon of that See, and such other inferior 'Clergymen, who cannot be imagined came there upon any consideration 'whatsoever, but that the King called them there as wise and learned men, 'whom he knew were well qualified to give him advice upon any juncture in 'the Grand Council of the nation.'

From finding, therefore, certain persons mentioned in the rolls of Parliament, we can by no means with any certainty conclude, that they sat there in their

No 117. own right, and in virtue of their holding lands as vassals of the Crown. The Noble complainer, notwithstanding all his researches, has hitherto failed to bring clear and positive proof, that such eldest sons did, at any period, sit in the Parliament of Scotland, in virtue of their being possessed of lands held of the Crown, and of their making part of the freeholders, or *libere tenentes*. He does not pretend to have discovered any eldest sons of Peers, (to all of whom, in ancient times, the appellation of *Master* was indiscriminately given, as it was likewise even to all their presumptive heirs, whether by blood or destination,) in the rolls of Parliament prior to the year 1478. His Lordship has, indeed, found about thirty-two or thirty-three Masters in the rolls of Parliament, (that are now extant,) between that period and the year 1587, when the representation of the lesser Barons, or freeholders, was established; but as no evidence has been produced to show, that more of these Masters than twelve, or thirteen at most, were possessed of lands held by them of the Crown, so it does not appear, that they ever sat in the character of freeholders, or lesser Barons.

On the contrary, there are strong reasons to presume, that this was not the case; for, 1*st*, These Masters are in no one instance described by their lands; whereas the lesser Barons are in the rolls of Parliament uniformly so described. 2*dly*, Some of them might have attended as proxies for their fathers. It is indeed proved by the act 1425, cap. 52. that proxies were allowed even for freeholders. 3*dly*, Their sitting in the character of lesser Barons or Freeholders is inconsistent with what passed at the famous Convention in 1560, as the doubt which then arose respecting the right of the lesser Barons to attend in Parliament, and their petition to be restored to that right, never could have existed, if those Masters, who are to be found in some of the rolls only a few years before, had been understood to have sat in virtue of their lands, and in the character of lesser Barons or Freeholders. Nor is it any answer to this, that other lesser Barons are likewise to be found in the rolls of Parliament. They likewise may have attended in consequence of a special summons from the Crown, which is surely more probable, than that the whole body should know so little of their own rights as to present a petition for the purpose of obtaining an acknowledgement of what they had always enjoyed, and of which they were actually in possession at the time.

The presumption therefore is, that all those Masters who appear in the rolls of Parliament, attended only as proxies, or in consequence of their being called by special writ; and this presumption is strongly confirmed by the constant usage which took place from the time that the representation of counties was established in 1587, down to the period of the Union.

It has been *contended*, That the power of calling by special writ, reserved to the King by the acts of 1457 and 1503, was only meant to apply to those whose constant presence was thus dispensed with, and that it would have been adverse to the idea of Parliament, as well as an insult to the dignity and privileges of

those who sat there, to introduce amongst them any person who was not a tenant *in capite* of the Crown. No 117.

This observation stands however unsupported by evidence of any kind. It ought to be remembered, that, in those days, attendance in Parliament was considered, not as a privilege bestowed upon, but as a burden inherent in, a certain tenure. Why, therefore, presume the King restrained from requiring the assistance of any of his subjects in his Great Council, but those who were possessed of landed property held immediately of the Crown? It is more reasonable to suppose, that his prerogative entitled him to lay that burden upon any person he chose to summon; and it is at least probable, that, in the exercise of this prerogative, he would call upon persons high in point of rank, or of consequence in other respects.

It is no doubt true, that those Masters, who, upon the authority of Randolph's letter to Sir William Cecil, (for there is no other), are said to have attended the Convention of Estates in 1560, could not have been summoned by the Crown, that Convention having assembled without the Royal authority. But laying out of the question, that one of the five Masters, whose names are to be found in the list, (viz. the Master of Lindesay), was not the eldest son of a Peer, it must appear sufficient to observe, that the Convention was called by those who took the lead in the conduct of affairs, in consequence of an article in the treaty of Leith, while the importance of the business then in agitation, would render any person of consequence welcome to a National meeting held independent of the Royal authority. It is accordingly worthy of remark, that Randolph in his letter to Cecil, after giving a particular list of Clergy, Nobles, Peers eldest sons, Commissaries for Burghs, and lesser Barons, adds, 'with 'many other Barons, Freeholders, landed men, but all armour.'

But even supposing that the eldest sons of Peers, as well as every other person holding lands immediately of the Crown, were not only entitled, but bound to attend in Parliament; and further, supposing it true, that they did actually attend in that character down to the year 1587, when the representation of the lesser Barons was established; yet it is an undisputed and incontrovertible fact, that, from that period down to the present day, there is not a single instance to be found, of the eldest son of a Scottish Peer representing either a Scotch county or burgh in Parliament. It cannot be supposed that this could proceed from mere accident. Considering attendance in Parliament as a burden, it must have been natural for the freeholders to impose it upon them, as most able to bear it; and, considering it as a privilege, they would, in all probability be disposed to court it. The fact can therefore only be rationally accounted for, by supposing it to have been understood to be a constitutional point, that they were ineligible, on account of their intimate connection with a higher order in the State, and of which they seem, from the passage above referred to in the work of Chambers of Ormond, to have been understood to make a part.

No 117. In order to assign some reason for the total absence of the eldest sons of Peers from Parliament after the representation of the lesser Barons was established, it was said, that, to be the delegated deputies and hired messengers of such inferior persons, could but ill befit the gallant sons of proud and independent nobles. This however is not altogether consistent with the foundation of the complainer's plea, which rests entirely upon their being bound to attend, by being lesser Barons or Freeholders; the consequence of which must have been, to put it out of their power to refuse that burden, when imposed upon them by the other freeholders. The conclusion drawn from their haughty spirit will, at the same time, appear to be better founded, when applied to a more ancient period, when all the lesser Barons, except those of the smallest estates, were upon the same footing. The eldest sons of Peers might then wish to keep themselves distinguished from an order of men, whom they considered to be greatly their inferiors. On that account they would be unwilling to appear in Parliament, unless in the character of proxies for their fathers, or when summoned by special writ; and hence it came to be understood, that although possessed of lands held immediately of the Crown, they did not belong to the order of freeholders, and therefore were not bound to come to Parliament; the more especially as, after the introduction of personal honours, their fathers were considered to hold their seats by virtue of their dignities, and not of their possessions, as in more remote ages.

That the act 1587 was understood to exclude the eldest sons of Peers from sitting in Parliament, there is also much reason to presume, from the general dissatisfaction which this statute gave to the Peerage. They were sensible that it would have been inconsistent with the form into which Parliament was then moulded, for the King to continue to summon any person by special writ; and they saw that when the load was to be taken off the whole body of the freeholders, and two only were to come from each county, and these two were to be allowed a certain sum for defraying their daily expense, the attendance of the Commons would be more regular and numerous, and of course their own Parliamentary influence would be much diminished. But of this they must have had less apprehension, if it had been understood, that their eldest sons, who were to succeed them in the Peerage, were capable to be chosen Commissioners from shires.

This presumption is farther confirmed by a minute of the Parliament of Scotland, 18th August 1681, containing a letter from Charles II. to the Duke of York; in which, after stating that the county of Kinross had been represented in Parliament until it came almost entirely to belong to two Peers, the Earl of Morton and the Lord Burleigh, his Majesty proceeds as follows: 'But 'that now Sir William Bruce of Balcaskie having acquired the Earl of Mor-'ton's interest, (which is far the greatest part of the shire), and having like-'wise a commission from the rest of the freeholders thereof, doth crave, that he 'may represent that shire in Parliament, according to former custom founded 'upon the said act and records: And we being well satisfied with the dutiful

'deference shown to us by the said Sir William in the prosecution of that his 'right, it is now our will and pleasure, and we do hereby authorise and require you, 'to cause him to be enrolled and called in this Parliament, to the effect the said 'shire may enjoy its old privilege of being represented in Parliament by its Barons.' No 117.

If the eldest son of a Peer had been capable of representing the Commons in Parliament, it can scarcely be doubted, that one or both the noble Lords who divided the shire of Kinross between them, would from time to time have taken care that their eldest sons should have lands of 40s. of old extent, in order to represent the county; for, though confidential conveyances were at that time unknown, a father could have been under no difficulty, in such circumstances, to divest himself of a part of his estate in favour of his eldest son and presumptive heir.

It is in vain the complainer resorts to the different statutes relative to the election of Commissioners from shires, to shew, that under the words Freeholders, Heritors, &c. occurring in these statutes, the eldest sons of Peers who were infeft in lands held in chief of the Crown, must have been included. Custom is the best interpreter of the words made use of in an act of Parliament, and under such a guide we must with certainty discover, Whether a particular expression, or term, has been adopted in the view of including all who can possibly be comprehended under it, or only in a more limited sense. Had any usage prevailed of eldest sons of Peers representing counties in the Parliament of Scotland subsequent to the act 1587, it might have been more difficult to maintain that they were not included under the general terms of Freeholders, Heritors, Liferenters, Wadsetters, &c. that appear in these statutes. There is however good reason to presume that the legislature, in passing these statutes, had no idea of including them under these general terms; and it is scarcely necessary to add, that some of these statutes are very far from being correct and accurate in the form of expression.

Even, therefore, if the present question was left to rest upon the statute-law, and upon the usage, from the year 1587 down to the period of the Union, it would be sufficiently clear. But farther, it does not even rest here; for every doubt is removed by two explicit determinations of the Parliament of Scotland itself, the one in the case of the eldest son of the Viscount of Tarbat in 1685, and the other in the case of Lord Livingston in 1689.

Sir George Mackenzie was created Viscount of Tarbat, by letters-patent, bearing date the 15th of April 1685. His eldest son had been returned one of the Commissioners for the county of Ross; but it was determined that he was now incapable of sitting, and the following resolution appears in the records. April 23d 1685. 'In respect the Viscount of Tarbat's eldest son, elected one 'of the Commissioners for the shire of Ross, by reason that his father is nobi-'litate, cannot now represent that shire, warrant was given to the freeholders 'of that shire to meet and elect another person in his place.' Accordingly his name does not appear in the roll; and the Commissioners for the shire of Ross are Sir George Munro of Culcairn, and Sir Donald Bayn of Tulloch.

No 117. Those who composed the Parliament of Scotland in 1685, must have been at least as well qualified to judge of a question regarding its constitution, as even the most enlightened antiquaries of the present age. But the resolution above inserted, with regard to the incapacity of the eldest son of the Viscount of Tarbat, shows it to have been then a settled point, that the eldest sons of Peers were ineligible. This resolution must also have the greater weight, when it is considered, that it was not formed in a controverted election, which, according to the practice, would have gone before a Committee appointed to try such cases, but was taken up by Parliament itself. And it is in vain the complainer attempts to derogate from the force of this precedent, either by abusing the Viscount of Tarbat, as the defender of the proceedings that took place in the preceding Parliament, when the Duke of York acted as Commissioner for his Royal Brother; or, by conjecturing, that, as it was not a time for urging unpopular topics, especially in the case of a son of an obnoxious minister, the Viscount chose rather to withdraw his son from Parliament, than to try the question. It is well known, that the Viscount of Tarbat stood at that time high in favour with King James; and although the arbitrary measures that were afterwards adopted by that Monarch, soon proved ruinous to his family, few Princes were more popular at the time of their succession. It is therefore impossible to believe that the Viscount of Tarbat could have any inducement for withdrawing his son from Parliament on this occasion, or that the seat of the son would have been vacated in this manner, if it had not been understood to be perfectly clear, that the ennoblement of the father did, *ipso facto*, disqualify him from holding it.

On occasion of the memorable Convention of Estates, which convened in 1689, to settle the government of the kingdom, an attempt was made by Lord Livingston, the eldest son of a Peer, to be chosen as the Representative of the Burgh of Linlithgow. It accordingly appears, that after William Higgins had been chosen and declared duly elected, his Lordship prevailed with the common clerk of that burgh to call a new meeting for election, and to return him also; but the merits of the election were decided in favour of Higgins. And it is remarkable, that although he omitted to state his antagonist's disqualification, contenting himself with averring that he had a majority of legal votes in his favour, and that the clerk had been guilty of a gross irregularity, not only in admitting bad votes for the Noble Lord, but also in holding a second election, after Higgins had been chosen to represent the burgh; yet the Committee of Controverted Elections, unwilling to allow the ineligibility of the eldest son of a Peer to pass unnoticed, came to the following resolution.—March 18. 1689. 'In the controverted elections for the Burgh of Linlithgow, in favour of the 'Lord Livingston and William Higgins, it is the opinion of the Committee, 'that William Higgins's petition should be preferred; 1*st*, In regard of the 'Lord Livingston's incapacity to represent a burgh, being the eldest son of a 'Peer; and 2*dly*, In respect William Higgins was more legally and formally 'elected by the plurality of the votes of the Burgesses.' This resolution was approved of, and signed the same day. 'The Meeting of the Estates having

' heard and considered the report of the Committee, they approve of the same ' in both heads thereof.' No 117.

The complainer has in vain attempted to invalidate the force of this resolution. The circumstance on which he chiefly founds, namely, that the memorial or case for Mr Higgins, takes not the smallest notice of the ineligibility of Lord Livingston, as the eldest son of a Peer, serves only to show, that the Committee who tried the question, were too attentive to the constitution, to allow the Noble Lord's ineligibility to pass unnoticed, even in a case where there were other good grounds for deciding in favour of the other candidate.

These two precedents are most precisely in point, and clearly shew, that by the constitution of the Scottish Parliament, the eldest son of a Peer was held ineligible for either a county or a borough. And if this be the case, there is an end of the question; it having been enacted by the act 1707, cap. 8. which was declared to be as valid as if it were a part of, and engrossed in the treaty of Union, ' That none shall be capable to elect or to 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 Commissioners for shires or burghs to the Parliament of ' Scotland.'

The noble complainer has endeavoured to derive some aid from the minutes of the Parliament of Scotland upon that occasion. From these it appears, that, 24th January 1707, it was proposed that ' Thirty shall be the number of the ' Barons, and fifteen the number of the burghs, to represent this part of the ' united kingdom in the House of Commons in Great Britain; and that no Peer, ' nor the eldest son of any Peer, can be chosen to represent either shire or burgh ' in this part of the united kingdom, in the said House of Commons.' The question was accordingly put, ' If the number shall be thirty for the Barons, ' and fifteen for the burghs?' which was carried.

The House then adjourned till the 27th of the month; and the second part of the clause relative to Peers and their eldest sons, being again read, it appears from the minutes, that, after a debate thereon, another clause was offered in these terms. ' Declaring always, That none shall elect nor be elected to repre- ' sent a shire or burgh in the Parliament of Great Britain, from this part of the ' united kingdom, except such as are capable, by the laws of this kingdom, to ' elect or to be elected as Commissioners for shire or burgh to the said Parlia- ' ment.' And after further reasoning thereon, the vote was stated, ' Approve ' of the first clause, or of the second.' Before voting, however, it was agreed that the votes should be marked, and that a list of the members' names, as they voted, be printed and recorded; and the Lord Chancellor was allowed to have his name printed and recorded amongst those who voted for the second clause. Then the vote was put, ' Approve of the first clause or second;' and it was carried, ' Second.'

From all this, the complainer is pleased to suppose, that the question with regard to the eligibility of the eldest sons of Peers, was held to be at least doubt-

No 117. ful; but the smallest attention to what generally passes in popular assemblies, will show, that there is nothing solid in the observation. The first motion, That Peers and their eldest sons were incapable to elect or be elected, would no doubt have been more satisfactory than the second, which, without any express determination, left matters as they stood: But it does not follow, that they were then deemed capable of electing, or being elected; on the contrary, the proposers of the first motion must have expected to carry it. Indeed, it was only lost by a majority of eighty-six to seventy-two, while the Peers did not venture to put the direct question, That they themselves, or their eldest sons, were eligible. Each party, as is uniformly the case in such assemblies, wished to carry the motion most decisively in their own favour: And there is a palpable defect in the inferences drawn by the complainer; for, if they prove any thing at all, they prove too much.

Every argument, which, from the double state of the question, has been drawn in favour of the eldest sons of Peers, is equally applicable to their fathers; and yet it will not be said, that, at that time of day, there was any idea, that, in the Parliament of Scotland, Peers were entitled to sit as the Representatives of the Commons. Besides, the first motion was only directed to a particular object, and must have been followed up by other resolutions, in order to settle who were qualified to elect or be elected. It was therefore more proper to form one general resolution, which, in a few words, would settle the whole at once; and it was so framed as to leave no doubt. Peers might likewise be averse to declare their eldest sons expressly excluded, lest it might prove an exomple for excluding them from seats in England.

But farther, could there have remained any doubt as to the ineligibility of the eldest sons of Peers to represent a Scotch county or burgh, it is removed by the resolutions of the House of Commons, in the cases of Lord Haddo and other persons in the same situation, in the year 1708. It is a mistake to suppose that these resolutions were carried in any hasty or precipitant manner. In a book printed in the year 1709, and entitled 'The History of the Reign of Queen 'Anne, digested into Annals,' it is mentioned, that Mr Serjeant Pratt, Mr Pnipps, Mr Raymond, and Mr Lutwich, were heard as counsel; and it gives an abstract of the arguments which were urged. In particular, the resolutions of the Parliament of Scotland respecting the Master of Tarbat in 1685, and the Lord Livingston in 1689, were much relied on; so that there can be no pretence for saying, that the House of Commons proceeded without the fullest information, and the most attentive consideration of the case.

In that collection, which goes under the name of Lord Somers' Tracts, vol. 15. x. 5. p. 76. there is a paper entitled, 'The Case of the Commons of that part 'of Great Britain formerly called Scotland, with respect to the Election of their 'Representatives and Members to Parliament.' It would seem to have been a paper distributed at the time of the question before the House of Commons in 1708. It states, *verbatim*, another paper then distributed, in support of the

right of the eldest sons of Peers, and then gives answers to every thing that had been there urged. No 117.

In the paper for the eldest sons of Peers, much weight had been laid upon the vote of the Parliament of Scotland in 1707, which has been above mentioned; and, in answer to this, it is, amongst other things, said, "But, in the "next place, it is to be remembered, that, in the Parliament of Scotland, held "in the year 1690, 'though the Peers did press very earnestly to have it de-"clared that the eldest sons might be capable to elect and be elected at that "time,' when there was an additional representation granted to several shires in "Scotland, 'they could not prevail;' on the contrary, the act passed without "any such declaration." The truth of this important fact, indeed, rests entirely upon the authority of the paper referred to; but the assertion, unless true, could scarcely have been hazarded in the year 1708, when the transactions of so recent a period as the year 1690, must have been fresh in remembrance.

In short, as the resolutions of the House of Commons in 1708, went the length of declaring, that the eldest sons of Peers of Scotland were incapable, by the laws of Scotland at the time of the Union, to elect, or be elected, as Commissioners for shires or burghs to the Parliament of Scotland, and therefore, by the treaty of the Union, were incapable to elect or be elected to represent any shire or burgh in Scotland, to sit in the House of Commons of Great Britain, it is humbly conceived, that, independent of every other consideration, these resolutions must afford an effectual bar to the complainer's claim to be admitted to the roll of freeholders of any county in Scotland; more especially, as, by the act of 2d George III. cap. 24. it is expressly enacted, '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, concerning any county, 'city, burgh, cinqueport, or place, shall be final to all intents and purposes 'whatsoever, any usage to the contrary notwithstanding.'

The matter has accordingly ever since been understood to be completely settled; and it is so stated by every author who has since written upon this branch of the law of Scotland; by Forbes, p. 21.; by Spottiswoode, p. 49, and 59.; by Lord Bankton, b. 4. tit. 1. § 41.; and by Mr Wight, p. 269. No attempt has been made since the year 1708, by the eldest son of any Peer of Scotland, to represent in Parliament the Commons of that part of the united kingdom; and in every instance that has occurred of a representative, either of a county or of a district of burghs in Scotland, becoming the eldest son of a Scottish Peer, his seat has been understood to be vacated, and a writ has issued for the election of a new Member of the House of Commons in his place. The attempt, therefore, on the part of the complainer, to revive a claim in behalf of himself and others of his order, to a right which they confessedly have not enjoyed for upwards of two centuries, and which it is not proved they ever enjoyed, will meet with no countenance, especially when in direct opposition to repeated resolutions of the whole body of the Scottish Parliament, and of the British House of Commons.

No 117. The interlocutor of the Court, 25th January 1792, was in these words:

'THE LORDS having resumed the consideration of the petition and complaint of the Right Honourable Bazil William Douglas, commonly called Lord Daer; and having advised the same, with the answers thereto by the Honourable Keith Stewart, and others, freeholders of the county of Wigton, replies for the complainer, duplies for the respondents, and writings produced; and having heard parties procurators upon the whole, they sustain the objection to the complainer's claim to be enrolled; find the freeholders of the county of Wigton did right in refusing to enrol him; and therefore dismiss the complaint, assoilzie the respondent, and decern: Find the complainer liable to the respondents in the statutory penalty of L. 30 Sterling, and decern against him therefor: Find him also liable in full costs of suit, and appoint an account thereof to be given in to Court.'

For Lord Daer, *Dean of Faculty, Solicitor General, Cullen, Morthland, et Cha. Hope.*
For the Freeholders, *Wight, Geo. Ferguson, Montgomery, et Bushby Maitland.* Clerk, *Hume.*

C. *Fac. Col.* (APPENDIX.) *No* 4. *p.* 16.

*** This case was appealed:

THE House of Lords, 26th March 1793, 'ORDERED and ADJUDGED, That the appeal be dismissed, and the interlocutors complained of be affirmed.'

1796. *February* 24. MACKAY *against* HOUSTON.

No 118.

IN the county of Sutherland, where enrolment is competent on lands held of a subject superior, the freeholder having refused to enrol a claimant, in respect his charter had been granted by a factor *loco tutoris*, for the superior, who was fatuous; it was *urged*, That such act was beyond the ordinary powers of a factor, and moreover his nomination by the Court of Session had not been produced.—THE LORDS, on a complaint, ordered the claimant to be enrolled.—*See* APPENDIX.

Fol. Dic. v. 3. *p.* 417.

1802. *March* 9.

Honourable GEORGE ABERCROMBY *against* SPEIRS, and other Freeholder of Stirling.

No 119.
The eldest son of a British Peer may be enrolled among the freeholders of Scotland.

THE freeholders of the county of Stirling having refused to enrol the Honourable George Abercromby of Tullibody, advocate, because he was the eldest son of a British Peeress, he presented a complaint to the Court of Session, and

Pleaded; From the earliest periods of the Scottish Parliament to the reign of James VI. it appears, that every vassal of the Crown was entitled to a seat