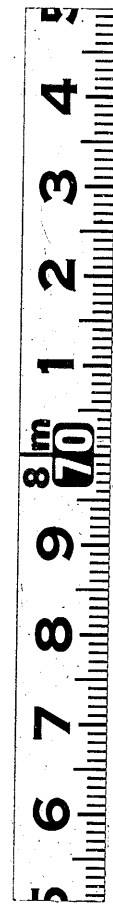


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AN
E S S A Y
UPON
FEUDAL HOLDINGS,
SUPERIORITIES, and
Hereditary Jurisdictions, in
S C O T L A N D.

S H E W I N G,

- I. The Nature of Feudal Holdings, Superiorities and Jurisdictions, with the Casualties and Forfeitures incident thereto.
- II. The Errors and gross Misrepresentations, touching the same, in a late Pamphlet, entitled, *Superiorities display'd, or Scotland's Grievance on account of Holdings and Hereditary Jurisdictions, &c.*
- III. That these Holdings, Superiorities and Jurisdictions have not been any of the Causes of the Rebellions 1715, or 1745.
- IV. That the infringing the same may be dangerous to our happy Constitution.

Non cuiquam hominum jus suum detrahendum est.

L. 2. ff. DE HIS QUI SUI VEL AL.

L O N D O N :

Printed for R. LEE, at the *Dove* in *Fleet-Street*. M. DCC. XLVII.

A N

ESSAY upon *Feudal Holdings, Superiorities, and hereditary Jurisdictions* in SCOTLAND, &c.

It is suggested in the Advertisement prefixed to the Pamphlet, intituled, *Superiorities displayed, &c.* which gives Occasion to this Essay, "That the valuable Performance was published in the Year 1716, by a Gentleman of great Knowledge, touching Holdings and Jurisdictions: And that a second Edition would not be unacceptable after the late Rebellion, when the Parliament are to take that important Affair under Deliberation." That it was not wrote in the Year 1716, is evident from the Reference to the Act of King George I. who could not be so designed till after his present Majesty's Accession to the Crown; and the Author's Observation (a) that the Act was not complied with, could not be made till after a Tract of Years.

Be that as it will, I who own myself a Scotsman, but at the same Time a true Briton, shall show in the following Sheets, that the Author of

(a) Page 8.

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that Performance has fallen into many Errors touching our Holdings and Jurisdictions; and if he was a Person of Knowledge in them, he has not been endued with an Attachment to Truth and Integrity, he reproaches our Law in many Particulars, and paints it in the most odious Colours; it must therefore be agreeable to all Lovers of their Country, to have these Aspersions wiped off, and our Law, touching these Matters, put in its true Light, which I shall do in this Essay. It must likewise give Pleasure to all true Britons, that Justice be done their Fellow-subjects of North Britain.

I shall first describe the Nature of our Holdings and Jurisdictions, the Casualties and Forfeitures incident thereto in a summary Way, so far as the present Occasion requires; and then take notice of the diverse, gross, calumnious Assertions of our Author touching the same. And, in the third Place, I shall shew that they have not given Occasion to the unnatural Rebellions that commenced in the Highlands; and consequently, that the abolishing them cannot be a reasonable or necessary Mean to prevent the like in Time coming. And, in the last Place, I shall conclude with showing, that they are reserved to us, in such Manner, by the Articles of Union, that they cannot be infringed, without Danger to our happy Constitution.

S E C-

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SECTION I.

The Nature of Feudal Holdings and Jurisdictions briefly explained, with the Casualties and Forfeitures incident thereto.

A Feudal Holding, or Tenure of Lands and Tenements, is the Manner whereby the Vassal or Tenant holds the Tenements of his Lord or Superior. The Superior remains still vested and seized of the Lands, as of Fee, and his Right is deemed a Fee, in Questions with all others, except the Vassal, over whose Fee he has an inherent Jurisdiction, and diverse Casualties, according to the respective Kinds of Holdings.

The Superiority including this Jurisdiction, and these Casualties, is called *dominium directum*, and is as much the Property of the Superior, as the *dominium utile*, or a permanent Right to the yearly Fruits and Profits of the Subject is the Vassal's, and the Vassal's Right is subordinate to the Superior's reserved Right; so that any Invasion upon the Superior's Right of Superiority, is as much an Invasion upon his Property, as upon the Vassal's, when the Rents and Profits of the Lands are forcibly seized from him, and he dispossessed.

The different Kinds of Holding necessary to be noticed in the present Case, are only Ward, Feu and Blench: For, as to Burgage Holdings, whereby Persons hold Burgal Tenements of the Crown,

Crown for Performance of Watching and Warding within Royal Burrows, and Holdings in Mortification of Lands to Colleges, or other Corporations; they afford no Casualties, and are not exclaimed against by our Author.

Holdings in Ward, so called from the Wardship of the Heir, the principal Casualty are likewise termed Military Fiefs and Holdings by Knight Service; and are *these, by which the Vassal is liable to the Superior in Services, used and wont at large, servitia debita et consueta*; of old this was understood chiefly to be Military Service to assist the Lord in his Wars. And as to such Holdings of the King, the Vassals were bound to attend the King's Host as oft as called upon; and when of Subject Superiors, to relieve the Superiors of Part of the Military Service to the Crown, by attending the King's Host likewise; for still the Superior, notwithstanding the Fee is settled in the Sub-vassal, remains the Crown's Vassal, and the Sub-vassal is bound to serve the King his liege Lord paramount, in Preference to his immediate Over-lord: Attendance and other Services are likewise incumbent on Ward Vassals towards their Superiors, according to Use and Wont.

Holdings in Feu or Feu-farm are these, whereby the Superior has a reserved Rent or yearly Duty issuing out of the Lands, and resemble perpetual Leases; or what in the Civil Law was called *jus emphyteuticum*.

Blench

Blench Holdings are those, whereby the Vassal is only liable in an elusory Duty of a Penny, a Rose, or the like, if 'tis yearly askt, *si petatur tantum*; this is only for Form's sake, in Recognizance of the Superior's Jurisdiction. The Prestation, incumbent on the Vassal, is called the *Reddendo*, from the first Word of the Clause in the Charter to that Purpose, as the Clause, which discriminates the Manner of Holding, is called the *Tenendas*, from the first Word of it.

Ward Holdings or Military Fiefs were always reputed the most honourable, as they were the most ancient; but Feu and Blench Holdings are more beneficial to the Vassals, and have some Resemblance to Holdings in Soccage in *England*, and came to be in use with us, when Feudal Rights degenerated from their original State, and approached nearer to the Nature of allodial Rights.

But still in all these Kinds of Holdings, the reserved Right of Superiority implies certain Casualties, according to the different Contingencies befalling the Fee. Upon the Vassal's Death the Fief opens to the Superior, and is in his Hands; and to relieve it, the Heir is liable to a Casualty, termed *Relief*: This is a Year's Rent, according to the favourable Construction, in Ward and Blench Holdings, *viz.* the new Retour-duty or Extent, so called, in Contradistinction to the old Retour-duty or Extent. This old Retour-duty was made out in ancient Times;

but

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but thereafter there was a new Survey of the Lands in *Scotland*, and the yearly Value then ascertained was called the new Retour-duty.

This Survey was made some Centuries ago (*a*); and the Duty thence arising retains still the Name of the new Retour-duty and Extent, which it obtained at first, and which is the Rule betwixt Superior and Vassal as to the Relief, and in some Fiefs is not the fortieth Part of the real Rent at present, and in none, I believe, exceeds the twentieth Part; so that it is but a small Consideration to the Superior for receiving the Heir in those Holdings; and in Feu-farms only a Year's Feu-duty extraordinary is prestable in Name of Relief, and that only where it is expressly stipulated in the Charter, which, for most Part, is the Case.

If the Heir of the Vassal lies out unentered after the Year, whereby the Fief remains still in the Superior's Hands, he is intitled to the new retoured Duty during the Non-entry; and if he contumaciously lies out unentered, after the Superior interpellates him by a Declarator of Non-entry before the Court of Session, the full Rents and Profits of the Fief belong to the Superior, as a Penalty for his Contempt.

'Tis plain that the Vassal suffers this Hardship by his own Fault, for the Superior is bound to enter the Heir on Payment of the Relief; and if he refuses, the next Superior may be compelled

(a) Par. 1474. C. 55.

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pelled to receive him, and the immediate Superior, as a Penalty upon his Refusal, loses the Superiority during his Life.

Nor can the Creditors suffer by the Heirs lying out unentered; for they may lead Adjudications of the Estate upon a special Charge against the Heir to enter therein, and thereupon oblige the Superior to receive them as Vassals in the Fief; so that the Lands are no longer in Non-entry as to their Interest.

The next common Casualty of all Holdings is, the Liferent Escheat of the Vassal; for if the Vassal is charged with Horning (which is a Writ in the King's Name) to pay a Debt, and does it not within the Days of the Charge, he may be denounced the King's Rebel. This being done at the Market-Cross of the Head-Burrow of the County where he resides, and the Denunciation duly recorded, all his Moveables fall as Escheat to the Crown. The like holds, if one is cited in a criminal Action to abide Trial, and does not appear at the Diet prefixed, he is thereon denounced, and his Escheat falls to the King.

These Letters or Writs are termed Hornings, from three Blasts of a Horn used by the Messenger at the Denunciation, or Proclamation of the Person Rebel to the King, for not obtemperating his Majesty's Command in the Writ.

This single Escheat is always burdened with the Debt in the Horning, whereon it proceeds;

B

and

and likeways all Creditors who, for prior Debts, affect the Subjects that fall under it, before the Escheat is declared in a Suit before the Lords of Session for that Purpose, are preferable to the Donatary of the Escheat; nor do the Barons of Exchequer, as Administrators for the Crown, almost ever make such Gifts to others than lawful Creditors, for Payment of their Debts; so that there is no Hardship in this Executorial.

And further, such Denunciations for Civil Causes are commonly used at the Market-Cross of *Edinburgh*, which have no other Effect against Persons living without that County, than to serve as Warrants for a Caption to be raised thereon against the Party.

If the Person in Civil Rebellion (as one denounced orderly to the Horn is said to be) continue under it for Year and Day, after the Denunciation at the Market-Cross of the Head-Burrow, his Liferent Escheat falls to the respective Superiors of whom he holds his Lands: By this the Superior, his Vassal being deemed civilly dead, may, after obtaining Declarator of the Escheat, enter to the Possession of the Lands during the Vassal's Life.

But the Liferent Escheat being no natural Casualty of the Fief, but only arising from the Statute (a), falls to the Superior, with the Burden of all the Debts and Deeds affecting the Lands, whether consented to by the Superior

OR

(a) Par. 1535. C. 32.

or not: And Creditors may likeways perfect their Securities upon the Lands within Year and Day, after the Denunciation, termed *curfus rebellionis*; wherefore, if the Creditors suffer Damage by this Casualty, it is their Fault, that did not take Care of their own Security, *et jura vigilantibus scripta sunt*.

These Effects of a Civil Rebellion, with us, are not so grievous in the worst View, as of an Outlawry in *England*, the Party, who forfeits the Protection of the Law, might, in ancient Times, have been killed with Impunity by any Person; he was said *gerere caput lupinum*, and might be destroyed as a Wolf (a); and still the Effects of it are severe, especially for not comparing to take Trial in criminal Cases; the Outlawry has the same Effect, as a Conviction and Sentence, till it is reversed.

The Casualties, peculiarly incident to Ward Holdings, are two; 1st, The Wardship of the Lands during the Heir's Nonage; This, of old, carried the Wardship of the Person of the Heir, and excluded all others from the Guardianship; but that has been in Difuse more than a Century: It however still carries the Rents and Profits of the Fief during the Heir's Minority, and a Year's Rent farther for the Relief, which, in this Case, is extended to a full Year's Rent.

But this is with the Burden of a Terce, or Liferent of the Third of the Rents of the Lands

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(a) Bract. Tract. 21. Cap. 11.

to the Widow, and of all the Debts and Deeds of the Vassal consented to by the Superior; and it is the Creditors own Fault, if they did not obtain the Superior's Consent, which, upon Adjudications, he is bound to give, by entering them upon Payment of a Year's Rent: It is likewise burdened with a reasonable Consideration to the Heir for his Sustenance and Alimony, and the Overplus of the Rents and Profits of the Fief are justly allowed to the Superior, in order to provide one, in place of the minor Vassal, to perform the Services till he come of Age, and is capable to do it.

The other Casualty, incident to Ward Holdings, is the Avail or Value of the Marriage of the Heir; for if the Heir was not married in the Ancestor's Time, he is bound to take the Superior's Consent to his Marriage; and if he does not, is subjected to two Years Rent of his Estate, to which the Avail of the Marriage is by Custom limited; and if he marries contrary to the Superior's Mind, the double Avail is due, which is valued at a Year's Rent more.

If the Vassal holds more Fiefs of different Superiors, the eldest, or he of whom his Ancestors held the first Fief, is preferred to this Casualty; and if he held any of the King or Prince, they are preferred to all Subject Superiors.

The King taxes this Casualty, and that of the Wardship to small Sums, exigible in place of these

these Casualties, when they are incurr'd; nor does his Majesty, or the Prince, ordinarily gift these Casualties, unless upon extraordinary Occasions, to Creditors, or perhaps for the Behoof of younger Children, when they happen to be unprovided. In such Case, the King, who is the common Father of his Subjects, exerts his Royal Prerogative for their Good, and thereby supplies the Neglect or Omission of the natural Parents.

If it shall happen that one holds a small Fief of a Subject, and none of the King or Prince, it may seem a Hardship that the Heir, on Account of this Casualty, shall be subjected to two or three Years Rent of his whole Estate, which perhaps exceeds the Value of the Ward Fief: But then he has this Remedy, that he needs not concern himself with the Ward Fief; but suffer the Superior to evict it for satisfying this Casualty; for 'tis only the Heir's entering to the Fief that subjects him personally; but the Superior has a real Action for pointing or distraining the Ground for the Avail, as ascertained by Decree of the Court of Session, whether the Heir enter or not.

By the Feudal Contract, the Vassal comes under the Obligation of Gratitude; and therefore, upon Commission of certain Facts therewith inconsistent, called *Feudal Delinquencies*. he forfeits the Fee to the Superior; and, upon his obtaining a Decree of Declarator against the Vassal, the Fee opens to him free of all the Debts

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Debts and Deeds of the Vassal not consented to by the Superior, or secured by proper Diligence, two of these Delinquencies are common to all Holdings, *viz.* *Disclamation* and *Purpresture*, and one peculiar to Ward-holdings, specially termed *Recognition*, which, in a larger Acceptation, is comprehensive of all three, because the Fee recognosces and returns thereon to the Superior, and opens to him.

Disclamation is where the Vassal wilfully takes Infestment from another than his lawful Superior, or, in a formal Manner, disclaims his Superior's Right; this is an ungrateful Act in the Vassal, throwing off his Duty, and, in Effect, withdrawing himself from the Fidelity he owes the Superior, according to the original State of Fiefs; and therefore is justly punishable by a Forfeiture of the Fief; but any justifiable Excuse, or probable Ignorance, will save the Vassal from that severe Penalty.

The other common Feudal Delinquency, whereby the Fee opens and returns to the Superior, is *Purpresture* or *Purprison*; this happens when the Vassal encroaches upon the Superior's proper Lands, and attempts to appropriate the same, by enclosing them with his own. This is an Act of high Insolence and Ingratitude, to attempt to deprive the Superior of his Lands, when, at the same Time, the Vassal owes his own Property to the Superior; and therefore this justly infers a Forfeiture of the Fief to the Superior.

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Superior: But, at the same Time, it requires a deliberate and wilful Encroachment to infer it; and any probable Ignorance will afford an Excuse to the Vassal, and free him from the Penalty.

The Feudal Delinquency peculiar to Ward-holdings, is that, which in a special Sense is termed *Recognition*: It is incurred, when the Vassal aliens more than the Half of his Lands holden of the Superior without his Consent: By this he is presumed to render himself unfit to attend the Service of his Superior, and therefore the Fief returns to the Superior, that he may find a Vassal to serve him: If these Parcels of the Fee are confirmed by the Superior, or are aliened with his Consent, they are safe, and 'tis the Fault of the Purchasers that they did not obtain it, or by adjudging in Implement, compel the Superior to receive them, which would entirely secure them from the Effect of the Recognition that might be incurred, by the Vassal's alienating more than the Half.

All these Feudal Delinquencies come under the Name of *Recognition*, as already said; and therefore, tho' the Superior should refuse to confirm those Rights, yet these interested in them may use Inhibition thereon, which will secure them against the Effect of Recognition, by subsequent Alienations holden base, *i. e.* of the Vassal the Granter, as likeways may personal Cre-

Creditors (*a*); so that these Feudal Delinquencies cannot be prejudicial to Purchasers or Creditors that are attentive to their own Interest.

Thus I have shown the Nature of Superiorities, their Casualties, and the Delinquencies whereby the Fief may open to the Superior. I shall now proceed to the Jurisdictions inherent to them; and in the *first* Place, as above hinted, every Superiority implies a Jurisdiction in every Fief over the Possessors for the Rents; but there is great Difference of Jurisdictions, the lowest is that whereby the Heritor or Landlord may pursue, and give Decrees by his Baillie for the Rent, which every Vassal or Proprietor is vested with.

The next Degree of Jurisdiction, is that which includes both a Civil and Criminal Cognizance. The lowest Criminal Jurisdiction is what we call for Battery and Bloodwits, *viz.* Offences, whereby a Party is beaten or Blood-drawn of him, but no greater Harm done; and this is implied in all Baronies: But if the Erection of the Barony contain a Power of Pit and Gallows, it imports a Jurisdiction in ordinary capital Cases, but not in the excepted Crimes, which go under the Name of the *Four Pleas of the Crown*, *viz.* Murder, Robbery, Rape, and wilful Fire raising. It is so called, from the Manner of Execution of Criminals, *viz.* by hanging the Men upon the Gallows or Gibbet, and drown-

(*a*) Parl. 1686. C. 16.

ing the Women, sentenced in a capital Crime, in a Pit, it not being thought decent of old to hang them.

The Barons of old with us were Lords of Parliament (*a*), but the small Barons were at first indulged a Dispensation from attending in Person at Parliament, and that they might appear by their Commissioner (*b*). But at last this Privilege was turned into a Disability, so as they could not claim a Seat in Parliament, but behoved to content themselves with a Representation by their Commissioner (*c*), so that they were only intitled to vote in the Election of a Commissioner or Knight from the Shire, or of being elected; and thus they had no other Privilege than any Freeholder of the Shire, and this is their Condition at this Day. But the great Barons, *i. e.* these who had Lands to the Value of 20 *l.* of old Extent, or 100 Merks of the new Extent, continued to be Members of Parliament (*d*); and many of our ancient Lords have no other Title to capacitate them as Peers, than their Baronies, which being once established to them, they and their Heirs are Peers equal to those that have Patents of Peerage.

Hence it is, that Lords of Parliament, Viscounts, Earls, Marquisses and Dukes, have no higher Jurisdiction than that of Barons; for

C truly

(*a*) Parl. 1425. C. 52. (*b*) Parl. 1427. C. 10. Parl. 1503. C. 78. (*c*) Parl. 1587. C. 114. (*d*) Parl. 1457. C. 75. Parl. 1503. C. 78.

truly the Barons originally were Peers, *pares curiæ*, composing the King's supreme Court of Parliament, tho' at last their Privilege, as to the greatest Part of them, dwindled, as above, into a Right of Representation, as at this Day.

But the Jurisdiction of a Regality is much higher than that of a Barony, and the Person vested with it, whether Peer or Commoner, has a Civil Jurisdiction within the Bounds of the Regality, equal to that of a Sheriff, and a Criminal Jurisdiction superior thereto; for he can judge by his Baillie, in the foresaid *four Pleas of the Crown*, to which the Sheriff is not competent.

They are called Regalities, because they have Royal Liberties, the *Regalia minora*, annexed to them; however their Privileges are not equal to those of a *County Palatine in England*; for their Sentences in Civil Cases are subject to the Review of the Lords of Session, and in Criminal, regularly to the Court of Justiciary; and that the Party lesed by them, in Criminal Trials, may have Opportunity of Redress, Thirty Days are allowed before Execution of the Sentence on this Side *Forth*, and Forty on the other. The Royal Jurisdiction competent to Counties Palatine are much higher.

Hereditary Sheriffs have the same Jurisdiction with Lords of Regalities, except in the above *Pleas of the Crown*, and their Decrees and Sentences are liable to the same Review: And as

Lords of Regalities must of Necessity appoint Baillies to hold their Courts, so the principal Sheriffs, whether hereditary, or named by his Majesty, for most Part do not judge in their Courts, but appoint Deputes; and consequently, it can make no Difference as to the Ease or Benefit of the Lieges, whether their Principals are of the one Kind or other. It would certainly tend much to the Good of this Country, that Sallaries were appointed for Baillies of Regalities and Sheriffs, and that those vested with the Jurisdiction, were bound to appoint such to administer Justice for them, as are educated to the Law, and of Ability to exercise the Office. This would effectually remove all the Inconveniencies complained of in all Jurisdctions, whether hereditary or not; for there is no Difference in that Respect betwixt them, since we find as few Murmurings against the hereditary Sheriffs, as against those appointed by the King; and the Reason is plain, that both exercise the Office by their Deputes; this were a happy Improvement of the Article of the Union (*a*), which reserves inferior Courts, subject to Alterations by the Parliament of *Great Britain*, such Alteration being for the better Administration of Justice.

S E C

(*a*) Art. 12.

SECTION II.

The Errors and gross Misrepresentations in the Pamphlet, touching Feudal Holdings and Jurisdictions, discovered.

THUS I have given a View of Feudal Holdings and Hereditary Jurisdictions; let us now examine how far our Author has display'd their genuine Nature; or, if he has misrepresented them in various Instances. I shall not trouble myself or the Reader, with Observations upon his malevolent Spirit, that runs thro' the whole Performance. The Tradition is, that the Author held Lands Ward of a Subject Superior, with whom he was at Variance, and, to be avenged of him, wrote the Piece; but he ought not, from his private Resentment, to have poured out his Rancour upon the Constitution.

The first Mistake I shall notice in this Author is, that he avers (*a*), "That a Superior entering to possess his Vassal's Estate, in virtue of the Liferent Escheat, is not obliged to pay the Debt for which the Vassal was outlawed, nor any other Debt of the Vassal's or Sub-vassal's, other than these to which the Superior consented before the Time of the Outlawry."

This is surprizing Ignorance or Malice: The Superior, in such Case, is bound to own all the Burdens imposed by the Vassal upon the Fief, whether

(*a*) P. 5.

whether they were consented to by himself or not; and even these that are compleated within Year and Day, after the Denunciation as above, either founded on voluntary Rights granted by the Debtor before, or Adjudications led against the Vassal for the same within that Period. The Liferent Escheat (*says my Lord Stair (a)*) "falls to the several Superiors *cum suo onere*;" "and whatsoever did affect the Lands in the Hands of the Vassal, the same doth affect them in the Hands of the Superior, in which it differs from the common Casualty of Ward and Non-entry; for these return to the Superior, with such Burdens only as he gave them with, or whereunto he consented."

Next he affirms (*b*), "That the Superior may force the Vassal to open his Charter-chest, and exhibit to him all the Rights of his Lands; and if they are wanting, they are declared void." This is no other Privilege, than what every other Person, seized of Lands, may use by a most useful Action, a *Reduction and Improbation*, the Intent of forcing the Production of the Rights is, in order to bring on a Competition touching the same; but if the Rights are lost or wanting, the Defender may, to avoid the fatal Consequence, repeat a proving of the Tenor of them; and if he possessed without a just Title, 'tis but reasonable he be dispossess'd; and why the Benefit of such Action should

(*a*) Lib. 4. Tit. 10. p. 576. (*b*) p. 5.

should not be allowed to the Superior as much as to others, is hard to conceive.

Our Author proceeds to notice (a), "That if the Vassal is guilty of *Purprision*, by encroaching upon his Superior's proper Lands, or of *Disclamation*, by disowning his Superior, he forfeits his whole Fee to the Superior." But it has been already observed, that these Feudal Delinquencies are not incurred, unless the above Deeds are maliciously committed, which, to be sure, ought not to pass with Impunity: 'Tis but just that the Superior be secured in his Property and Right of Superiority, as much as the Vassal in his Right of Fee; and when the Vassal invades them wilfully or maliciously, he ought to suffer the Loss of his Fee, which proceeded from the Superior: But there can hardly an Instance be given, where such Forfeiture was claimed, and made effectual; however, 'tis just the Law, for securing the Superior in his Right, should stand as it is, tho' our Author is for breaking thro' all the Fences the Law has provided for that Purpose.

He observes, in the next Place (b), "That Vassals are bound to appear at the Superior's three Head-Courts: And that they are exorbitantly fined in case of Absence". But, for most Part, there is only one Head-Court, and the Vassal may appear by his Proxy; and tho' he is in Default, the Fine cannot exceed Ten Pounds

(a) P. 6. (b) D. P.

Pounds *Scots*. And few or no Instances have occurred, in the Memory of Man, where such Fines have been exacted.

Our Author, in the next Place (a), gives us a Detail of the Hardships in Ward-Holdings: But if the original Vassal had the Lands so holden by a gratuitous Grant from the Superior, he, or those that succeed to him, have no Reason to complain of the Burdens affecting the Gift; and if he was a Purchaser, the Purchase-money or Price was adjusted, according to the Contingencies and Casualties inherent to that Kind of Holding; so that the Superior would be forfeited of his Interest, by altering the Tenure to his Prejudice, and the Vassal enriched with his Spoils, to use our Author's Words upon the like Occasion.

He observes (b), "That the Superior is preferred to the Guardianship of the Heir of the Vassal in such Holdings, during his Nonage, and is his only Guardian by Law." But he admits, that *Custom has made some Change in this Point*; and indeed there is such Change in that Matter, that for upwards of a Century past, no Superior has had the Assurance to make such Claim; and if he did, he would be ridiculed. The Tutory of Pupils belongs to these named by their Father; and in Default of such Nomination, to the next Agnat or Kinsman upon the Father's Side; and if he declines or delays, a Gift

(a) P. 6. (b) Ibid.

Gift of Tutory is granted by his Majesty, as the common Parent, to such Persons as are thought most proper by the Pupils near Kinsmen, who must be cited to the passing such Gift.

But our Author exclaims severely against the Casualty, of the Avail or Value of the Vassal's Marriage; and puts the Case (a), "Where the Vassal cannot avoid the Mischief of his losing thereby one Hundred, or one Hundred and fifty Times more than the full Worth of the Ward-Fee, viz. if he is worth 10,000 l. per annum, and holds a Ward-Fee of 5 l."

But it has been already shown, that the Vassal may forbear entering to the Ward-Fee, and suffer the Superior to make his Casualty of Marriage effectual, by a real Action of Pointing the Ground; for no personal Action lyes against the Heir, unless he enter and possess the Lands holden Ward; and this the Court of Session have adjudged in express Terms (b).

Next he states a fictitious Case (c) of ten Heirs succeeding one after another in a Ward-Fee, unmarried, whereby so many different Avails of a Marriage may be due, and exhaust the Fief; but the Law is not made to obviate all possible Cases and Inconveniencies, and only concerns what in common Course, and for most Part happens (d). And the diverse Temperaments and Methods for

(a) P. 7. (b) January 5. 1681. Laird of Dun. (c) P. 7. (d) Ad ea aptari debet jus quæ et frequenter et facile eveniunt, L. 5. ff. de legibus.

for alleviating or obviating this Casualty above mentioned, may be followed; and indeed the Vassal's making a Conveyance of the Ward-Fee to his presumptive Heir, as to Lands holden of the Crown, will prevent the Casualties of both Ward and Marriage; for the Barons of Exchequer will expedite Infeftments thereon without further Inquiry.

The Author proceeds (a) to Recognition, specially so called, which is a Feudal Delinquency peculiar to Ward-holdings, whereby, upon Alienation of more than the Half of the Fief, without the Superior's Consent, the whole returns, and opens to him, as above. By this Means, 'tis pretended the Superior may rob the Vassal and defraud his Creditors; but there is no Place for such Severity of Language; the Law has secured the Vassal and his Creditors sufficiently against the Superior, were he ever so rigid, if they follow its Prescription in Manner above mentioned; and if they do not, they have themselves only to blame, they have depended upon his personal Credit, and not upon his Estate, and so cannot complain, though that shall, by the Vassal's Deeds, be forfeited to the Superior.

He further avers (b), That many Superiors, especially in the North Highlands and Islands, have their Vassals bound in Charters to follow them in the Wars, and to many slavish Services, even on Pain of losing their Fief. The Fact

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(a) P. 8. (b) Ditto P.

may be denied, as our Author's Veracity is not much to be relied upon; but if Charters with such Clauses are or shall be granted, the Ward Vassal is only liable *to Services used and wont*; and such Service, with respect to the King, has been in Disuse for some Centuries, and never could have been used by the Subjects, but in Behalf of his Majesty, and Defence of the Government, as noticed upon the first Head of this Essay. And because in Parts of the Highlands, in Place of the ordinary *Reddendo* of Ward-charters, *viz. Services used and wont*, explicite and special Prestations were insert, *viz. Hoisting, Hunting, Watching and Warding*, and used to very bad Purpose, *and were one of the greatest Means of raising and carrying on the unhappy Rebellion* (as the Statute expresses it) they were justly abolished, and an annual Sum allowed the Superior in Recompence of the same, to be taxed by the Lords of Session, as therein directed (a).

It is affirmed by our Author (b), "That these Clauses, annulled by the Statute, are still continued and renewed in the Vassals Charters, and the Services demanded and performed." But this is a very improbable Story, and cannot be taken on his Word; especially, since it is said he wrote this Piece in the 1716, the very Year that the Act was made, unless he could have had the Spirit of Prophecy: And, however, such Services are not exigible in Law; for, as

(a) 1 Geo. I. c. 24.

(b) P. 9.

either Superior or Vassal may apply to the Lords of Session, to have the Value of them ascertained, so, though neither should make Application to that Purpose, the Services cannot be exacted. The Obligations or Provisions to that Purpose, whether in the Charter, or by any other Agreement made or to be made, are declared void and null, and to have no Effect in Law, and so remain in all Time coming; so that, if no Application is made for adjusting the Value, the Superior loses both the Services and their Value till it is ascertained.

Our Author observes (a), "That these Tenures are the Remains of the old *Gothick* Constitution, whereby the Vassals, who held by Knight-service, were instead of a Standing Army; and now that we have regular Troops, and that the Vassals, being burdened for the most Part with the Supplies for Payment of them, ought to be freed from the Slavery of these Holdings, which now are not only useless, but hurtful." But do not the Superiors likewise pay a Proportion of the Land-tax? And admitting that the Vassals in Ward-holdings pay their Proportion of it, that may be Reason for relieving them from furnishing Men for Defence of the Country, but can be none for exeeing them from the Casualties incident to these Holdings; and, however, Vassals in Lands of all kinds of Tenure, as much as in those holden

(a) P. 9.

den Ward, are equally liable to a Proportion of the Cefs or Land-tax, tho' they were not subjected to any Necessity of attending the King's Army for Defence of the Country.

It is to the *Gothick* Constitution that we owe our Parliaments, which are the Guardians of our Rights and Liberties; and I suppose our Author is not for abolishing them, because they have such Original; And, consequently, neither can our Feudal Holdings be impeached on that Account.

Our Author having arraigned the Tenures as useless and hurtful, proceeds to Hereditary Jurisdictions, as another Grievance he pretends we labour under; "Some Great Men (says he) have a Power of Justiciary over vast Tracts of Ground, equal, in Criminals, to the Power of the Lords of Justiciary, and exclusive of them; and that the Lords of Regality have a Power of punishing capitally (a)."

For Answer; As the Court of Justiciary may regularly review the Sentences of the Baillies of Regality, so there is no Exception from this Rule but one, *viz.* that of his Grace the Duke of *Argyle*, who has a peculiar and exempt Jurisdiction; in that Respect he has Prerogatives that may be deemed perhaps equal to those of a County Palatine; and why should they be envied him? The Jurisdiction belonging to that Family was anciently universal over the whole Kingdom of *Scotland*, of which the Earls of *Argyle*

(a) P. 9.

Argyle were hereditary Justices General. In the Reign of King *Charles II.* this was resigned to the Crown, with the Exception and Reservation of that ancient Jurisdiction within the Shire of *Argyle*: Thus that Reservation was purchased or allowed for a very valuable Consideration, no less than the Surrender of the like Jurisdiction over all the rest of the Kingdom; and tho' that Reservation has now taken Place about fourscore Years, has it been ever heard, that any Abuses have been made of that Power or Jurisdiction so reserved, either to the Prejudice of the Publick, or the Oppression of Individuals? If any such had occurred, it would have been no Secret; the rest of the Kingdom must have heard of it; and the Rivalships that are always, more or less, subsisting betwixt great Families and Parties, in a free Government, would have effectually prevented any such Abuses or Oppressions being buried in Silence, if such had truly occurred. Besides, this ancient and noble Family has always been the Bulwark of the Protestant Interest in the Highlands, and have greatly suffered more than once on account of their Revolution Principles, and owe their Restoration to that happy Event.

The Bishop of *Durham* has a County Palatine Parcel of his Bishoprick, and it were pretty ridiculous to make a Proposal, to have it, or the other Counties Palatine in *England*, abolished, as hurtful to the Liberties of the Subjects there,

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there. And yet our hereditary Jurisdictions, as they were originally Rights of Property, so they are expressly reserved to us, as such, by the solemn Treaty of Union, as shall afterwards more fully appear.

The hereditary Sheriffships, which our Author likewise finds Fault with, have been already considered, and may be regarded in the same Light as Regalities.

He next suggests (a), "That, by the Multitude of Jurisdictions, the Subjects are heavily aggrieved; that if a Royal Burrow lie within a Regality, that Regality within a Commissariat, and that Commissariat within a Shire, the Inhabitants of the Burrow are liable to all these Courts for the same Cause, and so may be harrassed by contending Jurisdictions."

If these Jurisdictions were subordinate to one another, so as the Plaintiff might be obliged to make his Way through all of them, there would be good Ground, upon his Part, for the Complaint; but since they are *co-ordinate*, none of them having Power of reviewing the Decrees of the other, it is a Benefit to the Subjects, that they have easy Access to any of these Courts, for administering Justice, and, if they give erroneous Judgments, Application may be made directly to the Court of Session in Civil Cases, and of Justiciary in Criminal, for Redress; and some
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(a) P. 10.

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of these Courts have a *peculiar* and exclusive Jurisdiction, which gave Occasion to their Establishment, as the Commissary Court for Confirmation of Testaments, in the same Manner as the Bishops Courts in *England*, for proving of Wills, and granting Letters of Administration of the Effects of Persons deceased.

Nor is it any Hardship upon Defenders, that they may be sued before any of these inferior Courts, since they cannot be convened before more than one of them for the same Cause, as is self-evident; and if one should be harrassed before different Courts for the same Cause, he would be intitled to his full Costs, and the Action dismissed by the Court before whom he is sifted, after being convened before the other; or, if Justice were not done in that Respect, he has easy Access to the Court of Session for Redress, by Advocation or Suspension.

SECTION III.

That the Feudal Holdings, Superiorities and Jurisdictions, have no Tendency to the raising and fomenting Rebellions.

BUT, says our Author (a), The Protestant Religion, and the Civil Liberties of *Great Britain*, are in imminent Danger by these Superiorities and hereditary Jurisdictions; that there were 151 Landlords, and 51 Clans, in the Rolls, subjoined to the Parliament 1587, to whom the
People

(a) P. 10, 11, 12, 13, 14, and 15.

People were under a slavish Subjection; that they are extremely poor, and grossly ignorant; that they are always on the Side of Popery and Slavery; that they are ready Tools at the Call of their Superiors, even against the Sovereign, from several Instances he gives; that by them *Great Britain* and our happy Constitution is in great Danger; and that therefore they ought to be taken out of the Way.

Were these Objections true, the Feudal Holdings and hereditary Jurisdictions ought to be abolished for the Safety of the Publick, *salus populi est suprema lex*. The Properties of the Subjects are no doubt subject to the Publick, and whatever has a Tendency to ruin our happy Constitution ought to be removed: These Surmises are industriously propagated; let us see therefore if there is any Truth in them, so as to merit Credit.

In the *first* Place, it is plain, that the Mischief complained of is only owing to the slavish Dependence of the People upon their Landlords and Chiefs of Clans, and not to the Superiorities, which concern only the Vassals, nor to lawful Jurisdictions, which the Captains of Clans have no Title to over these Clans. It will not be pretended, that the Landlords should be deprived of their Property, to remove the Dependence of their Tenants upon them; and much less ought the Rights of Superiors to be violated

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since they have no Influence upon the Tenants, who depend upon their Masters the Vassals.

And as to the Clans, it were very just and expedient for the Good of the Publick, that these Dependencies were abolished; but, from the Nature of Clan-ship, it will appear, That it hath no Concern with Superiorities or hereditary Jurisdictions. A Clan in the Highlands is a *Tribe of Families associated together, as it were in a League, offensive and defensive, under a Captain, Chief, or Chieftain*. The Ground of the Association is the Connexion of Blood or Neighbourhood; those of the same Name imagine, they have sprung from the same Root, that they are descended of the same common Parent; and others, though of a different Name, associate with them on Account of their Neighbourhood, and become Branches of the same Clan; and some of these Chiefs of Clans have no Superiority, and others little or no Property, as is notoriously the Case of a signal Rebel, *MacDonald of Keppoch*, and others.

It will appear from the several Acts made in King *James* the VI.'s Parliament (a), for settling the Peace of the Borders and Highlands, That it was only the Landlords and Chiefs of Clans that were noticed, as having the People under their Command, and obliged to find Security for Redress of the Damages, occasioned by the Depredations, Thefts, Robberies and

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(a) Anno 1587.

Fire-raising, committed by these under their Banner, and not the Superiors, or these having hereditary Jurisdictions.

Thus the Landlords are bound to present to the Justices Offenders, living within their Lands; complained upon, to abide Trial for Crimes committed by them; and, in Default, the Landlords themselves must satisfy the Damage of the Persons aggrieved (a). And the Act contains a *Proviso*, That in case the Landlords of Lands, in the Borders or Highlands, live in the *Inlands*, and the Tenants being Dependents on Chieftains or Captains of Clans, from whom they only receive their Rents, but whom they cannot command, the Landlords shall only be obliged to recover Decrees, and denounce them thereon; and, on presenting such Denunciation to the Privy-Council, take out Letters of Horning against the Captain of the Clan, to charge him to apprehend the Offenders; and, in Default, to denounce him to the Horn. It is not to the Superiors of these Lands that Recourse is had, but to the Chief of the Clan, with whom the Landlords have no Connexion in the Case of the foresaid *Proviso*.

The subsequent Statute (b) is directed immediately against the Chiefs of the Clans; and, from the Preamble of the Statute, the Ground of Clan-ship appears to be as above. "It sets forth, that these of the Clans dwell upon the Lands of diverse Landlords, and depend upon the

(a) P. 1587. cap. 93. (b) Cap. 94.

"the Direction of the Chief or Captain." ON PRETENCE OF BLOOD OR PLACE OF ABODE, oftimes against the Will of the Lords of the Grounds; and it provides, "That the Chiefs or Captains of the Clans be charged to enter Pledges (*i. e. Hostages*) for keeping good Order and Rule in the Bounds, on Pain of executing to Death the Pledges in case of Transgressions, and no Redress made by the Offenders, for whom the Pledges ly.

In none of those Statutes, and diverse others that follow in the same Parliament, for punishing or restraining the Crimes committed in the Borders and Highlands, is there the least Mention of Superiors, or Persons vested with hereditary Jurisdictions. How, in such Case, they can be chargeable with the Disorders and Misdemeanours committed by the People in the Highlands, is not easy to conceive; so that 'tis plainly a Mistake and groundless Aspersion, to load them with the same: 'Tis only the Dependence of the Possessors of the Ground, and Peasants, upon their Landlords, (when they live on the Ground) and on the Chiefs or Captains of Clans, that is supposed in the Statutes to occasion those Mischiefs.

And do we not see, that the Inhabitants of the Borders have been reduced to Civility and good Government, without impeaching the Feudal Holdings and Jurisdictions; One Third of the Clans, as appears from the Roll subjoined

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to the foresaid Parliament, was of those living upon the Borders betwixt *Scotland* and *England*, and the Writer of the Appendix, to our Author's Work, justly observes (a), *That they have, for a long Time, been as much civilized, as any Part of the united Kingdom.* And what should hinder the other two Parts, *viz.* those in the Highlands and Islands to become so too, without making an Encroachment upon the Property of the Subjects having Right to Superiorities and hereditary Jurisdictions? It is apparent, that these have no Influence upon the Disorders and Inconveniencies complained of, since they have been removed in the Borders, and the Superiorities left inviolate; for one may reasonably judge of the Nature of the Disease from the Cure; and have not these Superiorities and Jurisdictions as much Place in the other Parts of the Kingdom as in the Highlands, without any Inconveniencies attending them?

The Union of the two Crowns introduced into *Great Britain* the Happiness of National Concord and Security, which was compleated, and brought to its utmost Perfection by the Union of the two Kingdoms. Before King *James's* Accession to the Crown of *England* (b), Clanship, and its direful Consequences, prevailed as much in the Borders betwixt that Kingdom and *Scotland*, as it did in the Highlands; seventeen of them are noted as wicked and

(a) P. 20. (b) Anno 1606.

and disorderly People in the Middle and West Marches before the Union of the two Crowns; and Care is taken, by the foresaid Parliament, (a) to prevent or punish the Crimes and Misdemeanours occasioned by these unlawful Affociations: On that happy Event, Civility, good Order and Industry superveened among them, and Clanship wore off by Degrees, and at last totally ceased; so that no such Thing has been known, in these Parts, within the Memory of Man. Does not this discover the Root, whence these Disorders and Inconveniencies spring, and how it may be removed?

The same Writer (b) notices the Reason why People in the Highlands were not as easily reduced to Civility and good Order as these in the Borders, *viz.* *That there was easy Access to these Places, (i. e. the Borders) so that they were kept in Order and Subjection; but it is not so in the Highlands and Islands.* This is a juster Account by far of the Matter, than that of our Author, whose Work he publishes. The inaccessible Mountains, and the Inlets of the Sea that divide them in various Colonies, at Distance from one another, keep them in a barbarous uncivilized Way. And as Ignorance is said to be the Mother of Devotion, (or rather Superstition) so, no doubt, it is of a slavish Dependence: But what Concern have Superiorities and hereditary Jurisdictions with that Matter? Will the

(a) Anno 1587. (b) P. 20.

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the abolishing of these, infuse generous Principles and Notions of Liberty and Civil Government into the People, who are neither Superiors nor Vassals, but simple Possessors of the Ground? Will they become better Subjects or Christians, that these Privileges which they have no Concern with, be extinguished?

Since it were ridiculous to attempt to remove Mountains, or dry up the Seas, in order to reform and civilize the People in the Highlands and Islands; the only Method seems to be, that Knowledge of Christianity, Civility and good Manners, be diffused among them, by erecting Schools, and placing a sufficient Number of Catechists in these Bounds. To this Purpose, the Society for propagating Christian Knowledge, with the Assistance of his Majesty's gracious Bounty, have been labouring for many Years, and will, I hope, at last, wholly reform them both from their Ignorance, Popish Delusions, and slavish Dependence on their Chiefs of Clans, contrary to the Prescription of the Law.

As King James VI. was at great Pains to suppress the Depredations in the Borders and Highlands, in Manner above recited; so it were not unworthy the Care of the Legislature to cause put these Acts in Execution, in order to preserve the Peace and Quiet of the Highlands, as Occasion requires, (as I hope there never shall); for these wholesome Laws are, for that very Reason, extended to that Case, by an Act

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Act after the Revolution (a). This is perpetual; tho' the Writer of the Appendix is pleased to say, it only lasted for two Years: That concerns only the Period prefixed for the King's granting a Commission of Justiciary, in the Highlands, for repressing the Crimes and Disorders there, to certain Persons, to whom, these having Right to heritable Justiciaries-General should be obliged to grant Commission to the same Effect, within their respective Bounds, that all acting of Consent, the Depredations and Robberies might be the more effectually punished and restrained by the royal Authority; but as to the extending the Laws for repressing the Depredations in the Highlands, to the preserving the Peace of the Country, there is no doubt it is perpetual. The Act declares, *That the extending the Acts made against Clans and their Chiftains, for the more effectual repressing the Thefts and Depredations in the Highlands, may also be singularly useful, for preserving the publick Peace; and therefore extends the same to the Case of the publick Peace.*

It is observable from this Act, That, tho' it impowers the King to grant Commissions of Justiciary, yet it is with an Exception of the Lands lying within the heretable Right of Justiciary-General, pertaining to the Earl of Argyle, or any other within the Bounds foresaid; and the same is declared to be without Prejudice to the whole

(a) Par. 1693, Chap. 94.

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whole foresaid Persons, the Lords of Regality, and all others, of their several respective Rights and Jurisdictions: Hence 'tis plain, that our Legislature, in prescribing Measures for preserving the publick Peace, did not consider the hereditary Jurisdictions as prejudicial thereto; but on the contrary, as instrumental for that Purpose.

It is likewise to be noticed, on this Head, That the *British* Statute, which declares such Crimes and Offences, as are high Treason within *England*, to be Treason in *Scotland* (a), expressly provides, "That where any Commission of Oyer and Terminer shall issue, for the Trial of such Treason, pursuant to the Act, and is to be executed within any District where there is a Justice-General, or any Person having Right of Justiciary, who had Jurisdiction in Cases of High Treason, at the Time of making of the Act, such Justice-General or such Person having Right of Justiciary, or their respective Deputes, shall be in the said Commission, and one of the *Quorum*." This is a strong Ratification of hereditary Jurisdiction.

And further, by the *British* Act (b) for the more effectually securing the Peace of the *Highlands*, all Clauses in Charters, Contracts or Agreements, whereby Services of personal Attendance, Hosting, Hunting, &c. are declared void

(a) 7 Annæ, C. 21. (b) 1mo Geo. I: C: 24.

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void and null; and the Reason assigned in the Statute for annulling them is, "That the Custom of conveying Numbers of his Majesty's Subjects, together with the Practice of obliging them to perform these Services, in virtue of such Clauses, is contrary to the Nature of good Government, and destructive of the Liberties of free People, inconsistent with the Obedience and Allegiance due to his Majesty and Government, as well as obstructive to the Improvement of Trade, Husbandry, and Manufactories, and was one of the greatest Means of raising and carrying on the late unhappy Rebellion." But it is not insinuate in the least, That the feudal Holdings and heritable Jurisdictions had any Tendency to produce these fatal Consequences: Wherefore, this is another Instance of the Parliament's approbating the same.

The Examples given by our Author (a) of the *Highlanders* having disturbed the Government, and contributed to the Rebellion 1715, (and we may justly add the late unhappy Rebellion 1745) do not, in the least, concern the Superiorities and Jurisdictions, as was already shown. The Dependence of the Peasants upon their Landlords, and of both upon the Chief or Captain of the Clan, and their remote and almost unaccessible Situation afforded the Authors of these Rebellions Opportunity to set up their

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Standards

(a) P. 13, 14.

Standards among them. 'Tis certain, the late Earls of *Winton*, and *Nithsdale*, and Lord *Panmure*, who were attainted for the Rebellion 1715, had many Vassals and Tenants; and, however, none of these joined them in that wicked Enterprize. And the late unfortunate Earl of *Kilmarnock*, who had the whole Town of *Kilmarnock* holden of him, could not prevail upon any of the Inhabitants to join him in his rebellious Courses. All these had their Possessions in the inland Country; and their Vassals and Tenants had no Dependence upon them as Chiefs of Clans. These Instances demonstrate, that it is only the Dependence by Clanship, that gave Occasion to the raising and carrying on these unnatural Rebellions.

And as to the other Instance, where the *Highlanders* are said to have created Disturbance to the publick Peace, and to have harrassed the People in the West of *Scotland*, in the Reign of King *Charles II.* This was done in Obedience to the Commands of their lawful Sovereign, and these commissioned by him; and shows their excessive Attachment to Loyalty rather than a Spirit of Rebellion. But indeed, that and the other Instances, our Author alledges to the same Purpose (a), are quite out of the Case, since Superiorities and hereditary Jurisdictions had no Influence in any of them.

(a) P. 13,

That the infringing the feudal Holdings and hereditary Jurisdiction may be dangerous to our happy Constitution.

IT is therefore evident, that the feudal Holdings and hereditary Jurisdictions are not productive of any Inconveniencies to the publick Peace or Quiet of the Country; and much less can they be any of the Means of raising or carrying on Rebellions. And, I shall now proceed to show, in the last Place, That the infringing them may be dangerous to our happy Constitution.

Our Author pretends (a) to offer some Expedient to the Parliament, that may give *Strength and Security to our happy Constitution.* The Measure he proposes to accomplish that End is, to abolish our Feudal Holdings, and Hereditary Jurisdictions thereto inherent, which has a direct Tendency to undermine our Constitution, and the Settlement of the Crown in the Protestant Line: These are inseparable, and the sure Foundation of the Happiness of *Great Britain*, which however is laid by the Union; and therefore whatever tends to a Violation of any of the Articles of the Union, must, of Consequence, have a Tendency to undermine the Security of our Constitution in Church and State, built upon it.

(a) P. 1.

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By the Twentieth Article of the Union it is expressly provided, "That all heritable Offices, Superiorities, and heritable Jurisdictions, be reserved to the Owners thereof, as Rights of Property, in the same Manner as they are now enjoyed by the Laws of *Scotland*, notwithstanding this Treaty." If this Article is infringed, may not any other of the Articles of the Union be broke through? This is as unalterable as any of them. Thus, by the same Rule, the First Article, That the Two Kingdoms be united into One, by the Name of the Kingdom of *Great Britain*; and the Second, which establishes the Succession to the Crown of the United Kingdom, in the Protestant Line of his present Majesty; and the Third, That the United Kingdom be represented by one and the same Parliament of *Great Britain*; may likewise be unhinged: Wherefore this Proposal tends plainly to overthrow our present happy Constitution; the Union is the Foundation of it, the Great Charter of the Rights and Liberties of the *British* Subjects, both Sacred and Civil, and the Bulwark of them; it is the greatest Security of the Protestant Succession, which is Guardian of them.

And on Supposition, that the Constitution of the United Kingdom could be preserved, notwithstanding the Violation of any collateral Articles, (as it seems impossible, from the Nature of things, that it can) yet, will not the Reformed

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med Religion in *Great Britain* be in great Danger, by the same Rule that our reserved Rights of Property may be violated? The Protestant Religion, and Presbyterian Church Government, is established in *Scotland* by a separate Act of the Union Parliament, and the Church of *England*, by an Act of the Parliament of *England*, established there; both these Statutes, by the Acts of the respective Parliaments, ratifying and approving the Treaty of Union of the Two Kingdoms, are declared to be *fundamental Conditions of the Union, and Parts of the said Articles*: Wherefore the Security of the Protestant Religion, and Presbyterian Church Government here, and of the same Religion in *England*, according to the Prescription of their Church, is the same with that of the Rights and Privileges reserved to the Persons intitled thereto, by other of the Articles; and if any of these, touching our Civil Rights and Liberties, is broke through, the other, which concerns the Establishment of our Religious and Sacred Rights and Privileges, may likewise be violated.

Various Disputes have occurred amongst the Learned, touching fundamental Laws of a Country: Some have had the Assurance to deny there can be any such; for that, when the Government is conferred upon one or more Persons, those who are vested with it must be at Liberty to act with an unlimited Power, and that otherwise their Power could not be supreme; so that,

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that, in their Opinion, Fundamental Law is a mere Chimera. This was the Doctrine of the famous Mr. *Hobbes* (a): In his Book, inscribed **THE LEVIATHAN**, he lays down such Principles as undermine not only the Civil Rights and Liberties of the People, but even raise the Foundation of Moral Virtue and Religion.

This seems to have been the Opinion of our Author; for, as one of the Answers to the Objection, which he foresaw would ly against the abolishing the Feudal Holdings and heritable Jurisdictions, *That the same were reserved by the Articles of the Union as Rights of Property*, he asserts (b), "That the Act of the Union cannot protect them against a subsequent Act of the *British Parliament*."

But the most eminent Authors upon the Law, touching publick Right and Civil Government, are justly of a contrary Opinion (c), viz. that in establishing a Civil Government, there may be fundamental Laws and reserved Rights, and that the Acts of these vested with the sovereign Power, impeaching these reserved Rights and Liberties, are void and null. Not to mention the fundamental Laws of other States and Kingdoms, of this Kind is the Great Charter of the Liberties of *England*, ratified by diverse Acts of Parliament; in one of these it is enacted, *That if*
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(a) *De cive*, C. 6. (b) P. 16. (c) *Grot. de jure belli*, lib. 1. cap. 3. Sect. 10. 16. *Puffen. de jure nat. et gent.* lib. 7. c. 6. Sect. 12. *Hub. de jure civit.* lib. 3. c. 19.

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any Statute be made contrary to the Great Charter, it shall be holden for none (a). The Declaration of the Rights and Liberties of *England* presented to the Prince and Princess of *Orange*, upon which they accepted the Crown of *England*, and which was ratified by an Act of Parliament (b), is of the same Nature.

We had no expresse Charter of our Liberties; and though the States of the Kingdom presented a Claim or Declaration of our Rights and Liberties to King *William* and Queen *Mary* with the Crown of *Scotland*, upon which they accepted the Crown (c); yet many Articles of that Declaration never had the Sanction of an Act of Parliament. And though the seditious Parliaments in the latter Part of the Reign of King *Charles I.* greatly depressed the Royal Prerogative, which made it necessary, on the Restoration of the Royal Family, for the Parliament to assert (which they did too strongly) the Royal Prerogative in the several Branches, which had been encroached upon; yet we had not the Rights and Liberties of the Subject ascertained, so that the Security we had for the same, lay only in the Usage of our Government for a great Number of Centuries, and in the foresaid Claim of Right.

This, and diverse other Reasons, made it necessary, that our Rights and Privileges should be specially

(a) 42 E. 3. cap. 1. (b) *W. et M. Sess. 2. c. 2.* (c) *Conv. of States 1689. c. 13, 28, 38.*

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pecially reserved by the several Articles of the Union to that Purpose. These Articles, from the Nature of the Thing, and by express Declaration of both Parliaments, are to be observed as essential and fundamental Conditions of the Union; so that whatever Doubts and Difficulties might be concerning the fundamental Laws of other States and Kingdoms, there can be none with respect to these of the British Government. The Articles of the Union are the *pacta conventa*, the solemn Convention betwixt two independent Kingdoms, and the Conditions upon which they enter into an Union of both Kingdoms into one, and are so many reserved Rights to the respective Subjects of both; and since the Great Charter of the Liberties of the Subjects of England, which was only a Grant of the Sovereign, ratified by Acts of Parliament, was indefeasible, and to be maintained as a fundamental Law, can it be Matter of Question, that the Articles of Union, upon which the British Government and Constitution is founded, are to be deemed such?

Our Author, in order to remove the foresaid Objection to his Proposal (a), viz. That the Superiorities and Jurisdictions are reserved, by the 20th Article of the Union, as Rights of Property, suggests. That by Acts of the Scots Parliament (b), it is provided, "That no Regalities shall be granted without Consent of Parliament,

(a) P. 15. 16. (b) Parl. 1455. C. 43. 44.

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"ment, and that no Offices be granted thereafter in Fee and Heritage; that therefore all the Regalities and hereditary Sheriffships granted thereafter, without Consent of Parliament, were contrary to Law, and that the above Article of the Union cannot be construed a Repeal of these Acts, and a new Grant of such Offices as were possessed by the Subjects of Scotland against Law."

But the Answer is, That the foresaid Rights are preserved to the Owners, as they were then possessed at the Time of the Union; so that though they had been liable to Challenge, at the Instance of the Crown; upon these ancient Statutes, yet after a solemn Ratification of them, virtually implied in the foresaid Reservation, they cannot be impeached, more than if each of them had been particularly confirmed. And further, it has been already observed, that by the Act 1693, enjoining Lords of Regalities to grant Commissions of Justiciary in the Highlands to these appointed by the King, and by the British Statute, intitling them to sit, as of the Quorum, in Commissions of Oyer and Terminer, on Trial of Cases of Treason, they are owned, and in Effect confirmed, and so thereafter could not be deemed against Law; and indeed they were secured long ago to the Owners by the positive Prescription, which is good against the King.

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It is likewise said (a), "That, by the 4th Article of the Union, there is a Communication of all Rights, Privileges or Advantages, that do or may belong to the Subjects of either Kingdoms; and that therefore, since the Subjects in *England* have obtained Freedom from these slavish Tenures and Dependencies, the Subjects of *Scotland* have Right to claim the same Immunity."

But the Author had it seems forgot, or designedly leaves out the Exception subjoined in that 4th Article, and indeed implied in the Nature of the Thing, *viz. except where it is otherwise expressly agreed in these Articles.* Now it is expressly agreed by the 20th Article, *That all heritable Offices and Jurisdictions shall be reserved to the Owners as Rights of Property,* and consequently, the Immunity from these Tenures which take Place in *England*, can no more be communicated to the Vassals in *Scotland*, than the Privileges of Superiors, that take Place in *Scotland*, can be communicated to the Lords in *England* over their Vassals there.

Again, it is alledged by our Author (b), "That by the 18th Article of the Union, an Alteration may be made in the Laws which concern private Right, for the evident Utility of the Subjects in *Scotland*, and that the abolishing these Tenures and Jurisdictions will tend to the Utility of the People of *Scotland*, is

(a) P. 17. (b) Ditto P.

"evident from what he had said touching them, and that the 20th Article, which relates to the same, does not declare their Constitution unalterable."

But the same Answer recurs, *namely,* That the Laws touching private Rights are subject to Alterations, for the evident Utility of the Subjects of *Scotland*; but the Rights expressly reserved in the several Articles of the Union, without Power of Alteration, can be subject to none, and such is the Case of the Feudal Tenures and hereditary Jurisdictions; and there is a vast Difference betwixt a Subversion, or Infraction of private Rights already constitute and reserved, and an Alteration of the general Law touching private Right; for the first would be a manifest Injury to the Owners, whereas the other could be hurtful to none, as concerning only future Cases and Acquisitions.

And as to the Author's Remark, That the Article touching these Rights does not declare the Constitution of them unalterable; it is most absurd: For neither are the forementioned three Articles, uniting the Kingdoms of *Scotland* and *England* into one, constituting the *British* Government and Parliament, declared unalterable, and yet none will have the Assurance to affirm, that they are subject to any Alteration. The Rule, from the Nature of the thing, and plainly inferred from the Composition and Complexion of the Articles, is, That such as are not declared

red alterable, must remain firm and unalterable, as the Conditions whereupon the Union proceeded, and Basis and Foundation of the *British* Constitution and Government, which, and the Succession to the Crown of *Great Britain* in the Protestant Line, shall remain fixt and inviolate while Sun and Moon endure, notwithstanding that the Articles touching the same do not declare them unalterable.

Our Author concludes with observing, That the *British* Parliament, by their foresaid Act annulling Obligations for personal Services of Vassals (*a*), have already broke in upon the Superiorities in *Scotland*, by taking away some of their Consequences, for an Equivalent in Money, and thought not that their so doing was any Encroachment upon the Articles of the Union; and that therefore they may apply the same Remedy as to the whole, that the Seeds of Rebellion, arising from thence, may be for ever removed.

But, for Answer; What is done by that Statute is no Impeachment at all upon Superiorities: For not only Clauses in Charters, but likewise all Obligations in other Contracts or Agreements, for personal Services of Hosting and Hunting, &c. are annulled. It has been already noticed, that these Clauses were not agreeable to the Nature of the Holdings, and such Obligations were indeed contrary to the several Statutes, that dis-

charged.

(*a*) 1 Geo. I. C. 24.

charged all Leagues and Bonds of Association, without the Privy and Consent of the King, as tending to Sedition, and to the Breach and Disturbance of the publick Peace (*a*); so that they might justly have been declared void, as being contrary to our former Laws; and therefore 'tis absurd to pretend, that the Parliament was making any Encroachment on the Rights of Superiors by that Statute, when they were giving them more than they were intitled to, *viz.* an Equivalent for these Services.

And as to our Feudal Holdings and Hereditary Jurisdictions their being the Seeds of Rebellion, it hath been fully shewn, that that is a groundless Reflection, and a Surmise raised of Purpose to influence the abolishing them; but 'tis hoped the Wisdom of the Parliament will not listen to calumnious Reflections, but weigh the true Merits of the Case, and the Consequence of violating Rights and Privileges, expressly secured, as Rights of Property, by the Articles of the Union, whereupon their own Constitution is founded, and which is the Bulwark of the Succession to the Crown of *Great Britain* in the Protestant Line, upon which, and the *British* Constitution inseparably connected therewith, all our Rights, Liberties and Privileges Sacred and Civil, depend, which every *British* Subject, that is a Lover of his Country, cannot but wish to remain inviolate for ever.

Next

(*a*) Par. 1424. c. 36. Par. 1558. c. 43. Par. 1585. c. 12.

54 AN ESSAY UPON

Next to the Dissolution of the Union, which is the strongest Bar against the Popish Pretender that human Wisdom can invent, the Enemies to our Constitution long, with the greatest Ardour, for an Infraction of any of the Articles of the Treaty, touching our reserved Rights and Liberties, as having a direct Tendency to undermine its Security, which, to be sure, the Wisdom of the Parliament will by all Means prevent.

APPEN-

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A P P E N D I X.

Since writing this Essay, I have seen a little Pamphlet, entituled, *National Union recommended, in Answer to a late scurrilous Paper in the Old England of 27th December 1746; and an equally scurrilous Reply, in a late Pamphlet entituled the THISTLE.*

I join with that Author in all the hard but just Epithets he gives these two Performances; I shall only add one Observation, viz. that it appears to me that the same Person has been the Author of both. The Author of the *Thistle* subjoins to his Piece the other Paper which he pretends to answer; Why all this Care about it, if it was not his own genuine Offspring?

The Project of both Papers is the same: In the first the *Scots* are excited to Rancour against the *English*, by the Proposal of excluding them from all Communication of Trade, and other Privileges, secured to them by the UNION; and in the *Thistle* the *English* are scurrilously abused, and injurious and groundless Suggestions made, that the UNION was carried on by corrupt Means, upon the Part of the *English*; That they are sick of the *Scots*; and that the *Scots* are very sick of the UNION, and fond to have it dissolved, and to be restored to their ancient Independency. The Design of both plainly is
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to raise an universal Combustion, in order to make Way for a Dissolution of the UNION, and thereby revive the Hopes of the *Popish Pretender*, which by the UNION were extinguished, and will remain so while the UNION continues inviolate.

At the same Time while the Author of the Pamphlet before me recommends a *National Union*, and endeavours to establish it in the Affections of the People, he makes the same Proposal (a) with the Author of *Superiorities Display'd*, and perhaps he is the same Person that wrote and publish'd it.

He suggests, that the Root whence all the late Disorders sprung, was the Vassalages and Jurisdictions in the *Highlands*, and that therefore the Soil ought to be rid of so pernicious a Growth, and makes a virulent Invective against them.

But, I hope it has been abundantly shown in the foregoing Essay, That the Superiorities and Jurisdictions had no Influence in raising the late unnatural Rebellion, or on the former, in the 1715; that they were owing to a quite different Cause, *viz.* the Clanship in the Highlands, which has no Concern with Superiorities and Jurisdictions; and that it would be of most dangerous Consequence, to our happy Constitution, to infringe them; since they are secured, to the Owners, by the Treaty of the Union, as Rights of Property.

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(a) P. 8.

Wherefore, 'tis surprizing that such Motion should be made by a Person that recommends the Union as inviolable, and the great Security of the Settlement of the Succession to the Crown in the illustrious House of *Hanover*, and as the Fundamental of our whole Political System, solemnly ratified and confirmed; and that none but an avowed or concealed *Jacobite* would surmise the least hint to the contrary (a).

I shall not accuse the Author of falling under such Character, but 'tis obvious that his Plan has a direct Tendency to undermine our happy Constitution. How is it possible to preserve a Chain entire, and at the same Time break one of the Links? Is not the 20th Article of the Treaty a Fundamental Part of it? And how then can an Infraction be made of it, without undermining the whole? Wherefore, tho' this Author pretends to be a Friend to our happy Establishment, yet, in reality, he contributes to the same fatal Enterprize, which the avowed or concealed *Jacobites*, and the Authors he is confuting, aim at, *viz.* the unhinging of the Union, by an Infraction of an express Article of it, and by that Means to advance the wicked Scheme of the Enemies of our happy Constitution, to ruin it.

The Cardinal Principle our Author founds on, is (b), *That whoever knowingly and wittingly goes about to loosen the Bands of a Community, is a Traitor*

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(a) P. 4. (b) P. 1, and 2.

Traitor to that Constitution, which he thus endeavours to destroy; That the Union is the Fundamental of our Political System; and that therefore these are guilty of High Treason against the Body-politick, who endeavour to dissolve the Union, and ought to suffer Punishment, as in Cases of High Treason.

Now all the Articles of the Treaty have the same binding Force and Authority, are solemn Conventions and essential Conditions; whereupon two independent Kingdoms agree to unite into one, and so are the Fundamental Law of the *British* Constitution. What the Apostle suggests, with respect to the Law of GOD, *That whosoever offends in one Point, is guilty of all (a)*, holds in the present Case; and therefore the same Judgment, which our Author pronounces against these he is confuting, for their Endeavours to subvert our Constitution, by dissolving the Union, must fall upon himself, for proposing an Infraction of one of the Articles. He could only plead, in Arrest of Judgment, a pretended, but surely a mistaken Zeal for the Constitution, which he is unwarily undermining; whereas the other Authors openly declare themselves Enemies to it.

Upon the whole, a Compliance with the Proposal to abolish or infringe the Feudal Superiorities and Hereditary Jurisdictions in *Scotland*, secured by the Union, would be highly injuri-

(a) Jam. ii. 10;

ous to the private Persons vested therewith, and most dangerous to the Publick: Such Measures would not extinguish the Seeds of Rebellion, but rather foment and diffuse them, by occasioning Animosities and Disaffection to the Government: Wherefore it ought to be the Wish and Endeavour of all Lovers of their Country, and true *Britons*, to regard the Articles of that solemn Treaty as inviolable, and to maintain the same inviolate. The Union is the great Security of our Rights and Liberties, and of the Succession to the *British* Crown in the Protestant Line; and consequently the strongest Bar against the Popish Pretender, and an Infraction of any one of the Articles, has an undoubted Tendency to unhinge the whole.

F I N I S.

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