OBSERVATIONS

Upon a BILL, entituled,

An Act for taking away, and aboliſhing the heritable Juriſdictions in that Part of Great Britain *called* Scotland, *and for reſtoring ſuch Juriſdictions to the Crown; and for making more effectual Proviſion for the Adminiſtration of Juſtice throughout that Part of the united Kingdom, by the King's Courts and Judges there; and for rendering the Union more complete;*

OBS. I. That the aboliſhing heritable Juriſdictions and Offices of Inheritance, inſtead of compleating the Union, will tend to diſſolve it, and that the reſtoring them to the Crown is againſt our Conſtitution.

II. That no Equivalent or Satisfaction in Money can be aſſeſſed or accepted of for the Juriſdictions in queſtion.

III. That the Regulations touching Sheriff and Steward-deputes, and their Courts, and the inhibiting Advocations from them, are attended with Inconveniencies.

IV. That to raiſe and diſcuſs Suſpenſions before the Circuit Courts is inept, not anſwering the Deſign, and againſt the Treaty of Union.

V. That an Attempt to introduce a Conformity betwixt our Circuit Courts, as to Cognizance in Civil Matters, and the Aſſizes or Commiſſions of *niſi prius* in *England* is vain, and againſt our Conſtitution.

VI. That the Tendency of this Bill is to undermine the *Britiſh* Conſtitution, and advance the *Jacobite* Intereſt.

Minime ſunt mutanda, quæ interpretationem certam ſemper habuerunt. L. 23. ff. DE LEGIBUS.

EDINBURGH,
Printed in the Year, M,DCC,XLVII.

OBSERVATIONS upon a BILL,

ENTITULED,

An Act for taking away, and aboliſhing the heritable Juriſdictions in that Part of Great Britain *called* Scotland, *and for reſtoring ſuch Juriſdictions to the Crown; and for making more effectual Proviſion for the Adminiſtration of Juſtice throughout that Part of the united Kingdom, by the King's Courts and Judges there; and for rendering the Union more complete.*

OBSERVATION I.

That the aboliſhing heritable Juriſdictions and Offices of Inheritance, inſtead of compleating the Union, will tend to diſſolve it, and that the reſtoring them to the Crown is againſt our Conſtitution.

BY this Bill, "all heritable Powers and "Juriſdictions of Juſticiary, and all Re-"galities and heritable Baillieries in *Scot-"land*, are *propoſed to be* abrogated and extin-"guiſhed, and the Juriſdictions, Powers and "Autho-

" Authorities belonging to them, to be veſted " in, and exerciſed by the Court of Seſſion, " Court of Juſticiary, the Judges in the Cir- " cuits, and the Sheriff and Steward-courts, in " the ſame Manner, as if ſuch Juſticiaries, Re- " galities or Baillieries had never been granted."

And by another Clauſe, " all Sheriffships and " Stewartries granted unto, or poſſeſſed by any " Subject in *Scotland*, either heritably or for " Life, and all Juriſdictions, Authorities and " Privileges thereunto belonging, *are to be* re- " ſumed and annexed to the Crown."

And by a 3d Clauſe, " No Heritor or Pro- " prietor of Lands, which have been erected in- " to a Barony, or granted with other lower Ju- " riſdiction, ſhall by Virtue thereof have, or " exerciſe any Juriſdiction whatſoever, Crimi- " nal or Civil, other than for recovering the " Rents and Profits of the Lands from the Te- " nants and Poſſeſſors thereof, and all other " Powers, Juriſdictions or Authorities, that " may have heretofore been claimed or exerci- " ſed by any ſuch Heritor or Proprietor, ſhall " be abrogated and diſcharged."

By the ſame Bill it is provided, " That rea- " ſonable and juſt Compenſation and Satisfacti- " on be made for, and in reſpect of every ſuch " Juſticiary, Regality, Sheriffship, Stewartry " and Bailliary, and for the Juriſdiction of a Ba- " rony, or other Juriſdiction taken away, diſ- " ſolved and aboliſhed, or reſumed or annexed " to

" to the Crown, to all Perſons who ſhall be " found to be lawfully poſſeſſed of the ſame, " and for that End they may enter their Claims " reſpectively before the Court of Seſſion, who " are in a ſummary Way to examine their Titles " to the ſame, and determine the Value there- " of."

In the Title and Preamble of this Bill, it is ſaid to be intended *for rendering the Union more complete*. Now, ſo far as concerns the aboliſh- ing Juriſdictions and Offices of Inheritance, it is manifeſtly a Breach of the 20th Article of the Union, which reſerves *all heritable Offices, he- ritable Juriſdictions, Offices for Life, and Ju- riſdictions for Life to the Owners thereof, as Rights of Property, in the ſame Manner as they were enjoyed by the Laws of* Scotland *at the Time of the Union, notwithſtanding the Treaty*; how then can this tend to render the Union more complete, when it is a direct Violation of it?

In the next Place, the Juriſdictions of *Coun- ties Palatine*, *Manours*, and other *Franchiſes* in *England* are preſerved entire. The Juriſdicti- on, Power and Privileges of Counties Palatine, are much higher than theſe of our Juſticiaries or Regalities belonging to the Subjects of *Scot- land*, and the Powers, Authorities and Privi- leges of Lords of Manours, are likeways more eminent than thoſe of our Barons: The Lords of Manours had the Franchiſe of *infang Thief* and

and *outfang Thief*, to be heard and determined in their Courts Baron, but theſe are now antiquated; and in the ſame Manner, theſe Powers of old competent to our Barons, (commonly called with us Powers of *Pit* and *Gallows*) are gone in Diſuſe, ſo that in this Reſpect they are upon the ſame Footing.

But ſtill the Lords of Manors have Authority and Juriſdiction, not only in puniſhing Offences and Miſdemeanors committed within their Precincts, but likeways in deciding Controverſies about the Title of Copy-hold Lands within their Bounds, where they may redreſs Matters as a Chancellor in Equity (*a*.) This laſt Juriſdiction never belonged to our Barons, nor even to Lords of Regalities; they cannot determine in any Competition of Rights betwixt their Vaſſals. All Competitions about heretable Subjects, or Rights of Inheritance, are peculiar to the Court of Seſſion by our Law: Theſe and other Privileges belong to Lords of Manors in *England*; and many more to theſe veſted in Counties Palatine.

How can it render the Union more compleat to aboliſh our Juriſdictions and Privileges, which are expreſly ſecured by the Union, and leave theſe in *England*, which are more eminent, intire and inviolate, though they are not expreſly reſerved by the Union? Is not this to make a Diſtinction betwixt the Subjects of *North Britain*

(*a*) Littlet. Sect. 58 et 59. et ibid. Coke.

tain poſſeſſed of theſe Juriſdictions, and theſe in *England* poſſeſſed of greater? Theirs are ſecured only by the Common Law, as it ſtood before the Union, ours have the additional Security by the Union; and yet ours ſhall be abrogated, and theirs preſerved! This would not only ſeem to be making a Jeſt of the Article of the Union ſecuring our Rights, but likeways to make a ſignal Difference betwixt us and our Fellow-ſubjects in *South Britain*, to our Prejudice. If a Breach of the Union tends to compleat it, then this Bill will have that Effect; but till Contradictions in Terms can be conſiſtent, this Bill cannot be compatible with the Union, and much leſs compleat it.

It is further ſet forth in the Preamble of the Bill, *That it is intended for reſtoring to the Crown the Powers of Juriſdiction originally and properly belonging thereto, according to the Conſtitution.* There is no Doubt all Juriſdiction originally proceeded from the Crown; but after it is duly granted to the Subjects veſted therein as Part of their Inheritance, they can no more be outed of it than of any other Rights of Property belonging to them. Of this Nature are all thoſe heretable Juriſdictions againſt which this Bill ſtrikes; and any Infringement of them is inconſiſtent with our Conſtitution as it was before the Union, and much more now, ſince they are ſecured thereby as Rights of Property.

Rights

Rights of theſe Juriſdictions were granted ſome Ages ago. Thus Regulations are made touching the Lords of Regalities, *viz.* the Manner of exerciſing that Juriſdiction by their Baillies; and it is provided (*a*), "That in caſe the "Lords of Regality do not their Duty, in pu-"niſhing their Baillies who ſhall be found cul-"pable, they ſhall be challenged before the "King therefore, upon Pain of Forfeiture of "their Lands and Privilege of Regality;" and Orders are made touching Baillies of Regalities their Conduct in relation to Malefactors within their Bounds (*b*). Again, it is ſtatuted, "That "Lords having Regalities ſhall hold *Juſtice* "*Eyres* twice in the Year, in the ſame Man-"ner as the King's Juſticiar (*c*)."

Thus Regalities were in great Number upwards of 300 Years ago authoriſed by the Law; and 'tis highly probable few or none have been granted ſince the Date of the Statute (*d*), which ordains, *That in Times thereafter no Regalities be granted without Deliberance of Parliament*; or if any ſuch are, they have had the Conſent of the Parliament in terms of the Statute: How then can they be reſumed at this Day by the Crown, even though they had not had the ſolemn Sanction of the Union? for their Security is the ſame

(*a*) Statute Rob. II. cap. 14. anno 1371. (*b*) Dit. Stat. cap. 16. (*c*) Stat. Rob. III. cap. 30. cap. 33. anno 1400. (*d*) Parl. 1455. cap. 43.

ſame which founds the *Britiſh* Conſtitution itſelf.

Some Regalities have been granted many Centuries before the foreſaid Periods, and for moſt juſt and reaſonable Conſiderations. Thus the firſt Regality we read of was that erected by *Malcom* III. called *Canmore*, in favours of *Mac-Duff* Earl of *Fyfe*, for his ſignal Service in dethroning the Uſurper *MacBeth*, and reſtoring King *Malcolm* to the Throne of his Anceſtors. This is deſcribed by the Hiſtorian as importing the very ſame Privileges that belong to the Lords of Regalities at this Day (*a*).

Heretable Sheriffſhips are of the ſame ſtanding, and have the ſame Security for their Rights as Lords of Regality have for theirs; and as Lords of Regality cannot exerciſe their Juriſdiction otherways than by Baillies, ſo Sheriffs that have the Office in Fee, and are not ſufficient to miniſter Juſtice in their own Perſons, are bound to conſtitute Deputes capable of the Office, for whom they ſhall be anſwerable, who muſt be *Perſons of Subſtance, of good Fame, Knowledge and Experience* (*b*).

The Bill ordains, "That no Sheriffſhip or "Stewartry ſhall at any time hereafter be "granted to any Perſon either heritably or for "Life." I obſerve, on this Head, that our Convention of Eſtates 1689 (*c*), in their Declaration,

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(*a*) Boet. lib. 12. p. 256. anno 1057. (*b*) Parl. 1424. cap. 6. Parl. 1540. cap. 73. (*c*) Cap. 13.

ration, containing the Claim of Right, mention this as one among many other Inſtances of King *James* his exercing arbitrary Power, whereby he had forfeited his Right to the Crown, *viz.* "his changing the Nature of the Judges Gifts "*ad vitam aut culpam*, and giving them Com- "miſſions *ad beneplacitum*, to diſpoſe them to "Compliance with arbitrary Courſes." Now 'tis pretty extraordinary, that by this Bill it is intended, that the above Grievance ſhould be ſo far from being redreſſed, that it ſhall be put out of his Majeſty's Power to give any Remedy to it; and, for certain, it is vaſtly more for the Liberty of the Subjects, and contributes to the free Adminiſtration of Juſtice, that Judges be appointed *quamdiu ſe bene geſſerint*, that, being under no Apprehenſions of Removal, but upon real Maleverſation, they may proceed in the Exerciſe of their Office, as the Law and a good Conſcience direct.

And as to the Power of Barons, it is coeval with the Introduction of the Feudal Law into this Country, which, I doubt not, took Place with us, on *Fergus* the Second's recovering the Throne of his Anceſtors, after they and their Countrymen had ſuffered an Exile of 44 Years in *Denmark*; for, as our Hiſtorians inform us, he, with an Army of *Picts* and *Danes*, aſſiſted *Alaricus* in his Wars in *Italy*, when he ſacked and took Poſſeſſion of *Rome*, and the whole *Roman* Provinces in theſe Parts, and divided the

the conquered Lands among his Followers, on Condition of Fealty and military Service by a Feudal Tenure with ample Privileges.

After this ſucceſsful Expedition, *Fergus* returned to his kind Friend the King of *Denmark*, whoſe near Kinſman he was by his Father *Ethus*, a *Daniſh* Prince, to whom his Mother, the Heireſs to the Crown of *Scotland*, was married. And ſoon thereafter, on earneſt Invitation from the *Picts*, to aſſiſt them againſt the *Britons*, he came over with all the *Scots* that were in theſe Parts, and ſuch of the *Danes* as were willing to follow his Fortune. Upon getting from the *Picts* Poſſeſſion of their ancient *Scottiſh* Kingdom, *Fergus* parcelled out the ſame among his Followers (*a*), after the Example of *Alarick*, in reſpect to the conquered Countries in *Italy*, on Condition of Homage and Fealty, and to be holden as Fiefs of him.

In the ſame Manner the *Engliſh* Lawyers, in the accounting for the Inſtitution of Courts Baron inform us (*b*), "That, by the Laws and "Ordinances of ancient Kings, eſpecially of "King *Alfred*, it appeareth that the firſt Kings "of the Realm had all the Lands of *England* "in *Demean*, that they reſerved to themſelves "the great Manours and Royalties, and, of the "Remanent, they, for the Defence of the "Realm,

(*a*) *Boet.* Lib. 7. p. 114. et ſeqq. (*b*) *Littlet.* Cap. 9. Sect. 73. et ibid. *Coke.*

" Realm, infeoffed the Barons with ſuch Juriſ-
" dictions, as the Court Barons now have.

Wherefore, if 'tis good Ground for aboliſhing the hereditary Juriſdictions, and reſuming Offices of Inheritance, that they proceeded from the Crown; then, by the ſame Reaſon, all Rights of Property in Land belonging to the Subject, either in this Country or *England*, may be reſumed, it being moſt certain, that they all flowed originally from the Crown: A Demonſtration of this (*whether the foreſaid Account of the Matter ſhall hold or not*) is, That they all hold of the Crown, either mediately or immediately at this Day, and are eſtabliſhed by Charters from the Crown; and, to be ſure, the King could not have conveyed them by his Grants, whereon theſe Charters proceed, unleſs the ſame had belonged to his Majeſty.

OBSERV. II.

That no Equivalent or Satisfaction in Money can be aſſeſſed or accepted of for the Juriſdictions in Queſtion.

AS to a reaſonable Satisfaction or Compenſation, which the Bill propoſes ſhall be given for theſe Juriſdictions and Privileges, it would ſeem impoſſible, that any ſuch Meaſure can be followed without the Conſent of the Perſons intereſted, by ſubmitting their Rights to be diſpoſed of in that Way; for otherwiſe, may not we of *North*

North Britain be outed of all our Lands, on Pretence of an Equivalent in Money, for we have no better Security for the one than the other? And thus no *Scotſman*, by this Rule, may have a Foot of Ground in his native Country, if the Scheme in the Bill ſhall be purſued.

There is indeed this Difference from the Nature of Things, that the Rate and Value of Land is known; whereas Honour, Juriſdiction, Franchiſe or Privilege, cannot admit of any Value, in a proper Senſe: 'Tis like Life and Liberty, which the Law Terms *res ineſtimabiles*, Things ineſtimable. Theſe afford no yearly Profits, but are moſt Important, and highly eſteemed by all generous and ingenuous Souls, tho' they can admit of no pecuniary Value; they raiſe one above the State of the Yeomanry and common People, and gain him Authority and Grandeur, which procure Reſpect and Eſteem; and by ſuppreſſing theſe Juriſdictions, the higheſt Dukes with us are brought upon a Level with their meaneſt Vaſſals or Feuers of the Rank of Yeomanry; For, by this Bill, their Power and Authority is equal in every Reſpect, and at the ſame time the great Men in *England*, Lords of Manors, and thoſe veſted with Counties Palatine, ſhall bruik and enjoy their Honours, Franchiſes and Privileges as formerly: This were forfeiting our Nobility and Gentry of their Birth-Right, and uſing them arbitrarily by ſuch Debaſement, under a free

free Government. If *Esau* is justly censured as a *prophane Person* for selling his Birth-Right for a Morsel of Meat, as the great Apostle Characterizes him *(a)*? must our Nobility and Gentry, be compelled to sell theirs for a Piece of Money? Wherefore, 'tis hop'd, the Wisdom of the Parliament will not listen to such injurious and dangerous Measures.

The People in *England* are at Liberty to apply to their Courts-Baron, for Decision of their trivial Differences, and the Lords of the Manors have Jurisdiction to punish Riots and Misdemeanours within their Precincts, for the quiet of the Country; all this may be done at little Expence and Trouble. We have at present the same Privileges; but, by the purview of this Bill, our Tenants and Possessors shall be obliged to apply to the Sheriff-Courts for Justice in every little Claim or Demand, at their great Expence and Trouble; and our Lords of Regality, and Barons, must likewise have Recourse to the same Courts for punishing any Crimes or Misdemeanours, that shall happen within their Bounds. This certainly is not to facilitate, but manifestly to obstruct the Administration of Justice among us; and why ought this Hardship to be imposed upon us by the *British* Parliament, which is the Guardian of the Rights and Liberties of all the *British* Subjects? Why must our Privileges be abolished?

(a) Heb. xii. 16.

shed, and theirs in *England* remain inviolate? Can any pretended Equivalent in Money be a reasonable Satisfaction for the Honour and Dignity accompanying these Jurisdictions? Among private Persons, it would be lookt upon as a high Indignity and Affront, to make the Proposal; and none but Persons in the utmost Straits would accept of such dishonourable Barter.

'Tis the Interest of all *British* Subjects to concern themselves in this Question: The Consequences may be dreadful. The *British* Constitution can no longer be safe and firm, if the Union upon which it is founded is shaken; so that all our Rights and Liberties, sacred and civil, must hang in Suspense, while this Bill is in Dependence; and therefore 'tis hoped that such a bold Attack on them shall be prevented, by not allowing it to be presented. 'Tis dangerous to bring such Points in Question, as if it were a Matter of Deliberation and Dispute, whether our *British* Constitution shall be maintained inviolate or broke through? Or, whether our Rights and Liberties shall be supported under our happy Constitution, or, if they shall be infringed and quite abolished?

If indeed these Jurisdictions had been the Occasion of the late unhappy Rebellion; or, of the former in the 1715, or had in the least contributed to the same, there would be good Reason for taking them away; even perhaps without any Recompense; for then it would be

be neceſſary for the Good of our Conſtitution, *et ſalus populi ſuprema lex*: But, it has been abundantly ſhewn in a late Eſſay, *(a)* that they have not the leaſt Tendency that Way, but, on the contrary, that they rather contribute to the quelling Rebellions, than fomenting them: It is the Clanſhip in the Highlands, to which any Thing of that Kind is owing, as that Author has fully evinced.

I ſhall only add, that all thoſe poſſeſt of high Juriſdictions in the Highlands, are Friends to the Government, and the ſuppreſſing their Power and Authority, ſhall diſable them for ever from being ſerviceable in quaſhing Inſurrections or Rebellions in theſe Parts; ſo that if theſe lawleſs Aſſociations of Clans created Diſturbances to the Government formerly, they ſhall have it much more in their Power, if theſe Juriſdictions are removed, which if duly encouraged might be moſt uſeful to curb and ſuppreſs them: Wherefore, inſtead of aboliſhing theſe Juriſdictions, they ought to be ſtrengthened by Powers of Lieutenancy in the Bounds of the Highlands and Iſlands of *Scotland* for the more effectual maintaining of the publick Peace.

Sheriffs for moſt Part, are not Men of that Conſequence and Authority, as theſe powerful Lords of Regality; and therefore not ſo capable

(a) Eſſay upon Feudal Holdings, Superiorities and Juriſdictions, printed this ſame Year, 1747.

pable to ſuppreſs Seditions and Commotions of the People, more eſpecially when deprived of the Aſſiſtance of theſe Lords and Barons, who, in the preſent State, may, and ought to concur, for preſerving the publick Peace and Quiet of the Country, under the auſpicious Reign of our moſt gracious Sovereign. His Majeſty is the great Protector of our Rights and Liberties, and would not, I preſume, from the great regard he has to Honour and Juſtice, according to his known Character, ſuffer them to be infringed, even tho' we ſhould be diſpoſed to throw them up, as the Promoters of this Bill ſeem inclined.

And this leads me to obſerve, that I ſtrongly ſuſpect a Jacobite Plot in projecting this Bill; the Plan ſeems to be to create Animoſities and Diſaffection againſt the Government, to infuſe Jealouſies in the Breaſts of the Friends of the Government, and to make theſe that are not zealouſly affected, entirely Enemies to the preſent happy Conſtitution: Its Tendency muſt be to give all true *Scots* Men an Abhorrence at the Union, when under it their Rights and Liberties ſhall be deſtroyed and extinguiſhed, inſtead of being preſerved and ſecured, as they had ground to expect from the Nature of the Treaty, and the expreſs Stipulations in it. Theſe direful Effects, 'tis hoped, the Wiſdom of the Nation will prevent, by treating this Bill as it deſerves, and not to regard it ſo much as

to allow the ſame a Hearing; for indeed the Propoſal of an Equivalent adds Diſhonour and Affront to the Injury intended by it, as if we were diſpoſed to part with an Honour, Dignity and Pre-eminence, ſcandalouſly, for a Conſideration in Money.

OBSERV. III.

That the Regulations touching Sheriff and Steward-deputes, and their Courts, and the inhibiting Advocations from them, are attended with Inconveniencies.

I Shall now proceed to make ſome few Obſervations upon the reſt of the Bill, moſt of the Law-ſuits that are brought before Courts of Regalities and Baronies, muſt, on the Foot of this Bill, come before the Sheriff and Steward Courts; and the Bill ſets forth, "That it is reaſonable, that ſome further Regulation be made relating to the Number, Qualifications and Appointments of Sheriff-deputes and Steward-deputes in *Scotland*;" *and therefore provides*, "That it ſhall be lawful for his Majeſty to direct how many Sheriff-deputes or Steward-deputes ſhall be appointed for any County, Shire or Stewartry, Regard being had to the Extent of the ſame, and that one Sheriff-depute, an Advocate of Years ſtanding, ſhall be nominate by his Majeſty, and that the other Deputes ſhall be appointed

ed by the principal Sheriff or Steward whom the King may diſapprove, and that his Majeſty may appoint the ſame Perſon, being an Advocate, to be Depute for Counties, Shires or Stewartries, being adjacent to each other."

The Multiplicity of Buſineſs that ſhall come before theſe Courts on this new Plan, requires, perhaps, that more Deputes be appointed to overtake it. Now, whereas one of them only is to be an Advocate, who is preſumed to underſtand the Law, and capable to diſpenſe Juſtice to the Lieges in a right Manner, what ſhall be the Condition of theſe within the Diſtricts of the other Depute, that have no Dependence on the Depute Advocate? Is he bound to give Directions to his Collegues in their Procedure, or are they bound to obſerve them? And if ſuch Advocate Depute ſhall be nominate to more Shires, he can only be of Uſe within his own Diſtrict, unleſs he ſhall have the Superviſing and Controul of the Proceedings of all the Sheriffs principal, and their other Deputes, which is not intended by the Bill.

The Bill, in order to the Sheriff and Steward Courts being rendered more uſeful and beneficial to the Subjects in *Scotland*, ordains, "That no Advocation ſhall be granted or allowed in any Action brought before them, for any Sum of Money, or other perſonal Demand, not exceeding the Value of 30 *l. Sterl.* and all

"ſuch

" ſuch Letters or Proceſs of Advocation are in-
" hibited and diſcharged."

At preſent, all Advocations of Cauſes under 200 Merks, or 11 *l.* 2 *s.* $2\frac{2}{3}$ *d. Sterl.* are diſcharged; but at the ſame Time, even in theſe petty Actions, a Bill of Advocation may be preſented to the Lord Ordinary on the Bills, complaining of wrong Interlocutory-Judgments given by the inferior Judges, in order to have the Cauſes remitted to them, with Inſtructions to rectify and direct their Proceedings; and if the Party is not ſatisfied with the Ordinary's Judgment, he may have the joint Opinion of three Lords in Vacation Time, and of the whole Lords in Time of Seſſion. This Remedy may be obtained on very little Expence, and the Proceeding is in a moſt ſummary Way. This Method is a Check to the Conduct of inferior Judges, and their Decrees, given after ſuch Precautions, may be ſo juſt, as not to be in Hazard by a Suſpenſion or Reduction; whereas, by this Bill, the Lieges ſhall be left to theſe laſt mentioned Remedies, which are more expenſive and dilatory then Advocations in Matters within 30 *l. Sterl.* and, after all the Courſe projected, cannot be effectual.

OBSERV.

OBSERV. IV.

That the Propoſal to raiſe and diſcuſs Suſpenſions before the Circuit Courts is inept, not anſwering the Deſign, and againſt the Treaty of Union.

THE Remedy propoſed is, " That it ſhall
" be lawful for any Party conceiving him-
" ſelf aggrieved by any Decree or Judgment of
" the Sheriff or Steward Courts, to ſeek Relief
" of the ſame by Bill of Suſpenſion, to be pre-
" ferred to the Circuit Courts of ſuch County
" or Stewartry; and thereupon it ſhall be law-
" ful for the ſaid Circuit Court to ordain Let-
" ters of Suſpenſion to be iſſued, and to hear
" and determine thereon by the like Rules of
" Law and Juſtice, as the Court of Seſſion may
" now cognoſce and determine Suſpenſions of
" Decrees of the Steward or Sheriff Courts in a
" ſummary Way; and in caſe the Reaſons of
" Suſpenſion are found not to be relevant, or
" not inſtructed, they ſhall condemn the De-
" fender in the full Coſts of Suit to the other
" Party; and in caſe ſuch Bill of Suſpenſion
" ſhall be brought in the Interval of the Circuit
" Court, the ſame ſhall be preferred to the
" Judge or Judges who went that Circuit,
" wherein the Circuit pronouncing the Decree
" was held, and the ſame ſhall be determined
" at the next Circuit."

By

By another Clauſe the Bill ordains, "Circuit "Courts to be held twice in the Year, and that "they ſhall continue at each Town where they "ſhall be held Days for the Diſpatch of "Buſineſs."

It likewiſe provides, "That, in caſe the Cir-"cuit Courts in cognoſcing upon any Suſpen-"ſion ſhall find Difficulty, and not otherwiſe, "it ſhall be lawful for ſuch Circuit Court to "certify the ſame to the Court of Seſſion, which "is to determine the ſame in like Manner, as "if the Suſpenſion had been originally com-"menced in the Court of Seſſion."

I obſerve, upon this Head, 1. That this propoſed Expedient cannot anſwer the Deſign. 2. That it is againſt the 19th Article of the Union.

As to the *Firſt*, The Deſign, in Appearance, is to contribute to the Eaſe of the Lieges in obtaining Juſtice, and to the Diſpatch of it in the Method of Procedure. Now, when a Bill of Suſpenſion is preſented, the Charger (*as we call the Plaintiff*) muſt be allowed to ſee and anſwer the ſame. This will require ſome Days; and then, upon adviſing the Bill and Anſwers, the Bill is either refuſed or paſt; if the firſt, the Suſpender has no Remedy; whereas, were it before the Court of Seſſion, when a Bill is refuſed by the Lord Ordinary on the Bills, the Suſpender may reſort to three Lords in Time of Vacation, and to the whole Lords in Seſſion-

Seſſion-time. It is a Hardſhip upon the Party to be deprived of this Remedy, ſince, by the Conſtitution he is entitled to the Judgment of the Court of Seſſion, or of three Lords jointly in the Vacation-time.

Next, if the Bill is paſt, and Letters of Suſpenſion iſſued, then there muſt be a limited Time for the Charger to compear with his Decree to have the Suſpenſion diſcuſt, which is for moſt Part a Month: Before Expiry of this Period, the Circuit Court is over, and the Charger muſt wait the next Circuit, before he can have Execution upon his Decree, notwithſtanding that the Seſſion interveens, before which, by the preſent Conſtitution, he might have the Suſpenſion diſcuſſed; wherefore, by this new Model, Juſtice ſhall be greatly delayed, inſtead of being diſpatched.

But further, where a Bill of Suſpenſion is preferred in the Interval of the Circuit, it is to be determined at the next Circuit Court. Now, in the Interval of Circuits, the Court of Seſſion is for the moſt Part ſitting; and, by this Bill, it ſhall not be lawful for the Charger to have the Suſpenſion diſcuſt before that Court, but he muſt wait till the next Circuit. Thus put the Caſe, that a Suſpenſion of a Sheriff or Steward's Decree is obtained the firſt of *November*, the Charger muſt wait till *May*, that the next Circuit is held, before he can obtain Juſtice; whereas, by the preſent Courſe of Procedure, he might have

have it done long before in a much ſurer Way before the Court of Seſſion.

Again, the Caſe may happen, that the Judges of the next Circuit Court ſhall find Difficulty in diſcuſſing the Suſpenſion; and therefore, in the Terms of the other Proviſo, remit the ſame to the Court of Seſſion, to be cognoſced and determined: By this Means, the Charger ſhall undergo a new Delay and further Expence, before he can obtain Juſtice; ſo that inſtead of facilitating the Adminiſtration of Juſtice, and eaſing the Subjects of Expence and Trouble, they ſhall be exceedingly harraſſed with Expences, Delays, and Multiplicity of Courts, through all which the Suitors muſt make their Way, before they can attain the Execution of Juſtice; whereas at preſent the Proceedings are more ſimple and eaſy, firm and ſolemn. If a Suſpenſion is paſt, it may preſently be determined by the Court of Seſſion, no Allegations being admitted in ſuch Caſes, but theſe that are inſtantly verified or proved, and the Procedure is moſt ſummary.

There is this likewiſe in the Caſe, that the Clerk to the Bills, whoſe Office is for Life, is intitled to preſent all Bills of Suſpenſion, and receive certain Dues upon that Account, he muſt therefore attend one of theſe Circuit Courts, and appoint Deputes to officiate for him in the other two Circuit Courts; and 'tis almoſt certain, that the Expence of the Journey and Attendance,

tendance, and a Conſideration to the Deputes, muſt vaſtly exceed all the Perquiſites of the Office, this were no ſmall Grievance and Inconveniency to him; but he, being in a publick Office, may be compelled to attend theſe new Courts, or to appoint others to officiate for him.

But the Writers to the Signet, whoſe Privilege it is to write and ſign all Bills of Suſpenſion, cannot be bound to give Attendance, and probably none of them would find their Account in it, for the Expence would exceed the Profit they could expect from ſuch Undertaking; and the ſame would be the Caſe of Advocates, all the Profits before the Circuit Courts could not afford them ſufficient Encouragement to undergo ſuch Employment; ſo that unleſs Salaries were appointed to both Advocates and Writers to the Signet, in order to their officiating before the Circuit Courts, the Deſign muſt be fruſtrated.

There is this further Conſideration, that the Clerks of the Seſſion are intitled to all the Dues of Petitions and Extracts before that Court, in diſcuſſing Suſpenſions and Advocations, in the ſame Manner as in other Actions or Cauſes before them, and theſe are the only Fund for their Salaries; by this Scheme they ſhall be defeated of the one Half of their Perquiſites, which were a Kind of Forfeiture of them, notwithſtanding their Offices are for Life, or *quamdiu ſe bene geſſerint*; and the ſame is the Caſe

of the Clerks to the Bills. Now, Offices for Life are reſerved to theſe veſted with them as Rights of Property by the 20th Article of the Union, in the ſame Manner as ſuch Offices were poſſeſſed at that Time.

And this leads me to the ſecond Obſervation upon this Head, *namely*, That this new projected Scheme is againſt the Articles of the Union. This holds not only in the Caſe juſt noticed, but likeways, which is more important, with reſpect to the Court of Seſſion itſelf.

By the Treaty of Union it is ordained (*a*), " That the Court of Seſſion, or College of Juſtice, do, after the Union, and notwithſtanding thereof, remain in all Time coming within *Scotland*, as it is now conſtituted by the Laws of that Kingdom, and with the ſame Authority and Privileges as before the Union; ſubject nevertheleſs to ſuch Regulations, for the better Adminiſtration of Juſtice, as ſhall be made by the Parliament of *Great Britain*." Now, according to the Conſtitution of the Court of Seſſion, all Advocations and Suſpenſions in Civil Caſes, are annexed to its Juriſdiction, and conſequently the Erection of this new Circuit Court, for preferring and diſcuſſing Suſpenſions, is a Derogation to the Authority and Privileges of the Seſſion. The Judges of the Circuit Court had never with us any Juriſdiction in Civil Matters; the Juſtice

(*a*) Article 19.

Juſtice Eyre, in place of which the Circuit comes, was originally conſtitute for Cognition and Trial only of Crimes (*a*), and to take Inſpection of the Management of inferior Judges. For this Purpoſe, on the laſt Day of the Court they were to enter the Pannel, or abide Trial at the Suit of any Perſon that ſhould make Complaints of them, and anſwer for their Adminiſtration of Juſtice; and the above is the only Power and Juriſdiction they have at this Day.

Wherefore, the veſting the Judges of the Circuit with a Juriſdiction in Civil Matters, is undoubtedly the Erection of a new Court; and whatever Authority or Juriſdiction is given to them in Caſes Civil, is plainly by diveſting the Court of Seſſion of ſo much of that Authority and Juriſdiction, and annexing the ſame to theſe Judges: For, tho' they are of the Number of the Lords of Seſſion, as well as Juſticiary, yet they are to act by this new Scheme independently of the Court of Seſſion.

By the ſame Rule the whole Juriſdiction that belongs to the Court of Seſſion, may be taken from them, and annexed to ſome other Court of the King's Creation for *in toto et pars continetur* (*a*). If ſuch Meaſure can be taken with reſpect to a Part of the Juriſdiction of the College of Juſtice, (and a conſiderable Branch too) may not the ſame be followed as to the whole? And

are

(*a*) Iter Juſtic. per totum Parl. 1587. cap. 28. Parl. 1672. cap. 16. (*b*) L. 113. ff. de reg. ju.

are not the People of *Scotland* intitled to have the Decrees before the inferior Courts againſt them cognoſced and determined (in caſe of a Review) before the Court of Seſſion, and not before any other Court, in the ſame Manner as if the Suits whereon ſuch Decrees proceeded had been originally commenced before them? This were, therefore, a manifeſt Breach of the Conſtitution of the Court of Seſſion, whoſe Authorities and Privileges are expreſly ſecured by the Union, and to which all the Lieges are intitled to reſort for Juſtice.

Nor can the *Proviſo* ſubjoined in the Article ſupport this Innovation; for it concerns only Regulations for the better Adminiſtration of Juſtice in the Court of Seſſion, but ſtill the Court muſt be ſupported inviolate in its Authority and Privileges, and Juſtice muſt be adminiſtrate by that Court accordingly, in all Cauſes that were annexed to their Juriſdiction at the Time of the Union. This is inconſiſtent with the veſting this new Juriſdiction in the Judges of the Circuit, to review the Decrees of inferior Judges independently of the Court of Seſſion.

OB-

OBSERV. V.

That an Attempt to introduce a Conformity betwixt our Circuit Courts, as to Cognizance in Civil Matters, and the Aſſizes or Commiſſions of niſi prius *in* England, *is vain, and againſt our Conſtitution.*

'TIS poſſible that the Framers of this Bill have had in their Eye the Courſe of Proceedings in *England*, upon Commiſſions or Writs called *niſi prius*, and as theſe were inſtituted for the Eaſe of the Subjects of *England*, and the ſpeedy Adminiſtration of Juſtice in the Country, as their Lawyers inform us (*a*); ſo theſe Projectors perhaps imagined they were contributing to the ſame End by this Bill; if that were the Caſe, the Deſign were Praiſe worthy, and beneficial to the People of *Scotland*.

But this is by no Means the Caſe, for the Courſe of Proceedings upon Writs of *niſi prius* before the Judges of Aſſize (to whom the Authority of Juſtices of *niſi prius* is annexed) in Civil Cauſes, touching which only the preſent Queſtion occurs, is, that they muſt be grown to iſſue (*i. e.* the Suit conteſted, and the Fact ready to be tried) in the Courts of *Weſtminſter*, and then they are brought down in the Vacation, before the Day of Appearance appointed for the Jury by the Court above, into the County where

(*a*) Coke 4. Inſtit. p. 159. et ſeq.

where the Action was laid, for the Eaſe of the Plaintiff, Defendant, Jury and Witneſſes, to be tried there, which is uſually done in two or three Days: The Verdict of the Jury muſt thereafter be returned to the Court above, and the Judges there give Judgment for the Party for whom the Verdict is found.

Wherefore all that the Judges of *niſi prius* do in Civil Caſes, is to overſee the Jury's giving their Verdict; but as the Suit was conteſted before the Judges in *Weſtminſter-hall*, ſo they, on the Return of the Verdict, give Judgment thereon. Is there any Thing ſimilar betwixt that Method of Procedure, and that propoſed in the Bill? The Court of Seſſion, which we may call the Court above, is by this Plan to have no Concern at all in Suſpenſions of Decrees before inferior Judges, firſt or laſt, unleſs the Judges of the Circuit think fit to refer the ſame to them. The abſolute Diſparity betwixt their Method of Proceedings in *England* in Civil Caſes, and ours, makes it impoſſible, without Breach of our Conſtitution, to inveſt the Judges of the Circuit with any Power in Civil Caſes, parallel to that of the Juſtices of *niſi prius*, in Caſes of Trials of Facts by Juries, as the Courſe is in *England*: The ſame on a Proof by Witneſſes, as well as the Points of Law are tried by the Lords of Seſſion, who at ſuch Trial may be Fifteen, if all are preſent, and at the leaſt there muſt be Nine, that being a *Quorum*; theſe learned Judges, to be ſure, are as much to be truſted, even in adviſing

adviſing the Proof taken in a Cauſe, as a Jury of illiterate Country Men. Now 'tis the Privilege of all the People of *Scotland* to have their Actions and Cauſes, in all Civil Caſes, tried before the Court of Seſſion, as the higheſt ſubordinate Court, under that of the laſt Reſort, as it is the Privilege of the People of *England* to have the Fact in their Suits tried by a Jury of Twelve, *liberos et legales homines patriæ*, and to withdraw any Cauſes from the Cognizance of the Court of Seſſion in the ſecond Inſtance, *i. e.* in the Caſe of Review of Decrees of inferior Judges, by Way of Suſpenſion or Reduction, is as much againſt our Conſtitution, as it would be againſt that in *England*, to deny the Suitors there a Trial by a Jury.

OBSERV. VI.

That the Tendency of this Bill is to undermine our Conſtitution, and advance the Jacobite *Intereſt.*

UPON the whole, this Bill, as to the firſt Part, might perhaps be acceptable to a Prince, that aſpires to abſolute Power and arbitrary Government, *viz.* to have all Juriſdiction and Authority lodged in himſelf, and the Emanations of it precariouſly to depend on his Pleaſure. This might be firſt tried upon the People of *Scotland*, on the Offer of a Premium to bribe them out of their Rights and Liberties, for ſuch,

to

to be ſure, the Juriſdictions in queſtion are; and if it ſucceeded, then the like Project might eaſily be accompliſhed in *England*, in order to make the Union more complete, that ſo there might be an Uniformity over all *Britain*. And as above noticed, I ſuſpect the Enemies of our Conſtitution to be the Promoters of this Bill; for as it was the attempting of abſolute Power that was the Rock on which the late King *James* ſplit, ſo they juſtly conceive, that the ſame might be the Caſe of his preſent Majeſty, if Meaſures tending that Way ſhall be followed; but 'tis not doubted, the Wiſdom of the Parliament will apprehend the Danger, and prevent it. 'Tis abſolutely certain, our moſt gracious Sovereign has always governed according to the Laws of the Kingdom, and ſhown himſelf, upon all Occaſions, a ſtrenuous Aſſerter and Protector of the juſt Rights and Liberties of his Subjects, and cannot poſſibly countenance ſuch deſtructive Meaſures.

The Caſe once happened in *England*, that the Parliament made an Act, whereby all future Parliaments were uſeleſs; but that very deſpotick Power which the King obtained by Act of Parliament was his Ruin: I mean the Caſe of *Richard* the ſecond (*a*); ſo that where the Rights and Liberties of the Subjects are invaded, tho' by Act of Parliament, it will not

(*a*) *Rapin*'s Hiſtory of *England*, Vol. V. Lib. X. page 168, 169. of the Fol. Edit.

not always prevent the terrible Conſequences of Proceedings of that Kind. But I am far from ſuſpecting the preſent *Britiſh* Parliament of ſuch Deſigns; and tho' they were capable of them, it is not to be imagined that his Majeſty would concur in Meaſures having the leaſt Tendency that Way; ſo that we are perfectly ſecure againſt the fatal Effects of this Bill, ſince it can never paſs into an Act; and I heartily join my Wiſhes with all true *Britons*, Friends to our happy Conſtitution, that it may never be attempted.

And as to the other Part of the Bill, it proceeds on miſtaken Notions of our Conſtitution; and in attempting to mend it, would encroach upon the ſame in divers Reſpects. It could never anſwer the ſpecious Deſign but have the contrary Effect; and inſtead of promoting the Adminiſtration of Juſtice, would greatly retard it, multiply Trouble and Expences to the Lieges, and occaſion great Delays to the Execution of Decrees, which it pretends to make more ſummary and eaſy; and as the Plan thereby propoſed is an evident Infraction of more than one of the Articles of Union, it muſt in that Reſpect have proceeded from the ſame Source, and be of the ſame fatal Tendency, as the other Part of the Bill, were it become a Law, which 'tis confidently hop'd ſhall never be the Caſe.

FINIS.