BOOK X.

THE PARLIAMENT OF SCOTLAND.

THE PARLIAMENT OF SCOTLAND.

CHAPTER I.

ITS EARLY HISTORY TO A D. 1560.

The Scottish Constitution.

It will be convenient here to interrupt the thread of my narrative, in order to trace the history of the Scottish Parliament from its earliest records down to the time of the Union with England. The Constitution of Scotland is more obscure in its origin and progress than that of most European states, for all ancient documents and contemporary chronicles which may have existed during the first eleven centuries of the Christian era have been irretrievably lost. No authentic Scottish charter, record, or chronicle is known to be extant so old as the reign of Malcolm Canmore, who died in 1093 ; and it is therefore useless to conjecture upon the constitution and powers of such political bodies as existed prior to the eleventh or twelfth century.

The King and the Legislative Council.

It is extremely difficult to distinguish the ancient Scottish legislative court or council of the sovereign from that which discharged the duty of counselling the King in judicial proceedings. While the early lawgivers enacted statutes by the advice of the "bishops, earls, barons, thanes, and whole community," or "through the common counsel of the kynryk (kingdom)," during the reigns previous to Alexander III. the King also decided causes in a similar assembly of magnates ; and laws of the greatest importance, and affecting the interests of

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all classes of the community, were enacted by the King and his judges. The appointment of Turgot to the bishopric of St. Andrews by King Alexander I. in 1107, and the proceedings in connection with the election and retirement of his successor, Eadmer, in 1120-1, are the earliest events in Scottish history where there is evidence of the concurrence of a national council. This council, as the King himself stated in a letter to the Archbishop of Canterbury, consisted of certain bishops, earls, "and good men of the country." In the few remaining charters of the kings preceding this monarch there is no mention of any great officers of the Crown. Those of Alexander are witnessed by his chancellor and constable, the former office being rendered necessary by the introduction of royal fiefs and charters, and the latter marking the rise of a feudal baronage. A justiciar also first occurs in this reign, and in royal grants of importance Alexander cites the testimony and consent of the bishops and magnates of his kingdom.[1]

The Scottish Estates.

The Representative Assembly, or Parliament, of the Scottish nation approximated more to the French than to the English model. It contained three estates, prelates, tenants-in-chief great and small, and townsmen, until James I., in 1428, in imitation of the English system, instituted commissioners of shires, to supersede the personal appearance of the minor tenants-in-chief; then the three estates became the lords, clerical and lay, the commissioners of shires, and the burgesses; and these throughout their history continued to sit in one house.[2] The estates have been simply and clearly defined by some authorities as the clergy, the barons, and the burgesses. The Chancellor was president; the officers of state had seats in virtue of their offices; and the judges of

[1] *The Acts of the Parliaments of Scotland, printed by command of Queen Victoria in pursuance of an Address of the House of Commons of Great Britain*, Vol. I., A.D. 1124—1423.

[2] *Lords' Report on the Dignity of a Peer*; and Stubbs's *Constitutional History*, Vol. II.

the Court of Session sat round a table in the centre of the hall, between the barons and the Commons. All tenants of the Crown, or barons, as they were denominated, were entitled to sit in Parliament; but many, from the smallness of their incomes and the overwhelming influence of the great aristocracy, forbore to attend an assembly where they were merely objects of disdain. It was this failure that led to the statute of James I., a statute passed nearly two centuries after the Commons of England had obtained representation. Moreover, in England the right of voting was not confined to mere tenants of the Crown; it was indisputably exercised by all freeholders; but in Scotland the right was restricted to proprietors who held of the Crown.[1] The burghs early acquired a right of representation, and their commissioners sometimes attended, but the commissioners for counties never.

Early constitutional progress.

The National Council practically established by Alexander I. is called the Curia Regis from the reign of William the Lion till the death of Alexander III. Constitutional progress during this period is interesting, though somewhat difficult to trace. David I. (1124—1153) was known as a legislator, and a considerable body of his work has survived to this day. In his reign the offices of great steward and constable became hereditary in the families of Stewart and De Morevil. Another important officer, the great chamberlain, had probably the general control of the Treasury; but his functions, administrative and judicial, had more particular reference to the affairs of the burghs, the defined constitution of which was one of the remarkable features of the reign.

The National Assemblies.

Well-defined constitutional landmarks distinguish the reign of William the Lion, who was crowned at Scone in 1165. This king held frequent great courts for the decision of causes and enacting of assizes and statutes. These assemblies consisted of bishops and prelates, earls, barons, and free tenants of the Crown. For the first

[1] *Constitutional History of the British Empire.* By George Brodie, Historiographer Royal of Scotland.

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time mention is now made of public taxes imposed by the National Assembly. The ordinary expenses of the government were obtained from other sources, such as the old prescriptive regal dues, the customs on export and import of merchandise, the rents of the Crown lands and of burgh tenements, and the fines and escheats in the king's courts. With the authority of the National Assembly, William imposed taxes on all lands, whether the property of the clergy or of the laity. During the reigns of Alexander I. and II. there was no material change in the constitution of Scotland. Alexander II. was supported by the National Assemblies in resisting the admission of legates from Rome, and in confirming the privileges of the National Church. Under legislative sanction, aids were imposed for public purposes, and several general statutes enacted. Alexander III., who reigned from 1249 till 1286, gave stability to the institutions which had sprung up in the stormier reigns of his predecessors. The administration of the law by sheriffs in shire courts was extended over the remotest districts, including Inverness, Elgin, and Dumfries; lands were valued by a general "extent" for ascertaining the dues of the Crown and assessing public taxes; and the whole of modern Scotland was brought under a firm and vigorous government. During this first period of constitutional history, extending from Alexander I. to the death of Alexander III., the National Council or Assembly of Scotland appears to have differed very little in its constitution from that of England at the same period.

Growing influence of the burghs.

It is important to note the growth of burgh privileges. It was under that wise sovereign David I. that the burghs of Scotland took their place as recognised members of the body politic of a feudal kingdom. Their voluntary incorporation was legalised, they became tenants *in capite* of the Crown, and from that period yielded a large proportion of the revenue of the country. Their growing influence was fostered by the organisation of an assembly for treating their common affairs. "Long before the principle of representation can be discovered elsewhere,

the burghs of Scotland sent delegates to a court of their own, where they framed laws for their common government, and reviewed decisions of individual burgh courts ; a burgher Parliament, which, though now become insignificant, long continued, under its successive characters of the Court or the Convention of Burghs, one of the most remarkable of the peculiar institutions of Scotland."[1] The burgesses joined in aids and public contributions from a very early period, and probably met for that purpose in their own court, as their attendance in the National Councils during a whole century is ignored by contemporary chroniclers.

Composition of the Councils.

Touching the composition of the National Councils, statutes are found in 1230 which profess to be enacted by the advice and consent of the magnates of the realm and of the whole community ; but the list of those present, preserved in several manuscripts, gives no more than the names of one bishop, two earls (one of them justiciar of Scotland proper), one prior, the justiciar of Lothian, the high steward, and one baron. In 1255 an important national convention numbered four bishops, four abbots, four earls, and thirteen great barons. At the head of the list were the Steward of Scotland and Robert de Brus (Bruce). The Assembly of Nobles which acknowledged the Maiden of Norway as heir to the throne at Scone on February 5th, 1283, consisted of thirteen earls and twenty-four great knights and barons. Finally, the great convention at Brigham in 1289 was composed of the four guardians, two of whom were bishops, of ten other bishops, twelve earls, twenty-three abbots, eleven priors, and forty-eight barons. There were thus upwards of a hundred representatives of the estates present. But down to the second period of the constitutional history of Scotland, which may be said to commence with the disputed succession and the War of Independence, there is no allusion to representatives of burghs as being present at any of the national councils or assemblies.

[1] *Acts of the Parliaments of Scotland*, Preface.

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Use of the word "Parliament."

There is some confusion as to the first actual mention of the word "Parliament" in connection with the Scottish representative councils. Lord Hailes[1] states that "a Parliament was held at Stirling in 1211, when the King demanded an aid for levying the sum due to the King of England by the late convention, when the barons gave him 10,000 merks, and the burghs 6,000." But in the official records this assembly is distinctly called a great council—*magnum concilium*. Burton states that up to 1289 no assembly had as yet called itself a Parliament on its record; and that the earliest Parliament thus styling itself is that of 1292, held by John Baliol at Scone.[2] But I find that the first use of the word "Parliament" in the records occurs at a much earlier date than this. In 1215 Alexander held a Parliament at Edinburgh, the language expressly used being *tenuit Parliamentum*. The next use of the word is in 1259, when a council was held whose proceedings were "apparently Parliamentary." Again, the famous assembly in 1283 is styled "a Parliament at Scone," when, as already stated, the settlement of the succession was made by the earls and barons in favour of the Maiden of Norway. The first time that Wyntoun gives to the National Assembly of the Estates the name of Parliament is in connection with that of 1286, in which the six wardens were appointed. In 1289, at the Parliament of Brigham (above referred to), letters were read from the guardians "and all the commonalty, or community, of the realm of Scotland,"[3] to the kings of England and Norway regarding the marriage of Queen Margaret. That the word "Parliament" must have been already in use is shown by the treaty of Brigham (1289), in which it was covenanted that no Parliament should be held without the boundaries of Scotland as to matters respecting the kingdom.

[1] *Annals of Scotland.*

[2] *History of Scotland*, by John Hill Burton, Historiographer Royal, Vol. II.

[3] *Et tote la commune de reaume de Escoce.*

But the records state that the Parliament assembled by John Baliol at Scone on February 9th, 1292, was probably the first of the National Councils of Scotland which bore that name throughout the country at the time. No change of constitution occasioned the adoption of the new term, which soon became in Scotland, as in England, the received designation of the great legislative council solemnly assembled. In 1289-90, however, burghs had been mentioned for the first time as having a voice in the affairs of the nation ; and to the treaty between John Baliol and Philip of France, ratified at Dunfermline in 1295, the seals of six burghs were appended. Yet from the peculiar phraseology of the deed itself, and from the silence of historians as to any meeting of a Parliamentary nature in which it could have been voted, it is doubtful whether the parties stated as consenting, and especially whether representatives of those six burghs, were actually present as in a National Assembly or Parliament. It is further dubious whether the representatives of the burghs formed a part of the Parliaments of Robert I. in 1314, 1315, and 1318, although in the Parliamentary settlement of the Crown by the second of these there is mention of the *majores communitatum*. In Bruce's great Parliament of 1326, however, held at Cambuskenneth, the representatives of corporations were undoubtedly present. To meet the expenses of the War of Independence and the necessities of the State, the tenth penny of all rents was granted to the monarch "by the earls, barons, burgesses, and free tenants in full Parliament assembled." From this time forward the representatives of the burghs formed the Third Estate, and an essential part of all Parliaments and General Councils.

Parliament and the burghs.

It is in this Parliament of 1326 that we meet with the first development in Scotland of what are now considered the fundamental principles of a representative constitution, namely, a claim of right, redress of grievances, a grant of supplies, and a strict limitation of the grant to its proper purposes. The gift of a tenth penny to the King was declared to be null if the King should

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defeat its application to the public service by any remissions granted beforehand. Then, because certain of the nobles had liberties and privileges—regalities and high jurisdictions—which impeded the King's officers in levying taxes within their bounds, all such privileged lords undertook to make payment of the tax effeiring to[1] their lands, which failing, the King's sheriffs were to distrain. The concluding words of the act were very remarkable: "It is consented and agreed between our lord the King and the community of his realm" (*inter dominum regem et communitatem regni sui*) "that on the death of the King the payment of the tenth penny shall stop, and that the thing shall not be drawn into a precedent." With this important constitutional limitation, the King gave his consent to the act by appending the Great Seal. He thus acknowledged the authority of the Estates in regard to money grants.

Burgh courts or Parliaments.

Before this period nevertheless the Scottish burghs, as we have seen, had courts or Parliaments of their own. There was a burghal Parliament in the south, called the Court of the Four Burghs. These were Edinburgh, Berwick, Stirling, and Roxburgh. Even after other corporations joined it, the old name was retained, and its functions partook of a mixed judicial and legislative character. "It reviewed," says Burton, "the decrees of the Lord Chamberlain in questions where individual corporations were concerned, as the English Parliament reviewed the decision of the King's judges, the Chamberlain himself sitting with the burgess representatives, and probably guiding their proceedings after the practice still followed by some law lord in the House of Lords." The Court of the Four Burghs further established rules of law on matters of private rights and obligations, such as the modes of succession to the property of burgesses. A notable case has been handed down where one of the parties appealed against a judgment in Scotland to Edward I., when the English king was asserting his

[1] Fairly falling to.

right of superiority over Scotland.[1] The laws of the Four Burghs are held to be more complete and compact, and to have in them more of the qualities of a body of statute law, than any other fragments of ancient legislation in Scotland. By degrees the Court absorbed all the royal burghs of Scotland, but its influence weakened as the municipalities became directly represented in the general Parliament of the country. Under the title of the "Convention of Royal Burghs," it continued to adjust questions affecting the internal affairs of corporations until the passing of the Burgh Reform Act of 1833; but the convention still has the semblance of life, and continues to meet annually at Edinburgh.[2] The old Scots burghs were truly democratic, and there was "no trace of thraldom or serfdom" within them, affording in this respect a marked contrast to the English corporations, while closely resembling them in others.

Edward I.'s government of Scotland.

Edward I., in his scheme for the government of the realm, decided that the Crown was to be represented in Scotland by a governor or lieutenant. He was to be assisted by a small council, not of a parliamentary or deliberative character, but one selected to give advice in aid of the executive government. The members chosen all bore distinctively Scottish titles.[3] In the year 1305 Edward summoned to the English Parliament ten representatives from Scotland, who were to be chosen as follows: two by the prelates, two by the abbots, two by the earls, two by the barons, and two by the commonalty; and they were to be recouped their expenses for attendance in England. With the desire of further pacifying and conciliating Scotland and completing the fusion of the two countries, Edward contemplated the summoning of a great union Parliament at Carlisle; but his efforts came too late, for early in 1306 Bruce left the English

[1] Ryley's *Collection of Pleadings in Parliament.*

[2] Marwick's *Records of the Convention of the Royal Burghs of Scotland.*

[3] Palgrave's *Documents Illustrative of the History of Scotland.*

Court, and soon raised his standard in the northern kingdom.

Parliament of 1318.

A Scottish Parliament held in 1318 passed many important laws, especially distinguishing itself in matters of order and good government. One statute provided for the arming of the people; a second prohibited the removal of any commodities or money from the kingdom of Scotland, so that the barons or others who lived in England could draw nothing from their estates. To retain their privileges as Scotsmen they must return to their native country. Another enactment would have affected the heart of old Izaak Walton. It dealt with that noble fish the salmon—which continues to be legislated upon until this day—and provided that it should be consumed so far as, and no farther than, might be consistent with the due preservation of the breed.

A national remonstrance.

On April 6th, 1320, a Parliament assembled in the abbey of Arbroath, when a solemn address to Pope John XXII. was resolved upon from the earls, barons, and free tenants, with all the community of the kingdom of Scotland. A great remonstrance was made against the wrongs of the Scottish nation and the misrepresentations of England. The language of this memorable document is distinguished for "a becoming and mournful dignity that has made the remonstrance illustrious among the utterings of national wrongs and appeals for national mercy and justice." The remonstrants complained of the King of England for attempting, under the guise of friendly intervention, to destroy the liberties of Scotland, and to conquer it for himself. Bruce's achievements were then proudly recited. The Scots' memorial at once produced a mitigatory effect through the bulls of the Papal Court, but ten years later the war with Scotland was renewed by Edward III.

Parliaments of David II.

During the reign of David II. (1329—1371) the Scottish Parliaments gained in independence and power. That held at Scone in 1363 rejected as inadmissible, and with disdain, the King's suggestion that his successor should be one of the sons of the King of England. Another

held in 1366 debated four propositions: homage, the succession, the dismemberment of the kingdom, and the subsidising of an armed force against England; and it resolved that all but the last should be rejected as intolerable, and not to be admitted even to deliberation.

Bold legislation.

The captivity and frequent absence of David, and still more, perhaps, his propensity to rely upon English counsels, had their effect upon his people. The later Parliaments of his reign manifested a "surly resoluteness in checking abuses and stretches of the prerogative." Among other things, it was resolved that strict justice should be administered between man and man, that favour should be shown to no one, and that the writs issued from the King's Chapel in Chancery should not be stopped at the instance of any one, however powerful. Royal remissions for injury done were to be null, unless the injured were satisfied; and no justiciar, sheriff, or other officer of the Crown was to execute any warrant, if it were contrary to statute or common law. Except the feudal dues, nothing was to be taken from the community for the King's use without prompt payment. Under severe penalties, horses were not to be sent to graze on peasants' lands. Royal gifts of estates and feudal dues were to be recalled, and the property of the Crown restored to its original state at King Robert's accession. Public services were to be rewarded, by advice of the Council, out of the movable property of the Crown. The liberal supplies granted to the Crown were to be used for their specified purposes, and no other. Here was asserted the great Parliamentary principle of the right to control the appropriation of the supplies, as well as the power to grant them.[1]

[1] In the collections of the Scots Acts made in the early part of the seventeenth century several of these enactments were omitted, although they must have existed in the original manuscripts. Burton attributes this to a propensity to overlook whatever bore testimony in these earlier times to the freedom of the people and their control of the royal prerogative.