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A View Of Society In Europe, In Its Progress From Rudeness To Refinement

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Authorities, Controversy, and Remarks.

B O O K I.

C H A P T E R I.

S E C T I O N I.

(1) 'AGRI, pro numero cultorum, ab universis per vices occupantur, quos mox inter se secundum dignationem partiuntur.' *Tacit. de Mor. Germ. c. 26.* 'Privati ac separati agri apud eos nihil est.' *Caesar de bell. Gall. lib. 4. c. 1.* The German tribes passed annually from the fields they had cultivated. 'Arva per annos mutant.' *Tacit. de Mor. Germ. c. 26.* 'Neque longius anno remanere uno in loco incolendi causa licet.' *Caesar de bell. Gall. lib. 4. c. 1.* The condition of property among these nations I have treated in another work. *Historical Dissert. concerning the Antiquity of the English Constitution, Part 1.*

Similar distinctions prevail in all barbarous nations, and give rise to a similar way of thinking. 'Formerly,' says Mr. *Adair*, 'the Indian law obliged every town to work together in one body, in sowing or planting their crops; though their fields are divided by proper marks, and their harvest is gathered separately. The Cheerake and Muskohge still observe that old custom.' *History of the American Indians.*

Among the Indians of Peru, it is said, that the territory occupied was the property of the state, and was regulated

by the magistrate; and that, when individuals were permitted to possess particular spots, these, in default of male issue, returned to the community. *Royal commentaries of Peru, book 5. ch. 1. and 3.*

It seems to have arisen out of the old custom, which considered land as the property of nations, that in Europe, when all heirs failed, the property of the individual went to the *fisc*, or to the sovereign as representing the state.

‘*Quod si maritus & mulier sine haerede mortui fuerint, & nullus usque ad septimum gradum de propinquis & quibuscunque parentibus invenitur, tunc res fiscus acquirit.*’
LL. Baiovar. tit. 14. l. 9.

‘*Fiscus tunc agat, quando nec parentum, nec filiorum, nec nepotum, nec agnatorum, nec cognatorum, nec uxoris & mariti, quae succedat, extare comperitur persona, secundum veterum constituta.*’ *Edictum Theoderici Regis, c. 24.*

The fields in pasture belonged to the community or tribe, as well as the fields in tillage. The moment that the flocks or herds of one individual left them, they might be possessed or occupied by those of another; and so on in succession. It was under the influence of such manners that Abraham said to Lot, ‘Is not the whole land before thee? separate thyself, I pray thee, from me; if thou wilt take the left-hand, then I will go to the right; or, if thou depart to the right-hand, then I will go to the left.’ *Genesis, Ch. xii. v. 9.* And to this condition of society the Roman poets make frequent allusions, though they do not seem to have understood it with accuracy*.

When the territory of a tribe or nation ceased to be its property, and individuals acquired particular spots or estates, which they cultivated for their use, and transmitted to their

* *Ante Jovem nulli subigebant arva coloni,
Nec arare quidem, aut partiri limite campum
Fas erat; in medium quaerebant; ipsaque tellus
Omnia liberius nullo poscente ferebat.*

VIRG.

*Non domus ulla fores habuit, non fixus in agris
Qui regeret certis arva lapis.*

TIBUL.

posterity, it was a consequence of the old manners, that these improvements were regarded as the usurpations of the powerful on the weak; and historians assure us, that it happened both in Greece and Italy, that the *land-marks* which had been fixed to distinguish the boundaries of property, were frequently removed or destroyed. It seemed an encroachment on the rights of the people, that lands, which, of old, pastured indifferently the cattle of successive occupiers, should be allotted to the use and convenience only of private men. It was, accordingly, not merely necessary to make laws to prevent the violation of private rights; but, what is curious in an uncommon degree, even the *termini* or *land-marks*, that they might remain unremoved for the preservation and the separation of property, were exalted into *divinities*. Thus, religion, as well as policy, held out its terrors to force mankind to learn the art of appropriation, and to accept of power and riches.

Among the Celtic and German barbarians, the defacing and the removing of *land-marks* were also common delinquencies; and, in the punishment of them, much severity was exercised.

‘ Si quis limites complantaverit, aut *terminos fixos* fuerit ausus evellere, si ingenuus est, per singula signa vel notas vicenos vi. solid. componat; si servus est, per singula signa L. flagella suscipiat.’ *LL. Baiivar. tit. xi. l. 1. § 2.*

‘ Si quis liber homo *terminum antiquum* corruperit, aut exterminaverit, & probatum fuerit, sit culpabilis lxxx. sol. medium regi, & medium in cujus sine fuerit terminus.

‘ Si quis servus alienus *terminum antiquum* ruperit, aut exterminaverit, mortis incurrat periculum, aut sol. xl. redimatur.’ *LL. Longobard, lib. 1. tit. 26. l. 1. § 2.*

See farther *LL. Wisigoth. lib. 10. tit. 3. De terminis & limitibus.*

Boundaries and *limits* are also an article in the code of Gentoo laws; and the regulations it holds out on this subject are, perhaps, a proof, that the mass of the inhabitants of Hindostan, at the period of their enactment, had not lost the idea of times which preceded the discovery of the

advantages of a landed property. *Code of Gentoo laws, cb. 12.*

(2) 'Dominum ac servum nullis educationis deliciis dignoscas. Inter eadem pecora; in eadem humo degunt; donec aetas separet ingenuos, virtus agnoscat.' *Tacit. de Mor. Germ. c. 20.*

(3) 'Si civitas, in qua orti sunt, longa pace & otio torpeat; plerique nobilium adolescentium petunt ultra eas nationes, quae tum bellum aliquod gerunt, quia & ingrata genti quies, & facilius inter ancipitia clarescunt. . . . Nec arare terram aut expectare annum, tam facile persuaseris quam vocare hostes & vulnera mereri: Pigrum quin inmo & iners videtur sudore acquirere, quod possis sanguine parare.' *Tacit. de Mor. Germ. c. 14.*

(4). *Tacit. de Mor. Germ. c. 15. 21. 24.* Struvius, *Corpus historiae Germanicae, prolegom.*

(5) 'Convictibus & hospitibus non alia gens effusius indulget. Quemcumque mortalium arcere tecto, nefas habetur, pro fortuna quisque apparatus epulis excipit. Cum defecere, qui modo hospes fuerat, monstrator hospitii & comes, proximam domum non invitati adeunt. Nec interest. Pari humanitate accipiuntur. Notum ignotumque, quantum ad jus hospitii, nemo discernit. Abeunti, si quid poposceris, concedere moris: Et poscendi invicem eadem facilitas. Gaudent muneribus; sed nec data imputant, nec acceptis obligantur.' *Tacit. de Mor. Germ. c. 21.*

The American tribes, who resemble so completely the ancient Germans, are thus characterized by *Lafitau*: 'Ils ont le cœur haut & fier, un courage à l'épreuve, une valeur intrépide, une constance dans les tourmens qui est héroïque, une égalité que le contre-temps & les mauvais succès n'altèrent point: Entre eux ils ont un espèce de civilité à leur mode, dont ils gardent toutes les bienfaisances, un respect pour leurs anciens, une déférence pour leurs égaux qui a quelque chose de surprenant, & qu'on a peine à concilier avec cette indépendance, & cette liberté dont ils paroissent extrêmement jaloux: Ils sont peu caressans, & font peu de démonstrations; mais non obstant cela, ils sont bons, affables, & exercent envers les étrangers

‘ & les malheureux une charitable hospitalité, qui a de
 ‘ quoi confondre toutes les nations de l’Europe.’ *Moeurs*
 ‘ *des Sauvages Américains*, vol. 1. p. 106. See also
 Charlevoix, *Journ. Hist. lettre 21*. Such, with a few excep-
 tions, it is to be thought, is the character of all nations in
 an early age of society.

(6) Tacit. de Mor. Germ. c. 15. Struvius, Corp. Hist.
 Ger. prolegom. Cluver. Germ. Antiq. lib. 1.

(7) ‘ Cibi simplices, agrestia poma, recens fera, aut lac
 ‘ concretum. Sine apparatu, sine blandimentis, expellunt
 ‘ famem. Adversus sitim non eadem temperantia. Si indulseris
 ‘ ebrietati, suggerendo quantum concupiscunt, haud minus
 ‘ facile vitiis, quam armis vincuntur.’ *Tacit. de Mor.*
 ‘ *Germ. c. 23*.

(8) ‘ Crebrae ut inter vinolentos rixae, raro conviciis,
 ‘ saepius caede & vulneribus, transiguntur. Sed & de recon-
 ‘ ciliandis invicem inimicis, & jungendis affinitatibus, &
 ‘ adsciscendis principibus, de pace denique ac bello, plerum-
 ‘ que *in conviviiis* consultant: Tanquam nullo magis tempore
 ‘ aut ad simplices cogitationes pateat animus, aut ad magnas
 ‘ incalescat. Gens non astuta nec callida aperit ad hoc secreta
 ‘ pectoris licentia loci. Ergo detecta & nuda omnium mens
 ‘ postera die retractatur: Et salva utriusque temporis ratio est.
 ‘ Deliberant dum fingere nesciunt; constituunt dum errare non
 ‘ possunt.’ *Tacit. de Mor. Germ. c. 22*.

The deliberating on business, and the holding of councils
 of state during entertainments, was the practice of the Celtic
 and Gothic nations. And, it is remarkable, that the word
mallum or *mallus*, which, during the middle ages, denoted
 the national assembly, as well as the county-court, is a
 derivative of *mael*, which signifies *convivium*.

From this union of festivity and business, there resulted
 evils which gave occasion to regulations which cannot be read
 without wonder. It was a law of the Longobards, ‘ Ut nullus
 ‘ ebrius suam causam in mallum possit conquirere, nec testi-
 ‘ monium dicere; nec comes placitum habeat nisi jejunus.’
LL. Longobard. lib. 2. tit. 52. l. xi. We read in *Capit. Kar.*
 & *Lud.* ‘ Rectum & honestum videtur ut judices jejuni causas

‘audiant & discernant.’ *Lib. 1. l. 62. ap. Lindenbrog.* And the following law was made in a synod held a Winchester ann. 1308. ‘Item, quia in personis ebbriis legitimus dici non debet consensus, inhibemus, ne in tabernis per quaecunque ve ba, aut nisi jejuna saliva, vir aut mulier de contrahendo matrimonio sibi invicem fidem dare praesumant.’ *Wilkins, Concil. tom. 2. p. 295.*

This rudeness, of which we see the source in Tacitus, seems to have continued very long in England. ‘Non exolevit hactenus mos antiquus,’ says *Sir Henry Spelman*, ‘nam in nullis seu placitis, quae assisae jam vocantur, vicecomites provinciarum bis quotannis magnam exhauriunt vim pecuniae, in iudiciis nobilibusque patriae convivendis.’ *Gloss. p. 385.* In Scotland, in the memory of persons yet alive, the lawyers and retainers of the courts of justice did business constantly and openly in the tavern. It is likewise observable, that some particulars which regard the institution of the jury, are to be explained and illustrated from these facts, and this way of thinking. *Historical Dissertation concerning the antiquity of the English constit. Part 4. Sect. 2.*

(9) ‘Nullas Germanorum populis urbes habitari, fatisc notum est, ne pati quidem inter se junctas sedes. Colunt discreti ac diversi, ut fons, ut campus, ut nemus placuit... Nec enim cum ubertate & amplitudine soli labore contentunt, ut pomaria conserant, & prata separent, & hortos rigent. Sola terrae seges imperatur. Unde annum quoque ipsum non in totidem digerunt species: Hiems, & ver, & aestas, intellectum ac vocabula habent: Autumni perinde nomen ac bona ignorantur.’ *Tacit. de Mor. Germ. c. 16. 26.*

(10) ‘Ceterum nec cohibere parietibus deos, neque in ullam humani oris speciem assimilare, ex magnitudine caelestium arbitrantur. Lucos ac nemora consecrant, deorumque nominibus appellant secretum illud, quod sola reverentia vident. Auspicia fortesque ut qui maxime observant.’ *Tacit. de Mor. Germ. c. 9. Struvius, Corp. Hist. Germ. prolegom.*

(11) *Tacit. de Mor. Germ. c. 12. Cluver, Germ. Antiq. lib. 1.*

(12) ‘Duces exemplo potius quam imperio, si prompti,

‘ si conspicui, si ante aciem agant, admiratione praesunt.’

Tacit. de Mor. Germ. c. 7.

(13) ‘ Nigra scuta, tincta corpora, atras ad proelia noctes legunt. . . . Cedere loco, dummodo rursus infestis, consilii quam formidinis arbitrantur.’ *Tacit. de Mor. Germ. c. 6. 43.*

A writer of reputation has, of late, advanced an opinion, that our European ancestors were averse from deceit and stratagem. Yet a propensity to these is perhaps a characteristic of all barbarous nations; and, that it applied to our forefathers, the testimony before us is a sufficient proof. In opposition to the barbarians of Europe, he holds out the American Indians, and contends that they are defective in active courage. Open violence he accounts as descriptive of the former; a reliance on stratagem and surprise, he remarks as peculiar to the latter. And, as the cause of this diversity, he assigns different original dispositions. *Sketches of the History of Man, vol. 1. p. 23. 24.*

The truth is, that a proneness to open violence, is to be applied to the American as well as to the European savage; and that the love of stratagem and surprise was not less peculiar to the European than to the American. Stratagem and surprise, in America and in Germany, and indeed in all tribes and nations whatever, are parts of the art of war, or of military prudence, and refer not to courage. When the military art is nearest to perfection, and when cultivation is highest, there will be less of stratagem in war; for cunning, if I may be allowed the expression, is the wisdom of weakness. The ingenious author hazards a conjecture for a discovery, and mistakes for philosophy a fallacy of vivacity.

(14) ‘ Latrocinia nullam habent infamiam, quae extra fines cujusque civitatis fiunt; atque ea juventutis exercendae ac desidia minuendae causa fieri praedicant.’ *Caesar de Bell. Gall. lib. 6. c. 22.* ‘Materia munificentiae per bella, & raptus.’ *Tacit. de Mor. Germ. c. 14.*

Among the Greeks the same manners were known. It was common among them, in early times, for the more eminent and powerful to exercise, with reputation and honor, the

crimes of robbery and piracy. *Thucydides*, lib. 1. *Homer*, *Odyss.* 3. Such is the case in all rude communities. In the wilds of America this way of thinking is prevalent at this hour. Warriors, restless and impatient, associate together, and seek for renown and plunder beyond the boundaries of their tribe. It is of bodies of this kind that *Lafitou* speaks in the following passage; which is not to be read, without recalling to one's mind what *Caesar* and *Tacitus* have said of the Gauls and Germans.

‘ Le partis détachés, qui se forment en pleine paix, pour ne pas intéresser la nation par des hostilités, lesquelles pourroient avoir des suites fâcheuses, vont porter la guerre chez les peuples les plus reculés. . . . Cette petite guerre est un véritable assassinat, & un brigandage, qui n’a nulle apparence de justice, ni dans le motif qui l’a fait entreprendre, ni par rapport aux peuples, à qui elle est faite; ils ne font seulement pas connus de ces nations éloignées, ou ne le font que par les dommages qu’ils leur causent, lorsqu’ils vont les assommer ou de faire esclaves presque jusques aux portes de leur palifades. Les sauvages regardent cela néanmoins comme un belle action.’ *Tom. 2. p. 169.*

It was under the influence of such manners that the northern nations carried on those piratical incursions, which, from the time of *Charlemagne*, filled Europe with terror. They were planned and conducted by men of rank, and conferred honor on them, and on the inferior adventurers. Yet modern historians, who are perpetually applying modern notions to ancient times, attend not to this circumstance, and treat these maritime expeditions with a severity that may be moral enough, but which is historically injudicious and absurd.

In the age of *Tacitus*, the only German community who appear to have conceived the blame of this conduct, were the *Chauci*. For the great superiority and refinement of this people, I pretend not to account. But though, in general, it consisted with honor and merit, among the German states, to commit spoil and plunder among neighbouring nations; yet, it is not to be forgot, that the theft or violence of an

individual within the territories of his own tribe, was atrocious, and a subject of punishment. This circumstance, which is curious in the history of morality, is to be explained from the condition of an infant society. Their riches, consisting chiefly of herds and flocks, which wander over vast tracts of country, are only to be protected by the terrors of justice. Hence the laws of the barbarians affixed *death* to the crime of stealing a horse, while the assassination, or the murder of a man, was expiated by a piece of money or a fine. 'Qui caballum furaverit, capite puniatur.' *LL. Saxon tit. 4. l. 1.*

The extent of their forests, while it contributed to render more easy the abstraction of cattle, made it the more necessary to punish the offence. It also was a result of their unappropriated solitudes, that the proprietors of cattle found a difficulty in tracing them. Hence the custom of fixing bells to them. 'Mos quippe antiquus inoleverat Francis, & maxime Austrasiis, ut pascentibus equis tintinnabula imponerent, quo si forte longius in pascendo aberrassent, eorum sonitu dignosci possent.' *Lindembrog. Gloss. voc. Tintinnabulum.*

And what is worthy of notice, the taking away of these bells was a heinous delinquency, and punished severely. 'Si quis tintinnabulum involaverit de jumento vel bove, solidum reddat. De vacca tremisses duos; De berbicibus vel quibuscunque pecoribus, tremisses singulos cogatur exsolvere.' *LL. Wisigoth. lib. 7. tit. 2. l. 11.* See also *LL. Salic. tit. 29.* & *LL. Burgund. tit. 4. § 5.* In general, the atrocity of theft among the Gothic nations, may be gathered from the following Swedish law, which is of high antiquity. 'In furti reum securi, furca, defossione, vivicomburio animadverti posse, nec eo nomine vel haeredibus, vel ecclesiae, vel regi, ullam satisfactionem deberi.' *Stiernbook de jur. Suev. & Goth. vet. p. 366.*

These important circumstances in the history of manners, the legality of a distant robbery, and the criminality of a domestic one, which are so pointedly illustrated by the early state of the Greeks, by that of the German and Celtic barbarians, and by the condition of the American tribes at this hour, receive a confirmation, of the greatest weight, from

the consideration of the Gentoo jurisprudence. In the code of Gentoo laws, there is this remarkable ordinance.

‘ The mode of *shares among robbers* is this: If any *thieves*,
 ‘ by the *command of the magistrate*, and with his *assistance*,
 ‘ have committed depredations upon, and brought any booty
 ‘ from *another province*, the magistrate shall receive a share
 ‘ of one sixth of the whole; if they receive no command or
 ‘ assistance from the magistrate, they shall give the magistrate,
 ‘ in that case, one tenth for his share; and, of the remainder,
 ‘ their chief shall receive four shares; and whosoever among
 ‘ them is perfect master of his occupation, shall receive three
 ‘ shares; also, whichever of them is remarkably strong and
 ‘ stout, shall receive two shares, and the rest shall receive
 ‘ one share; if any one of the community of the thieves
 ‘ happens to be taken, and should be released from the
 ‘ *cutcherry* *, upon payment of a sum of money, all the
 ‘ thieves shall make good that sum by equal shares.’ *Code of*
Gentoo laws, p. 146.

A person who has not considered savage and barbarous manners, will think, with the utmost surprise, that a magistrate should not only command a robbery, and give his countenance and protection to thieves, but even participate in their plunder. Such, notwithstanding, is the system of equity among all rude nations. While distant expeditions, however, and robberies, were thus considered as legal and honorable, the disturbers of domestic quiet and happiness were punished among the Hindoos with the greatest rigor.

‘ If a man,’ say their laws, ‘ steals an elephant, or a
 ‘ horse, excellent in all respects, the magistrate shall cut off
 ‘ his hand, and foot, and buttock, and deprive him of life.

‘ If a man steals an elephant, or a horse, of small account,
 ‘ the magistrate shall cut off from him one hand and one foot.

‘ If a man steals a camel or a cow, the magistrate shall
 ‘ cut off from him one hand and one foot.’ *Gentoo laws*,
 p. 249.

There are, in this code, a great variety of laws against

* A court of justice.

domestic thefts and robberies. The state of society of the Hindoos, to which it has a reference, resembles very much that of the German barbarians, when they had overturned the empire of the Romans; and a comparison of it with the laws of the Ripuarians, Burgundians, Longobards, and Franks, would lead to many curious discoveries in the progress of legislation and government.

(15) ‘ Nec regibus infinita aut libera potestas. . . .
 ‘ De minoribus rebus principes consultant, de majoribus omnes. Ita tamen, ut ea quoque, quorum penes plebem arbitrium est, apud principes petrantentur. Coeunt, nisi quid fortuitum & subitum inciderit, certis diebus, cum aut inchoatur Luna aut impletur; nam agendis rebus hoc auspiciatissimum initium credunt. . . . Rex vel princeps, prout aetas cuique, prout nobilitas, prout decus bellorum, prout facundia est, audiuntur, auctoritate suadendi, magis quam jubendi potestate. Si displicuit sententia, fremitu aspernantur: Sin placuit, frameas concutunt.’ *Tacit. de Mor. Germ. c. 7. 11.*

This limitation of government is a consequence of manners in early times; and, notwithstanding what is observed by many writers of antiquity, it seems very clear, that the popular or republican mode of administration is prior to monarchy.

In every rude community we know, the government has a surprising affinity to that of the Germans, as described by Tacitus. And this is peculiarly observable of the American nations. ‘ Tout,’ says *Charlevoix* of the Americans, ‘ doit être examiné & arrêté dans les conseils des anciens, qui juge en dernière instance.’ *Journ. Historiq. lettre 18.* The highest title among the Americans, says *Mr. Adair*, either in military or civil life, signifies only a chieftain: They have no words to express despotic power or arbitrary kings. . . . The power of their chiefs is an empty sound. They can only persuade or dissuade the people, either by the force of good nature and clear reasoning, or coloring things so as to suit their prevailing passions. It is reputed merit alone that gives them any titles of distinction

‘ among the meanest of the people. . . . When any national affair is in debate, you may hear every father of a family speaking in his house, on the subject, with rapid and bold language, and the utmost freedom that a people can use. Their voices, to a man, have due weight in every public affair, as it concerns their welfare alike.’ *Hist. of the American Indians*, p. 428. See also *Lastau*, tom. 2. p. 475.

(16) ‘ Ac primo statim Chaucorum gens, quamquam incipiat a Frisiis, ac partem litoris occupet, omnium quas expofui gentium lateribus obtenditur, donec in Cattos usque sinuetur. Tam immensum terrarum spatium non tenent tantum Chauci, sed & implent: Populus inter Germanos nobilissimus, quique magnitudinem suam malit justitia tueri. Sine cupiditate, sine impotentia, quieti secretique, nulla provocant bella, nullis raptibus aut latrocinii populantur. Idque praecipuum virtutis ac virium argumentum est, quod, ut superiores agant, non per injurias assequuntur. Prompta tamen omnibus arma, ac si res poscat exercitus: Plurimum virorum equorumque: Et quiescentibus eadem fama.’ *Tacit. de Mor. Germ. c. 35.*

‘ Fennis mira feritas, foeda paupertas, non arma, non equi, non penates: Victui herba, vestitui pelles, cubile humus. Sola in sagittis spes, quas inopia ferri ossibus asperant. Idemque venatus viros pariter ac feminas alit. Passim enim comitantur, partemque praedae petunt. Nec aliud infantibus ferarum imbriumque suffugium, quam ut in aliquo ramorum nexu contegantur. Huc redeunt juvenes, hoc fenem receptaculum. Id beatius arbitrantur, quam ingemere agris, illaborare domibus, suas alienasque fortunas spe metuque versare. Securi adversus homines, securi adversus deos, rem difficillimam assecuti sunt, ut illis ne voto quidem opus sit.’ *Tacit. de Mor. Germ. c. 46.*

SECTION II.

(1) MR. MILLAR on the Distinction of Ranks, ch. 1. Sketches of the History of Man, vol. 1. Dr. Robertson, History of America, vol. 1. p. 318.

(2) 'Verberare servum, ac vinculis & opere coercere, rarum.' *Tacit. de Mor. Germ. c. 25.*

(3) 'Domus officia uxor & liberi exequantur.' *Tacit. de Mor. Germ. c. 25.* 'Liberos suos,' says *Caesar* of the Gauls, 'nisi quum adoleverint, ut munus militiae sustinere possint, palam ad se adire non patiuntur; filiumque in puerili aetate in publico in conspectu patris assistere turpe ducunt.' *De Bell. Gall. lib. 6. c. 18.*

(4) 'Quum ex captivis quaereret *Caesar*, quamobrem Ariovistus proelio non decertaret? hanc reperiebat causam, quod apud Germanos ea consuetudo esset, ut matres familias earum fortibus & vaticinationibus declararent, utrum proelium committi ex usu esset necne, eas ita dicere, *non esse fas Germanos superare, si ante novam lunam proelio contendissent.*' *Caesar de Bell. Gall. lib. 1. c. 50.*

(5) Strabo lib. 7. Struvius, Corpus Histor. German. prolegom. Cluver. German. Antiq. lib. 1.

(6) 'Inesse quinetiam sanctum aliquid, & providum putant. . . . Vidimus sub Divo Vespasiano Velledam diu apud plerosque numinis loco habitam. Sed & olim Auriniam, & complures alias venerati sunt, non adulatione, nec tamquam facerent deas.' *Tacit. de Mor. Germ. c. 8.*

The honors of divinity came to be prostituted to these women with a wonderful profusion. Among the monuments of antiquity in Germany, many altars, with inscriptions to them, have been discovered; and, both in England and Scotland, there are remains of the same kind. *Keysler, Antiq. Select. Septentr. & Celt. p. 379—448. Camden, Britannia, passim.* The appellation given them, in *Caesar*, is *matres familias*; and these inscriptions bear *matribus* or *matronis Suevis, Treveris, Aufanis, &c.*

Under Paganism and Christianity, the fatidical arts they practised drew upon them a very different fate. The credulity of the Pagan advanced them into goddeses. The more criminal ignorance of the Christian considered them as witches, and consigned them to the fire. Their mutterings were conceived to be magical. It was thought they could fascinate children with a look, were in covenant with demons, to whose embraces they submitted, could blast the fruits of autumn, raise commotions in the air, and interpret dreams. What is remarkable, the laws against such women, and against witchcraft, were not abrogated in England till the year 1736: And, in other countries of Europe, there are still regulations in force against these miserable objects, and this imaginary crime.

(7) 'Ad matres ad conjuges vulnera ferunt: Nec illae numerare, aut exfugere plagas pavent.' *Tacit. de Mor. Germ. c. 7. Cluver. Germ. Antiq. lib. 1.*

(8) 'Feminae lineis amictibus velantur, eosque purpura variant.' *Tacit. de Mor. Germ. c. 17.* 'Cadurci, Caleti, Ruteni, Bituriges, ultimique hominum existimati Morini, imo vero Galliae universae vela texunt. Jam quidem & Transrhenani hostes: Nec pulchriorem aliam vestem eorum feminae noverunt.' *Plin. Hist. Nat. lib. 19. c. 1.* Concerning the Longobards, there is the following passage in *Paulus Diaconus*: 'Vestimenta eis erant laxa, & maxime linea, qualia Anglo-Saxones habere solent, ornata institis latioribus, vario colore contextis.' *Hist. Longobard. lib. 4. c. 7.* And of the daughters of Charlemagne, there is this notice in *Eginbard*. 'Filiis lanificio assuescere, coloque ac fuso, ne per otium torperent, operam impendere, atque ad omnem honestatem erudiri iussit.' *Vit. Car. Mag.* In America, according to *Mr. Adair*, the women are the chief, if not the only manufacturers. The men judge, that if they should perform offices of this kind, it would exceedingly disgrace them. *Hist. of the Amer. Indians, p. 423.* These offices, however, being characteristic of the women, are honorable in them. In Rome, during the virtuous times of the republic, the employments of the women were the distaff

and the spindle; and *Plutarch* has said, in reproach of *Fulvia* the widow of *Clodius*, that she could neither spin nor stay at home. *Vit. Anton.*

(9) 'Statim e fomno, quem plerumque in diem extrahunt, lavantur, saepius calida, ut apud quos plurimum hiems occupat.' *Tacit. de Mor. Germ. c. 22.*

———— 'Mollesque flagellant

'Colla comae.'

MART. EPIG. lib. 1:

'Partemque vestitus superioris in manicas non extendunt, nuda brachia ac lacertos: Sed & proxima pars pectoris patet.' *Tacit. de Mor. Germ. c. 17.* 'Cet usage,' says *Pelloutier*, 's'est conservé en Saxe, en Prusse, & en Livonie. Les femmes y portent des chemises sans manches, & laissent leur gorge à découvert.' *Hist. des Celtes, lib. 4. ch. 4.*

Diodorus Siculus, lib. 5. records the comelines both of the Gaulic and German women; and *Biffula*, a German beauty, is celebrated by *Ausonius*.

(10) 'Matrem suam,' says *Tacitus* of *Civilis*, 'sororesque, simul omnium conjuget, parvosque liberos, consistere a tergo jubet, hortamenta victoriae.' *Hist. lib. 4.* 'In proximo pignora; unde feminarum ululatus audiri, unde vagitus infantium. . . . Memoriae proditur quaedam acies, inclinatam jam & labantem, a feminis restitutas, constantiam precum, & objectum pectorum, & monstratam cominus captivitate, quam longe impatientius feminarum suarum nomine timent.' *Tacit. de Mor. Germ. c. 7, 8.* 'Ut virorum cantu, feminarum ululatu, sonuit acies.' *Tacit. Hist. lib. 4.* See also *Caesar de Bell. Gall. lib. 1. c. 51.*

'Adeo ut efficacius obligentur animi civitatum, quibus inter obsides puellae quoque nobiles imperantur.' *De Mor. Germ. c. 8.* *Suetonius*, speaking of the transactions of *Augustus* against the barbarians, has these words: 'A quibusdam novum genus obsidum feminas exigere tentaverit; quod negligere marium pignora sentiebat.' *Vit. Aug. c. 21.*

(11) 'Sororum filiis idem apud avunculum qui apud

‘ patrem honor.’ *Tacit. de Mor. Germ. c. 20.* Hence it is, says Montefquieu, that our earliest historians speak in such strong terms of the love of the kings of the Franks for the children of their *sisters*. *L’esprit des Loix, liv. 18. ch. 22.* John de Laet remarks of the Brasilians, that they call their uncles and aunts *fatbers* and *mothers*; and the same custom prevails among the north American Indians. *Adair, hist. of the Amer. Indians, p. 213.* Among the Hurons, says *Charlevoix*, with whom the dignity of the chief is hereditary, the succession is continued through the *women*; so that, at the death of a prince, it is not his own, but his *sister’s son* who succeeds; and, in default of him, the nearest relation in the female line. It is added, ‘ Si toute un branche vient à s’éteindre, la plus noble *matrone* de la tribu, ou de la nation, choisit le sujet, qui lui plait davantage, & le déclare chef.’ *Journ. Hist. Lett. 18.* ‘ Æthiopes,’ says *Domascenus*, ‘ *sororibus* potissimum honorem exhibent, & successionem tradunt reges, non suis, sed *sorum filiiis.*’ *De mor. Gent.* These facts, which coincide so curiously, express, in a forcible manner, the early importance of the sex.

(12) ‘ Nec aut consilia earum aspernantur, aut responsa negligunt.’ *Tacit. de Mor. Germ. c. 8.* To deliberate, in public, on national concerns, was a privilege common to the women in all the Gothic and Celtic tribes. *Plutarch, de virtut. mulier. Polyænus in Stratag. lib. 7.* This advantage they enjoyed also in old times in Greece. *Goguet, part 2. book 1. ch. 4.* And, at this hour, in America, they are called to the national meetings, to give their advice and counsel. *Charlevoix, Journ. Hist. let. 13. 18.* ‘ Les *femmes*,’ says *Lafitau*, ‘ sont toujours les premières qui délibèrent, ou qui doivent délibérer, selon leur principes, sur les affaires particulières ou communes. Elles tiennent leur conseil à part, & en conséquence de leur détermination, elles donnent avis aux chefs des matières qui sont sur le tapis, afin qu’ils en délibèrent à leur tour. Les chefs, sur ces avis, font assembler les anciens de leur tribu; & si la chose dont on doit traiter intéresse le bien

‘commun, tous se réunissent dans le conseil général de la nation.’ *Tome 1. p. 477.*

The German women, after their nations had made conquests, still attended to affairs. As they debated, in the days of Tacitus, in the assemblies of their tribes, so they appeared afterwards in the Gothic parliaments. Among the Franks, as well as the Anglo-Saxons, the Queens had an active share in the government; and, among the former, there is the example of a Queen who received a national homage. *Greg. of Tours, lib. 4.* Werburgh, Queen to King Wightred, assisted at the wittenagemot, or national council, held at Berghamsted. *Chron. Sax. p. 48.* *Malmsbury, lib. 2.* mentions a parliament held by King Edgar, in which he was assisted by his mother Alfgina. And Canute is said, in a national assembly, to have acted by the advice of Queen Emma, and the bishops and nobility of England. *Mat. West. p. 423.*

When the crown fell to a prince in his minority, the queen-mother had the guardianship. Thus Fredegund had the guardianship of her son Clotarius II. Brunehild of her grandsons Theodebert and Theoderic, and Balthildis of her son Clotarius III.

(13) The following particulars, as well as those already mentioned, favor the notion of the importance of women in early times. ‘Apud Saunitas vel Samnites, de adolescentibus & virginibus quotannis publicum habetur iudicium. Quem igitur eorum optimum esse sententia iudicum pronunciarit, is sibi ex virginibus eligit uxorem quam vult, deinde secundus ab eo alteram, & sic de cæteris deinceps.’ *Damasc. de Mor. Gent.* ‘Sauromatæ uxoribus in omnibus obtemperant, tamquam dominabus.’ *Ibid.* ‘Lycii vitam sustinuerunt ex latrociniiis. Legibus autem non utuntur, sed consuetudinibus, dominanturque ipsis feminæ inde usque ab initio.’ *Heraclides de Politicis Græcorum.* ‘In ea regione quam Athamanes habitant, mulieres terram colunt, viri greges pascunt.’ *Ibid. Tacitus*, discoursing of the ancient Britains, has these words. ‘His atque talibus invicem instructi, Boadicea generis regii femina, duce

‘ (neque enim *sexum* in imperiis discernunt) sumpserunt universi
 ‘ bellum.’ *Vit. Agric. c. 16.* In Homer, who paints rude
 manners, the women make a figure. In Virgil, who de-
 scribes refined manners, they are insipid. Helen, Hecuba,
 Andromache, Penelope, Nausicaa, and Calypso, have
 marked and distinct characters. But Lavinia seems to be
 without passions of any kind, and to have that nothingness
 of character which, in the ages of civility, is too frequently
 connected with the most enchanting forms. The women
 of Egypt were highly prized, and had a kind of authority
 over the men. The toilets of the goddesses in Homer,
 and the gay dresses of the Greek ladies, seem to mark the
 consideration of the sex. At Sparta, the women inter-
 fered in the affairs of state, and assumed a superiority over
 the men. ‘ *Les femmes,*’ says *Charlevoix* of the Americans,
 ‘ ont la principale autorité chez tous les peuples de la
 ‘ langue Huronne, si on en excepte le canton Iroquois
 ‘ d’Onneyouth, où elle est alternative entre les deux sexes.’
Journ. Hist. lett. 18.

The importance of women among the Hindoos, is illus-
 trated in a striking manner by the following laws.

‘ If a person has called a modest woman unchaste, and
 ‘ the woman, or her husband, should make complaint to
 ‘ a magistrate, whenever the person accused appears before
 ‘ the magistrate, or arbitrator, he shall, upon the spot,
 ‘ answer to the complaint, and make no delay.

‘ If a woman, impelled by any calamity, should come
 ‘ to any person, and remain with him, if he commits
 ‘ fornication with that woman, the magistrate shall fine
 ‘ him two hundred and fifty *puns* of *cowries*.

‘ If a man speaks reproachfully of his wife’s father or
 ‘ mother, the magistrate shall fine him fifty *puns* of *cowries*.

‘ If a man is prepared to cast upon a woman’s body
 ‘ tears, or phlegm, or the pairing of his nails, or the gum
 ‘ of his eyes, or the wax of his ears, or the refuse of
 ‘ victuals, or spittle, the magistrate shall fine him forty
 ‘ *puns* of *cowries*.

‘ If a man throws upon a woman, from the neck upwards,

any spue, or urine, or ordure, or semen, the magistrate shall fine him one hundred and sixty *puns* of *cowries*.
 So long as a woman remains unmarried, her father shall take care of her; and, so long as a wife remains young, her husband shall take care of her; and, in her old age, her son shall take care of her; and if, before a woman's marriage, her father should die, the brother, or brother's son, or such other near relations of the father, shall take care of her; if, after marriage, her husband should die, and the wife has not brought forth a son, the brothers, and brothers sons, and such other near relations of her husband, shall take care of her: If there are no brothers, brothers sons, or such other near relations of her husband, the brothers, or sons of the brothers of her father shall take care of her; and, in every stage of life, if the persons who have been allotted to take care of a woman, do not take care of her, each, in his respective stage accordingly, the magistrate shall fine them.' *Code of Gentoo laws*, p. 111. 163. 214. 220. 224. 282.

SECTION III.

(1) 'ET Venus in Sylvis jungebat corpora amantum;
 Conciliabat enim vel mutua quamque cupido,
 Vel violenta viri vis, atque impensa libido,
 Vel pretium, glandes, atque arbuta, vel pira lecta.'

Lucret. lib. 5.

(2) 'Interfunt parentes & propinqui ac munera probant:
 Munera non ad delicias muliebres quaesita, nec quibus
 nova nupta comatur; sed boves & frenatum equum, &
 scutum cum framea gladioque. In haec munera uxor
 accipitur, atque invicem ipsa armorum aliquid viro offert.
 Hoc maximum vinculum, haec arcana sacra, hos conjugales
 deos arbitrantur.' *Tacit. de Mor. Germ. c. 18.*

Remains of these usages are to be found during every period of the middle ages. About the year 500, on the

marriage of Alemerga, the niece of Theodoric King of the Ostrogoths, that prince wrote a letter to her husband, Hermanfrid, King of the Thuringians; from which it appears, that dressed or accoutred horses were presented; and, in *Loccenius*, there are other examples to the same purpose. *Antiq. Sueo-goth. lib. 2.* Among the Irish, a war-horse and a spear were conjugal presents, till a late æra. ‘Ejus modi quidpiam,’ says *Sir Henry Spelman*, in allusion to the passage quoted from Tacitus, ‘apud Germanorum nepotes Hibernicos ipsimet aliquando deprehendimus. Equum scilicet militarem cum framea inter jugalia munera solennius fuisse, sed a patre sponse donatum. Addebant autem Hiberni cytharam, ut blandioris fortunæ solatium.’ *Gloss. p. 174.*

In the American marriages, an interchange of presents was also an essential circumstance, and gave them a sanction and validity. ‘Le mariage n’est pas plutôt résolu que les parents de l’époux envoient un présent dans la cabane de l’épouse. Ce présent consiste en des colliers de porcelaine, des pelletteries, quelques couvertures de fourrure, & d’autres meubles d’usage, qui vont aux parents de la fille, à laquelle on ne demande point de dot; mais seulement qu’elle veuille accepter l’époux qu’on lui offre. Ces fortes de présents ne se font pas seulement une fois, il s’en fait un espèce d’alternative entre les deux cabanes des futurs époux, laquelle a ses loix prescrites par la coutume; mais, dès que les présents sont acceptés, le mariage est censé conclu, & le contrat passé.’ *Lastau, tom. 1. p. 565.*

From the words of Tacitus, it appears, that among the Germans the consent of the parents or relations was particularly necessary in the contracting of marriages; and this is still more obvious from the laws of the barbarians, after they had made conquests. *LL. Wisigoth, lib. 3. tit. 2. 4. 8. LL. Saxon. tit. 6. LL. Frisonum, tit. 9.* The reason was, that the young men and the young women might not, through passion, marry into families hostile to their own. In a state of society which is confined, and where govern-

ment is imperfect, divisions and animosities among chiefs are frequent, and carried to extremity. It is useful to remark, that the necessity of this consent, and the similar disorder of the feudal manners, ascertained *the incident of marriage*; in consequence of which, the *wards* of a superior could not marry without his approbation. This *incident*, which was to grow so important, is to be traced back to the woods of Germany. *Hist. Dissert. concerning the antiq. of the English constitution, part 2.*

(3) 'Nec se mulier extra virtutum cogitationes, extraque bellorum casus putet, ipsis incipientis matrimonii auspiciis admonetur, venire se laborum periculorumque *sociam*, idem in pace idem in bello passuram aufuramque; hoc juncti boves, hoc paratus equus, hoc data arma denuntiant. Sic vivendum, sic pereundum.' *Tacit. de Mor. Germ. c. 18.*

The matrimonial gifts among the savages of America, expressed, in like manner, the labor to which the women were to submit, and were doubtless to be understood in the same light, as indications of equality, and expressions of respect. Yet *Charlevoix* affects to consider them rather as marks of slavery, than as testimonies of friendship. *Journal. Hist. let. 19.* Of this author, it is to be wished, that he had given his facts without reasoning upon them; or, that he had endeavoured to be consistent with himself; for, in other parts of his writings, we are led to conceive a high opinion of the state of the American women. My Lord Kaimes and Mr. Millar seem, in the present case, to have estimated too highly his opinion. And I am sensible that Dr. Robertson has subscribed to their sentiments. They join, in considering the presents to the women as characteristic of the meanness of their condition, and of their being the slaves of the men. They connect slavery with labor and business, without reflecting, that ease and luxury cannot possibly belong to women in barbarous times, and that, in all times, the men and women are to be judged of by different standards. The warrior does not apply the same rules to his son and his daughter, and does not

fancy that they are to shine alike in feats of arms. Valor he accounts the chief quality of the former: In the latter, he requires something more of gentleness, and a skill in domestic affairs. Of this there is a very strong and apt illustration in Mr. *Adair*, with which I will conclude this note.

‘The American Indians lay their *male* children on the skins of panthers, on account of the communicative principle, which they reckon all nature is possessed of, in conveying qualities according to the regimen followed; and, as the panther is endowed with many qualities beyond any of his fellow animals in the American woods, as smelling, strength, cunning, and a prodigious spring, they reckon such a bed is the first rudiments of *war*. But, it is worthy of notice, that they change the regimen of nurturing their young *females*: These they lay on the skins of fawns, or buffalo-calves, because they are *shy* and *timorous*; and, if the mother be indisposed by sickness, her nearest female relation suckles the child, but only till she recovers.’ *Hist. of the American Indians*, p. 421.

I enter not into the dispute, whether there be panthers in America, or whether this name is only given to distinguish animals which resemble them. In either case, my argument is safe, and to the point.

(4) ‘Pugnatum in obsidentis; & ereptus Segestes, magna cum propinquorum & clientium manu. Inerant *feminae* nobiles; inter quas uxor Arminii, eademque filia Segestis, mariti magis quam parentis animo, neque victa in lacrymas, neque voce supplex, compressis intra sinum manibus, gravidum uterum intuens. . . . Arminium, super inlitam violentiam, rapta uxor, subjectus servitio uxoris uterus, recordem agebant, volitabatque per Cheruscos, arma in Segestem, arma in Caesarem poscens.’ *Tacit. Annal. lib. 1. c. 57. 59.*

(5) ‘Severa illic matrimonia. . . . Paucissima in tam numerosa gente *adulteria*, quorum poena praefens & maritis permissa. Accis crinibus, nudatam coram propinquis expellit domo maritus, ac per omnem vicum verbere agit.’ *Tacit. de Mor. Germ. c. 18, 19.*

The power of the husband to punish the adultery of the wife continued long during the middle ages. *LL. Wisgöth. lib. 3. tit. 4. l. 3, 4. LL. Burgund. tit. 68. l. 1.* It seems natural in a state of society, before the jurisdiction of the magistrate is fully acknowledged; and it is to be found accordingly among the Americans and other nations. *Lastau, tom. 1. p. 588. Europ. Settlem. vol. 1. p. 180.*

It is likewise to be observed, that the same mode of punishment prevailed long. 'Adulterii poena,' says *Lindembrogius*, 'decalvari & fustari per vicos vicinantes.' *Gloss. p. 1349.* See farther *LL. Longobard. lib. 1. tit. 17. l. 5.* When the magistrate came to punish this delinquency, and, when the women, growing more detached from business, considered themselves as objects of luxury and pleasure, the crime of adultery appeared less heinous and offensive; and a separation or divorce, with the infamy of incontinence, became the punishment of an adulteress.

From the assembled relations of the culprit, of whom *Tacitus* speaks, it is to be imagined, that, in conjunction with the husband, they constituted a court, and sat upon her in judgment. *Coram propinquis expellit domo maritus.* Before the jurisdiction of the magistrate is fully understood and unfolded, it appears, that a kind of domestic tribunal exercises authority, and forms a step in the progress of civil and criminal jurisdiction. This, in fact, we know to have been the case among the Romans. *Dion. Halicarn. Antiq. Rom. lib. 2.*

(6) 'Publicatae pudicitiae nulla venia: Non forma, non aetate, non opibus maritum invenerit. Nemo enim illic vitia ridet: Nec corrumpere & corrumpi seculum vocatur.' *Tacit. de Mor. Germ. c. 19.*

Tacitus, in this passage, as well as in many other places of his sentimental and incomparable treatise, glances at the depraved manners of the Romans. The expression *non opibus*, of which I have made no use in the text, applies not to the German tribes who inhabited the inland country, but to those who bordered on the territories of the Romans.

The same attentions to chastity, so beautifully described by the Roman historian, prevailed among the Americans. 'Ils attribuent à la virginité & à la chasteté certaines qualités & vertus particulières.' *Lastau*, tom. i. p. 339. Thus it is in all rude nations; and, I believe, it will be found, on examination, that those circumstances of immodesty among them, which oppose this way of thinking, have their rise in the weaknesses of superstition, and in the abuses of the priesthood.

Nature adorns and protects the female sex with modesty. And, it is a most decisive proof of the respect paid to women, that, in almost all nations, the institution of marriage is connected with usages, which are contrived to favor and encourage their reserve and chastity. It is the male always who solicits; and, in some states, a kind of violence was employed to support and succour the modesty of the bride. It seems to have been thus in early times among the Romans, and it was obviously so among the Spartans. In the former case, the bride appears to have been carried forcibly from the lap of her mother; in the latter, the affair assumed the semblance of a rape. *Festus*, *Catullus*, *Plutarch in Vit. Lycurg.* & *Quaest. Rom.* The virgin and her relations, no doubt, understood previously the transaction, and expected this violence. But it was a compliment to her thus to give an air of constraint to her consent, to relieve her embarrassment and distress, her emotion of fear and hope, anxiety and tenderness.

It was with a similar view that the Romans conducted a bride to the house of her husband, with her head covered. And the Germanic nations paid also this mark of respect to the modesty of their women, after they had made conquests. Compare *Apul. Metam. lib. 4.* *Tacit. Annal. lib. 15. c. 37.* And the laws of the barbarians *de conjugali velatione.*

These circumstances, and those which I formerly remarked, with others not less expressive of the early importance of women, that I am presently to mention, seem to have escaped my Lord Kaims and Mr. Millar; and I beg it to

be understood, that I oppose thus frequently their opinions from no captiousness of temper, but because, if they are just, mine must be ill founded and improper.

(7) 'Sera juvenum venus; eoque inexhausta pubertas; nec virgines festinantur; eadem juvena, similis proceritas: Pares validaeque miscentur; ac robora parentum liberi referunt. . . . Quanto plus propinquorum, quo major adfinium numerus, tanto gratiosior senectus: Nec ulla orbitatis pretia. . . . Numerum liberorum finire, aut quemquam ex agnatis necare, flagitium habetur.' *Tacit. de Mor. Germ. c. 19, 20.*

(8) 'Sua quemque mater uberibus alit, nec ancillis, ac nutricibus delegantur.' *Tacit. de Mor. Germ. c. 20.* This also is the practice in America and in all rude communities. 'Les sauvages n'ont garde de donner leur enfants à d'autres pour les nourrir. Elles croiroient se dépouiller de l'affection de mère, & elles font dans une surprise extrême de voir qu'il y ait des nations au monde, où cet usage soit reçu & établi.' *Lafitau, tom. 1. p. 593.* The Roman virtue was at an end, says the author of the dialogue concerning orators, when the women gave their children to be suckled and educated by Greek nurses and slaves. *Cap. 29.* In France, till the age of Charles V. princesses, and ladies of high rank, continued to suckle and educate their children. *Mezeray in Butteel's translation, p. 388.*

(9) A very ingenious writer has observed, that, before marriage is known as a regular institution, the interest of the mother must be great; children being then, in a particular manner, under her jurisdiction, and having no connexion, or a distant one, with the father. His observation is not to be controverted; and, accordingly, he mentions the circumstance, as an exception to his theory. *Prof. Millar concerning the Distinction of Ranks, ch. 1. sect. 2.*

It is obvious, that the respect which the children pay to the mother in this situation, raises the importance of the sex; and it is worthy of notice, that, after marriage is known as an institution, and the husband and wife live

together in the same cabin, the influence of the mother is by no means diminished. For, though the father then acquires authority, the more amiable and winning attentions of the mother preserve and continue her consideration; and the military pursuits of the former calling him abroad, and employing his thoughts, leave to her the task of educating their offspring. Thus, among the Gauls and Germans, it was not till children attained a certain age, that they dared publicly to approach their fathers. *Secl. 2. note 3.*

‘Les enfants,’ says *Charlevoix* of the Americans, ‘n’appartiennent qu’à la mère, & ne reconnoissent qu’elle. Le père est toujours comme étranger par rapport à eux.’ *Journ. Hist. let. 19.* It is our nature to be more attached to what is lovely and gentle, than to what is stern and venerable. It is ‘the soft green of the soul,’ as an elegant writer * expresses it, ‘on which the eye delights to rest.’

(10) ‘Septa pudicitia agunt, nullis spectaculorum illecebris, nullis conviviorum irritationibus corruptae. *Litterarum secreta viri pariter ac feminae ignorant.*’ *Tacit. de Mor. Germ. c. 19.*

That knowledge and letters were incentives to corruption, we have also the opinion of *Sallust*, who, notwithstanding the freedom of his life, is a beautiful declaimer on the side of morality. It is of *Sempronia* that he thus speaks: ‘*Literis Graecis docta: Psallere & saltare elegantius, quam necesse est probae: Multa alia norat, quae instrumenta luxuriae sunt, sed ei cariora semper omnia quam decus & pudicitia fuit.*’ *De Bel. Catilin.*

(11) These things, which are curious, are illustrated by the following passage of *Tacitus*. ‘*Melius quidem adhuc eae civitates, in quibus tantum virgines nubunt, & cum spe votoque uxoris femel transigitur. Sic unum accipiunt maritum, quo modo unum corpus, unamque vitam, ne ulla cogitatio ultra, ne longior cupiditas, ne tamquam maritum, sed tamquam matrimonium ament.*’ *De mor. Germ. c. 19.*

The matrimonial symbols, as was formerly observed,

* Mr. Burke.

Note 2. consisted chiefly of an interchange of arms; but, among those nations of the barbarians who, after their conquests, became accustomed to the manners of the Romans, this usage suffered an early innovation. The symbols of arms were often neglected for those of money. And the betrothing *per solidum & denarium* grew to be a fashion.

Thus, according to the Salic law, a *virgin* was married *per solidum & denarium*. ‘*Convenit ut ego te solido & denario secundum legem Salicam sponsare deberem; quod ita & feci.*’ *Form. Solen.* 75. *ap. Lindenbrog.* But it was not so with the *widow*. The symbols were augmented; and it is to be conceived, that their augmentation expressed that of the dower. ‘*Si quis homo moriens viduam dimiserit, & eam quis in conjugium voluerit accipere, antequam eam accipiat Tunginus aut Centenarius mallum indicent, & in ipso mallo scutum habere debent, & tres homines causas tres demandare; & tunc ille qui viduam accipere vult, cum tribus testibus qui adprobare debent, tres solidos aequè pensantes & denarium habere debet.*’ *Lex. Sat. tit.* 46. *c.* 1. The spirit of the German manners opposing second marriages, made it necessary to bribe, as it were, the modesty of the widow.

It deserves remark, that traces of the connexion of disgrace with second marriages, as to the women, are to be found in almost all nations; and this circumstance, so favorable to the modesty of the sex, is a striking proof of their early importance. There were ages of the Grecian and Roman manners when this disgrace prevailed in all its force; and even among races of men the most savage, the immodesty of second marriages is repressed by particular usages.

‘*Chez les habitants des côtes de Cumana,*’ says an ingenious writer, ‘*avant que de brûler le corps du mari, on en sépare la tête; on la porte à sa veuve, pour que la main posée dessus, elle jure de la conserver précieusement, & de ne jamais se remarier.* Une veuve, chez les Caffres & les Hottentots, chaque fois qu’elle se remarie, est

‘obligée de se couper un doigt.’ *St. Foix, Essais Historiques sur Paris, tom. 5. p. 177.*

(12) The King, according to Domesday-book, demanded 20 shillings for the marriage of a *widow*, and 10 shillings for that of a *virgin*. ‘Mulier accipiens quocunque modo maritum, si vidua dabat Regi 20 s. si puella 10 s. quolibet modo acciperet virum.’ *Domesd. tit. Scropesberie, ap. Spelman, voc. Maritagium.* There is good evidence, that, in several cities of Germany, in the middle times, fines were paid to the magistrate on the marriage of a widow. *Heinec. Elem. Jur. Germ. lib. 1. tit. 10. § 222.*

(13) Thus, the ravishing of a widow was punished more severely than that of a virgin. ‘Si quis virginem rapuerit contra ipsius voluntatem & parentum ejus, cum xl. fol. componat, & alios xl. cogatur in fisco. Si autem viduam rapuerit quae coacta ex tecto egreditur orphanorum, & pro penuriae rebus, cum lxxx. fol. componat, & lx. cogatur in fisco.’ *LL. Baiovar. tit. 7. l. 6. 7.*

By the way, this early severity against rapes, is a strong confirmation of my general argument, and is direct against the opinions of my Lord Kaims and Mr. Millar. The reputation of females suffering, in this way, was for ever marked with disgrace. No suitors were now to court their alliance. Yet their minds had received no pollution, and their innocence could not be impeached. Their bodies, however, had been abused; and the loss of value attending this abuse, with the severe punishment of their violators, express clearly the high and natural importance of the sex.

In the Gentoo code, the consideration of the sex is also illustrated by laws too explicit to admit of doubt or cavil, and still more severe.

‘If a man by force commits adultery with a woman of an equal or inferior cast, against her consent, the magistrate shall confiscate all his possessions, cut off his penis, and castrate him, and cause him to be led round the city, mounted upon an ass.

‘If a man, by cunning and deceit, commits adultery with a woman of an equal or inferior cast, against her

‘ consent, the magistrate shall take all his possessions, brand
‘ him in the forehead with the mark of the *puendum muliebre*,
‘ and banish him the kingdom.

‘ If a man, by violence, or by cunning, or deceit, or
‘ against the woman’s consent, commits adultery with a
‘ woman of a superior cast, the magistrate shall deprive him
‘ of life.

‘ If a man, either by violence or with her consent, commits
‘ adultery with an unmarried girl of a superior cast, the
‘ magistrate shall put him to death.’ *Code of Gentoo Laws*,
cb. 19.

(14) ‘ *Singulis uxoribus contenti sunt, exceptis admodum*
‘ *paucis, qui non libidine, sed ob nobilitatem, plurimis*
‘ *nuptiis ambiuntur.*’ *Tacit. de Mor. Germ. c. 18.*

This, says *Montesquieu*, explains the reasons why the
kings of the first race had so great a number of wives. These
marriages were less a proof of incontinence, than a consequence
of dignity; and it would have wounded them, in a tender
point, to have deprived them of such a prerogative. This,
continues he, explains, likewise, the reason why the ex-
ample of our kings was not followed by their subjects. *L’esprit*
des Loix, liv. 18. c. 25.

I know that my Lord *Kaims* has spoken of the polygamy
of the Germanic nations; but the authority to which he
appeals in proof of his notion, is the passage now cited from
Tacitus, which is most directly against him. *Sketches, vol. 1.*
p. 192. And indeed he has remarked, in another portion of his
work, ‘ That polygamy was never known among the northern
‘ nations of Europe.’ *Vol. 1. p. 316.* I am at a loss to recon-
cile these opinions; and this ingenious author appears to have
forgotten, that, in the states of Germanic and Gothic origin,
there were even severe laws against polygamy. *LL. Longob.*
lib. 2. tit. 13. l. 1. 3. 5. LL. Wisigoth. lib. 3.

The plurality of wives is a consequence of luxury and pride,
and does not uniformly distinguish rude times, even in clima-
tes which encourage and inspirit the passion. In general, one
man is then connected with one woman, and satisfied with
her; and it is a proof of the antiquity of monogamy, that,

when a plurality of wives is uniformly indulged, which happens not till the ages of property, there is always one of these who seems more peculiarly the wife; the rest appearing only as so many concubines.

The appetite for the sex, it is to be observed, is not nearly so strong in rude, as in cultivated times. Hardship and fatigue, the great enemies of inordinate love, waste the barbarian. 'Il est de l'ancien usage,' says *Lastau*, 'parmi la plupart des nations sauvages, de passer la première année, après le mariage contracté, sans le consommer; . . . Et quoique les époux passent la nuit ensemble, c'est sans préjudice de cet ancien usage.' *Tome 1. p. 575.* Ease and good living, on the contrary, flatter the senses in the ages of property. And, an abstinence of this sort would, doubtless, surprize very much the most timid and the most delicate of our virgins.

(15) The fortunate marriages of the relations of Dumnorix, are said, by *Caesar*, to have constituted a great proportion of his power. *De Bel. Gall. lib. 1. c. 18.* In the same author, there is the following notice concerning the wives of Ariovistus. 'Duæ fuerunt Ariovisti uxores, una Sueca natione, quam domum secum adduxerat; altera Norica, regis Vocionis soror, quam in Gallia duxerat, a fratre missam.' *De Bel. Gall. lib. 1. c. 53.*

Tacitus says expressly, that deliberations on the subject of marriage were frequent in the councils of a German state. *De Mor. Germ. c. 22.* And, in that singular work, the *Atlantica* of *Rudbeck*, there is this passage. 'In conciliis Upsalensibus decretum fuit, ut Olaus Rex Sueoniae filiam suam in matrimonio daret Olao Regi Norvægiæ.' *P. 214.*

(16) After the introduction of Christianity, a multitude of laws were enacted against incestuous marriages; and these prove, that little delicacy was previously paid to relation or descent. 'Uxorem habere non liceat socrum, nurum, privignam, novercam, filiam fratris, filiam sororis, fratris uxorem, uxoris sororem: Filii fratrum, filii sororum, inter se nulla præsumptione jungantur.' *LL. Baiwar.*

tit. 6. l. 1. See also *LL. Longob. lib. 2. tit. 8. LL. Alaman. tit. 39. LL. Sal. tit. 14. l. 16.*

In Scotland, about the year 1093, 'it was not uncommon,' says my *Lord Hailes*, 'for a man to marry his step-mother, or the widow of his brother.' The learned and ingenious author adds, 'I presume that this was not owing to vague lust, but to avarice; for it relieved the heir of a jointure.' *Annals of Scotland, p. 39.* The observation is acute; but I am afraid that, though in some instances it might be just, it will not vindicate the Scots from the grossness and indecency which the prevalence of the custom fixes upon them. Even in France, at a later period, an. 1454, the Count D'Armagnac married publicly his own sister. *St. Foix, Ess. Hist. vol. 5. p. 130.* The frange liberties taken by ancient nations are sufficiently known. A Persian acted in conformity to the laws, and to justice, when he married his mother; and an Egyptian when he married his sister.

In times of refinement and delicacy, virtue takes the alarm, even at the recital of such facts; but the philosopher, struck with their universality over all societies, however distant and distinct, is disposed to inquire, Where it is that nature has placed her barriers; and what, on this head, in the codes of nations, is to be explained by natural law, and what by a policy civil and religious? The topic is full of curiosity, but not for the present purpose.

CHAPTER II.

SECTION I.

(1) **T**HE total change produced in the condition of Europe by the settlements of the barbarous nations, is ascribed by many writers, and by Dr. Robertson in particular, to the destructive violence with which they carried on their conquests, and to the havoc which they made from one extremity of this quarter of the globe to the other. *History of Charles V. vol. 1. p. 11. 197, 198.*

It is to be remembered, notwithstanding, that the conquerors incorporated themselves, in some provinces, with the vanquished; that much of the havoc and violence so pompously described by ancient historians, is to be referred to the wars they carried on among themselves; and that, where havoc and violence were least known, the change produced was, with the exception of a few circumstances, as general and complete as where they were experienced in the greatest degree. Thus, chivalry and the feudal institutions prevailed, in every step of their progress, in every country of Europe.

In illustration, indeed, of his opinion, Dr. Robertson has said, that where havoc prevailed in no great degree, as in England, on the Norman invasion, the ancient inhabitants retained their own manners. It is certainly very true that the Anglo-Saxons retained their own manners. This, however, was no effect of the cause he has mentioned. The Norman revolution was not a conquest*. A victory was obtained by Duke William over Harold and his followers; but no victory was obtained over the people of England. And, even on the hypothesis that the Duke of Normandy had conquered England, his illustration is without force. For the manners and policy of the Normans were the same with

* See a Discourse prefixed to Dr. Sullivan's Lectures.

those of the Anglo-Saxons; with this difference, that the former were, in some measure, a more improved people.

The completeness of the revolution consequent on the settlements of the barbarians, is chiefly to be ascribed, as I observe in the text, to the immense difference of manners in the conquerors and the conquered. The former were in a condition of growing civility; the latter in a state of hopeless corruption. The German was approaching to perfection: The Roman had been declining from it. They mutually despised one another, and were urged on in different directions. The former, therefore, yielding to, and governed by the manners to which he had been accustomed, became necessarily the founder of new and peculiar establishments.

(2) 'Agri pro numero cultorum ab *universis* per *vices* occupantur, quos mox inter se secundum dignationem partiantur. Facilitatem partiendi camporum spatia praestant. Arva per annos mutant, & superest ager.' *Tacit. de Mor. Germ. c. 26.*

This interesting information is well illustrated in the following relation from Caesar. 'Suevorum gens est longe maxima & bellicosissima Germanorum omnium. Ii centum pagos habere dicuntur; ex quibus quotannis singula milia armatorum, bellandi causa, suis ex finibus educunt. Reliqui domi manent: Pro se atque illis colunt. Ii rursus invicem anno post in armis sunt: Illi domi remanent. Sic neque agricultura, neque ratio, neque usus belli intermittitur: Sed privati ac separati agri apud eos nihil est: Neque longius anno remanere uno in loco incolendi causa licet; neque multum frumento, sed maximam partem lacte atque pecore vivunt, multumque sunt in venationibus.' *De Bell. Gall. lib. 4. c. 1.*

(3) From some remarkable passages in *Tacitus*, it is to be gathered, that, even in his age, the Germans were beginning to have an idea of a *private* property in land. This improvement would probably take place among the princes or chiefs, and in those districts which joined to the Roman frontiers; and it is to be conceived, that the portions of ground first appropriated, would be those around the cabins or huts of

individuals. For each hut was surrounded with an *enclosure*. And it was doubtless out of this enclosure that the German slave, being assigned land by his master, paid, in return, like a tenant, a proportion of corn, cattle, or cloth. 'Ceteris
 "servis; non in nostrum morem descriptis per familiam minif-
 "teris utuntur. Suam quisque sedem, suos penates regit.
 "Frumenti modum dominus, aut pecoris, aut vestis, ut
 "colono injungit: Et servus haecenus paret.' Tacit. de Mor.
 Germ. c. 25. This appropriation of land, and exertion over it, would spread by degrees, and enlarge the notions of property.

In fact, it would seem, that this conduct was observed after the German conquests; and that the German *enclosure*, or the *lands of the house*, and the assignment of them to slaves or servants, were usual. A proprietor or noble retained, to be cultivated by his servants, for domestic use and hospitality, the land which was *inter curtem*, or within view of the house or hall. What was out of the view of the house or hall, was given out in tenancy. Hence, among the Anglo-Saxons, the distinction of *inland* and *outland*. The inland, was the land *inter curtem*, or the *land of the house*: The outland was the land out of the view of the house*. Brithic, the rich Anglo-Saxon, had inland and outland, and disposed of them, in his will, to different persons †.

What is worthy of observation, the method of paying *in kind*, practised in Germany, and mentioned by Tacitus, continued also in the settlements of the barbarians, and even after they had become acquainted with coinage. Thus, in estates which had been long in any family, there were payments in poultry, and in necessaries for the house. *Du Cange Gloss. voc. Gallinagium & Henedpeny*. At this hour, both in England and Scotland, there are relics of this usage.

* *Inland, & Inlandum*. Terra dominicalis, pars manerii dominica.

† *Vox Saxonum, terram interiorem significans, nam quae colonis & tenentibus concedatur, utland dicta fuit, hoc est terra exterior, hodie tenementalis.* Spelman, Gloss. p. 316.

† Lambard, Perambulation of Kent. 'Lego,' says Brithic, 'terras dominicales Wulfego, tenementales Ælfego'.

In England, it was not till the age of Henry I. that the rents due to the crown were paid in money. 'In the early days,' says *Madox*, 'next after the Norman conquest, (if we are rightly informed), there was very little money, *in specie*, in the realm. Then the tenants of knights fees answered to their Lords by military services; and the tenants in socage lands and demesnes (in great measure) by work and provisions. The ingenious author of the Dialogue concerning the Exchequer tells us, that, from the time of the Norman conquest, till the reign of King Henry I. the rents or fermes due to the king were wont to be rendered *in provisions and necessaries for his household* * : And that, in King Henry the First's time, the same were changed into money. Afterwards, in the succeeding times, the revenue of the crown was answered or paid, chiefly *in gold and silver*; sometimes in palfreys, destriers, chafeurs, levertiers, hawks, and falcons, (to wit, in horses, dogs, and birds of game of divers sorts), and in things of other kinds.' *Hist. of the Exchequer*, vol. 1. p. 272.

(4) *Allodial* lands were enjoyed in full property, and are therefore opposed to *feudal* or *beneficiary* possessions, which were received with limitations, and under the burden of military service to the *grantors*.

The Ripuarians, the Burgundians, and, indeed, all the barbaric nations, appear to have had lands of partition or allodial property. *LL. Ripuar. tit. 56. LL. Angl. & Werin. tit. 6. LL. Baiuvar. tit. 2. c. 1. l. 3. tit. 11. c. 5. tit. 17. l. 2. Capit. Kar. & Lud. lib. 3. l. 20. Marculph. Form. 16. 18. 51. 62. 67. ap. Lindenbrog.*

Some writers affirm, that the Salic lands were lands of *lot* or *partition*, and yet contend that they were *feudal*. This

* In the Saxon times of King Ina, the provisions paid for ten hides of land were as follows: 'Ex decem hydīs, ad nutriendū, decem dolia mellis, trecenti panes, duodecim amphorae Wallicae cerevisiae, triginta simplices, duo adulti arietes, vel decem vervecēs, decem anseres, viginti gallinae, decem casei, amphora plena butyro, quinque salmōnes, viginti librae pondo pabuli, & centum anguillae solvantur.' *LL. Inae ap Wilkins*, p. 25.

is certainly an absurdity. It is to be confessed, notwithstanding, that Du Cange, and many lawyers of great ability, have adopted this notion. *Dissert. 17. sur l'Histoire de St. Louis, p. 244. Selden, vol. 3. p. 1009**. The authority against them is most express and pointed. It is the text itself of the Salic law which actually treats *de alode*, and refers to no property that was not *allodial*. *LL. Sal. ap. Lindenbrog. p. 342*. What confounded Du Cange, was the following celebrated law of this text. 'De terra vero Salica nulla portio haereditatis mulieri veniat; sed ad virilem sexum tota terrae haereditas perveniat.' He knew that women could not, in the commencement of fiefs, pretend to lands which were held by a military tenure; and, as they are thus barred from the Salic lands, he thence conceived that these must be *feudal*.

But the circumstance of the exclusion of the women from the Salic lands is, by no means, to be accounted for on *feudal* principles. The women were excluded from property while the Germans were in their forests; and this law or usage they carried into their conquests. It is thence that, in the lands of *lot* or *partition*, the women were not considered; and it is thus, that this difficulty in the Salic text is to be explained, without the necessity of conceiving the feudality of the Salic lands, in contradiction to the Salic law.

Though the barbarians respected highly their women, the admission of them to land was altogether a new idea. For if, leaving the Salic law, we inquire into the allodial property, and the allodial laws of the other tribes, we shall find, that, even in these, the women were not admitted to land while there existed any male. The ideas of the barbarians required to enlarge before this admission had place, and before they could so far violate their ancient customs. The innovation,

* Selden observes, that 'the best interpretation of *terra Salica*, is by our *knight's fee*, or land holden by *knight's service*.' I have an infinite veneration for the learning and abilities of this great man. I cannot, however, but differ from him on this occasion. The *knight's fee* and *knight's service*, were late inventions in the history of fiefs, and cannot be carried back to the early aera of the Salic law. Even if they could, they would still be ineffectual to support his conclusion.

as might be expected, was gradual. In the title, accordingly, *de Alodibus* in the Riparian text, we read, 'Dum virilis sexus extiterit, femina in haereditatem aviaticam non succedat.' *Lindembrog. p. 460.* See also *LL. Anglor. & Werinor. tit. 6.* It is, I conceive, by this and similar ordinances, that the celebrated Salic law, which imposed on Du Cange, and on so many lawyers, is to be interpreted. Among the Salians and Franks, as well as among the other barbarous nations, when there were no males, the women were admitted to the property of the lands of *lot* or *partition*.

After having made these remarks, it is fit I should give some account of the word *Alodium*, or *Alode*; and a learned Judge, who is studious to cultivate literature in the intervals of business, and who has distinguished himself by laborious and instructive compositions in an idle and a dissipated age, has done me the honor to present me with the following communication on this subject.

'*Al-od*, in the Latin of the lower ages *allodium*; hence the adjective *alodialis*; and hence, from the analogy of language, *alodially*, and *alodiality* may be formed. Of *Al-od* the French have made *Aleud*, *aleu*.

'As to the etymology of the word, there is a variety of opinions; for learned men are apt to reject obvious etymologies, and to prefer those which are more remote. It would seem to be a good rule in such matters, that "the etymology which is nearest to the word, is the most probable."

Al is *totus*, *integer*, & *absolutus*. There is no occasion for proving this: The sense is in daily use among the northern nations of Europe. *Od* is *status*, or, *possessio*. The Scottish word *had*, and the English *bold*, are derived from this source, and the word itself is still visible in the English compounds, *man-hood*, *sister-hood*, *maiden-hood*, &c. The Anglo-Saxon word, corresponding to this, is *Hod*, *status* or *possessio*. Thus, *Al-od*, is *totus integer* & *absolutus status*, or *tota integra* & *absoluta possessio*.

'The etymology of *Al-od* confirms the opinion of Selden and others as to the etymology of *Feod*, in the Latin of the

‘ lower ages *Feodum*, *Feudum*. *Fe* is *beneficium* or *stipendium*; *Od* or *Hod*, is *status*; therefore, *Feod* is *status stipendiarius*, or *possessio stipendiaria*. *Odal* is *Alod* inverted, *status integer*, or *possessio tota & absoluta*.

‘ There is no difference between *odal* and *udal*. The Scots turned the Norwegian *ore*, a denomination of weight, into *ure*, and, in like manner, they turned *odal* into *udal*. If the Norwegian *o* was pronounced as *oe*, the change is scarcely perceptible. After the same manner the French have turned *alod* into *aleud*.

‘ It may be objected, that there are two syllables more in *allodial* than in *odal* or *udal*; and that, although etymologists often drop an embarrassing syllable or two, yet that such liberties are not allowable. The answer is obvious. *Allodial* is an adjective; and the word *subject*, or *land*, or something similar, is understood. But *odal* or *udal* is a substantive; and it is only from ignorance or misapprehension, that the word is used as an adjective. Thus, in propriety of speech, we say, ‘ The lands in Orkney are to be considered as *udal*;’ although, in common speech, we say, ‘ The *udal lands* of Orkney,’ and the ‘ *udal possession* in Orkney.’

(5) Dr. Robertson has affirmed, that the barbarians, while in their original seats, were not, in consequence of the condition of the landed property, brought under any positive or formal obligation to serve the community. *Hist. of Charles V. vol. 1. p. 213.*

It is obvious, however, that the partition of land received by the individual from the tribe, subjected him to serve the community. The person who did not serve it had no claim to any partition. Persons under the military age had no partitions, because they could give no service. Persons, who had attained this age, could give service, and entitle themselves to partitions. The former were parts of the *family*, the latter were members of the *republic*. See *Note 2.* and compare it with *Tacit. de Mor. Germ. c. 13.* Of this law of partition, it was even a consequence, that the coward was a criminal, because he could give no service, and was unable to entitle

himself to a subsistence or partition. He was therefore deemed unworthy of existence, and put to death, or expelled beyond the frontiers of his nation. *Tacit. de Mor. Germ. c. 12.*

I have said, that the lands of lot or partition, of which the grant or use was the distinction of the freeman and the citizen in the days of Tacitus, were also given after the conquests of the barbarians, under the general obligation of serving the community. And here is my evidence.

' *Quicumque liber homo a comite suo fuerit ammonitus, aut ministris ejus, ad patriam defendendam, & ire neglexerit, & exercitus supervenerit ad istius regni vastationem vel contrarietatem, fidelium nostrorum capitali subiaceat sententiae.*' *Capitularia apud Baluz. tom. 2. p. 325.*

' *Si aliquis in alode suo quiete vivere voluerit, nullus ei aliquod impedimentum facere praesumat, neque aliud aliquid ab eo requiratur, nisi solummodo ut ad patriae defensionem pergat.*' *Capit. Car. Calv. Ibid. p. 264.*

' *Et qui ad defensionem patriae non occurrerint, secundum antiquam consuetudinem & capitulorum constitutionem judicentur.*' *Capit. Car. Cal. tit. 36. c. 27. Ibid. p. 187.*

Hence it is to be concluded, that the stipulation of serving the community was very ancient; and thus too, the opinion I maintain, that this obligation was known to the old Germans, receives a confirmation. In reality, the sense of the obligation must have been stronger *before* than *after* their conquests. The citizen of a small community enters with ease into its views, and is zealous to promote them. The arrangements, on the contrary, of a great kingdom, are not easily perceived. A plain individual does not know the motives and the agents which put every thing into motion. His attention is more turned from the public, and penal regulations are necessary to preserve him in his duty. History confirms this remark. For, early after the barbaric conquests, regulations of this kind were made; and *allodial* proprietors, to avoid serving the community, devised the fraud of assigning their lands to the church, and of holding them under its exemptions and immunities.

Those, it is observable, who held possessions merely *allodial*, could only be called out in foreign wars, and against the enemies of the state. As they held of no superior or lord, they had no concern in private quarrels, and made no part in the feudal association. This circumstance, if judged by modern ideas, was advantageous. It was, in fact, however, the reverse, and operated as a cause of the conversion of *allodium* into *tenure*.

(6) *Monfr. Bignon*, in his notes to Marculphus, expresses, with a delicate precision, the distinction between *allodial* lands, or the lands of *partition*, and the lands of the *fisc*. ‘*Omnia namque praedia, aut propria erant, aut fiscalia. Propria seu proprietates dicebantur quae nullius juri obnoxia erant, sed optimo maximo jure possidebantur, ideoque ad haeredes transibant. Fiscalia vero, beneficia sive fisci vocabantur, quae a rege ut plurimum, posteaque ab aliis, ita concedebantur, ut certis legibus servitiisque obnoxia, cum vita accipientis finirentur.*’ *Not. ad Marculph. ap. Baluz. tom. 2. p. 875.*

It is even from *fiscus* that the term *fief* was formed; and, though the lands of the *fisc* meant originally only the benefices granted out by the sovereign, they came to express the subinfeudations of the crown-vassals. *Du Cange, voce Fiscus, Munus Regium. Assises & bons usages du Royaume de Jerusalem, avec des notes par Gaspard Thaumassière, p. 103. 245.*

(7) ‘*Principes jura per pagos vicisque reddunt. . . . Insignis nobilitas aut magna patrum merita, principis dignationem etiam adolescentulis assignant. Ceteris robustioribus ac jam pridem probatis aggregantur. . . . Magna comitum aemulatio, quibus primus apud principem suum locus; & principum cui plurimi & acerrimi comites. Haec dignitas, hae vires, magno semper electorum juvenum globo circumdari, in pace decus, in bello praesidium. . . . Cum ventum in aciem, turpe principi virtute vinci, turpe comitatu virtutem principis non adaequare. . . . Illum defendere, tueri, sua quoque fortia facta gloriae ejus assignare, praecipuum*

‘ sacramentum est. Principes pro victoria pugnant; comites pro principe.’ *Tacit. de Mor. Germ. c. 12, 13, 14.*

(3) Of the notion that tribes were the *vassals* of tribes, I have exhibited the most convincing proofs in another treatise. *Hist. Dissert. concerning the Antiq. of the Eng. Constit. part. 2.* As the subject, however, is highly curious and important, I shall here offer some additional observations concerning it.

The great bond of the confederacies, and the attachments of the states of the Gauls and Germans, was the *land* assigned by a *superior* community to an *inferior* one. In consequence of this assignment, the latter owed service in war to the former, and was entitled to its protection. In the language of *Caesar*, it was the *client* tribe. While land was yet the property of nations, and unconnected with individuals, the idea was natural, and almost unavoidable. Ariovistus, a prince of a German community, having, with his chiefs and retainers, made a conquest in Gaul, the territory of the vanquished people became the property of his nation; and, it was about to bestow a large tract of the acquisition on the Harudes, under the burden of their military aid or assistance, when *Caesar* interfered in the Gaulic affairs. *Caesar de Bell. Gall. lib. 1. c. 35—46.*

The idea of tribes in union, without their mutually furnishing *protection* and *assistance*, and without the medium of a grant of *land*, could not be conceived by the German and Gaulic nations. The *client* or *vassal* tribes of Ariovistus, were the Marcomani, Tribocci, Vangiones, Harudes, Nemetes, and Sedusii. *Caesar, de Bell. Gall. lib. 1. c. 51.* The Ubii, at one period, were the *vassal* tribe of the Suevi. *Ib. lib. 4. c. 3.* In an after-period, when the Romans imitated the manners of the Gauls and Germans, they were assigned *land* on the banks of the Rhine, under the obligation of *military* service. ‘Super ipsam Rheni ripam collocati, ut arcerent, non ut custodirentur.’ *Tacit. de Mor. Germ. c. 28.* *Caesar*, at the request of the Ædui, permitted the Boii to remain in Gaul; and they became the clients or confederates of that people, who assigned

them *land* on their confines. 'Boios, petentibus Æduis, quod egregia virtute erant, ut in finibus suis collocarent, concessit; quibus illi *agros* dederunt.' *De Bell. Gall. lib. 1. c. 28.* The extent of land allotted by a superior community to an inferior one, was proportioned to the numbers and the valor of the latter. And, it was this way of thinking which actuated the Helvetii, when they said, that their territories were not suited to their populousness and military glory. 'Pro multitudine autem hominum, & pro gloria belli atque fortitudinis, augustos se fines habere arbitrabantur.' *Id. lib. 1. c. 2.*

Thus, the state of land among the Gaulic and German nations directed their *political* condition. This circumstance escaped not the Romans; and the use made of its knowledge by the Emperors, though little attended to, is worthy of remark. To a body of the Vandals, Constantine, with a view to the aid of their arms, assigned a portion of Pannonia. The assignment of land by the Romans to the Burgundians, that they might assist them in opposing the Wisigoths, gave rise to the Burgundian empire in Gaul. And Justinian granted the lands and possessions of the Ostrogoths in Pannonia to the Longobards, under the burden of their defending that country against the Gepidae, the Heruli, and other barbarous nations. *Jornand. de Reb. Get. c. 22. Cassiodor. Chron. Procop. lib. 3.*

Amidst a multitude of examples, to the same purpose, which might be produced, it is proper to take notice of the monarchy of the Franks. Different nations, overpowered by the Franks, became parts of their monarchy, by receiving possessions from them, and acknowledging their superiority. For the lands and protection afforded them, they gave allegiance and service. In other respects they acted under their own dukes or princes, and under their own institutions. I speak of the principalities or duchies of Bavaria, Aquitain, and Suabia. The Bojoarii, Bojarii, or Boii, for so the Bavarians are called in writers of the middle ages, were conquered by the Franks, and, accepting lands from them, acknowledged their superiority. An old historian,
recording

recording this transaction, has these words: 'In bellis
 ' auxilio Francis sunt Boii; eisdem pro amicis & hostibus
 ' habeant; ceterum suis institutis ac moribus liberi vivant.'
Aventinus, Annal. Boior. lib. 3. This connexion or vassalage is even expressed in their laws. *LL. Baiuvvar. tit. 2. c. 1. ap. Lindenbrog. p. 404.* Such also was the case of the Dukes of Aquitain and Suabia. Under the Franconian kings of the first race, they owed fidelity and military service in war, for the lands they enjoyed, and yet governed in their own dominions. These things mark the attachment of nations to their ancient usages, and illustrate the idea that communities were first the vassals of communities.

What is not incurious, one of the greatest difficulties in developing the history of the barbaric tribes, has its source in these connexions I have mentioned. The inferior, or vassal tribes, are often meant and recorded under the names of the superior ones. Thus, under the general appellation of *Gotbi*, there are included the Thuringi, Gepidae, Pucini, Scirri, and other tribes. The historical confusions that were necessarily to arise from this practice are many, and often not to be disentangled.

(9) It is observable, that the Old German states affected, from grandeur, to have around them a vast extent of waste territory. 'Una ex parte a Suevis circiter millia passuum DC aeri vacare dicuntur.' *Caesar, de Bell. Gall. lib. 4. c. 2.* 'Civitatibus maxima laus est quam latissimas circum se vastatis finibus solitudines habere.' *Id. lib. 6. c. 22.* 'Bella cum finitimis gerunt, ut quae circa ipsos jacent vasta sint.' *Mela, lib. 3.*

What is remarkable, after land was connected with individuals, and when chiefs distributed portions of their possessions to their followers, they affected also wastes of this kind. The Lord of a manor, after having assigned to his servants a tract of ground for the maintenance of his house and hospitality, gave out other divisions to his vassals and tenants, for the support of his political greatness; and these purposes being answered, a large proportion of territory remained often unemployed by him. This waste dominion gave an

idea of his power, and served to excite, in the stranger, a sentiment of terror. On this tract of land, the inhabitants of the hamlet, connected with his castle, were tempted to feed their cattle. In the course of time, he lost all connexion with it. Their connexion was recent and in use. Hence *common pasture* and *commons*.

I will venture another conjecture. It was, perhaps, from the idea of magnificence attending the possession of a vast portion of uncultivated territory, more than for the purposes of hunting, that the kings of Europe affected, of old, to have extensive forests. A deer-park is still flattering to the *magnificence* of the rich, in proportion to its extensiveness; though hunting be no amusement of the proprietor.

(10) It has puzzled the learned to discover the nation of the barbarians which first gave a beginning to fiefs. No inquiry could be more frivolous. In all of them they must have appeared about the same period. And they prevailed in all of them in consequence of the similarity of their situation on their conquests, and in consequence of their being governed by the same customs. It is not, therefore, to the principle of imitation that their universality is to be ascribed.

The annals of France make mention of fiefs in the age of Childebert. The Longobards, at an early period, introduced them into Italy; and the customs and laws which relate to them seem to have advanced rapidly among this people. *Giannone, Hist. of Naples, book 4. sect. 3.* In England, there is little doubt that the feudal law was known in the Saxon times; and on this subject I refer, with pleasure, to what has been lately advanced by Mr. Whitaker, in his *History of Manchester*; a book valuable for deep learning, original thought, and uncommon ingenuity.

In Spain, the introduction of the feudal tenures preceded the devastations of the Saracens or Moors, which began in the year 710. Among the Goths, who established the monarchy of Spain, lands were granted for service and attachment; and the receiver was the retainer of the grantor. He

was said to be *in patrocinio*; and, if he refused his service, he forfeited his grant. It also appears, that the retainer, or vassal, swore fealty to his patron or lord. And it was on this scheme that their militia was regulated. *LL. Wisigoth. lib. 5. tit. 3. l. 4. tit. 7. l. 20.*

The Wisigothic laws were first published by the celebrated Pithœus, and are chiefly to be valued on account of their high antiquity. But how they came to survive the Moorish conquests, is an incident which I cannot explain. They served as the mine, and gave materials for the code of Spanish jurisprudence, termed the *forum judicum*, or the *fuero juzgo*; a circumstance which seems to prove their authenticity, and which the learned Mr. Barrington must have forgot, when he conceived the latter to be the most ancient collection of laws in Europe. *Observations on the Statutes, 3d edit. p. 9.*

SECTION II.

(1) 'TERRA pecorum foecunda, sed plerumque improcera: Ne armentis quidem suis honor, aut gloria frontis: Numero gaudent: Eaeque solae & gratissimae opes sunt.' *Tacit. de Mor. Germ. c. 5.*

(2) My Lord Kaims ascribes to the meanness of women, and to the disgrace in which they are held, their want of property in rude times. They appear, notwithstanding, to be in high estimation in such times; and their poverty, we see, or their want of property, is no mark or consequence of their meanness and disgrace; but a result of the nature of things. *Sketches, vol. 1. p. 203.*

(3) The eldest son, it would appear, came in place of the father, and continued the family. 'Inter familiares,' says *Tacitus*, '& penates, & jura successionum, equi traduntur: Excipit filius, non ut cetera maximus natu, sed prout ferox bello & melior.' *De Mor. Germ. c. 32.* This testimony in favor of the eldest son, and the right of primogeniture, is the more strong, as being included in an exception to the general rule. I know that Sir Henry Spelman,

in his Glossary (1), Mr. Harris, in his History of Kent (2), Mr. Lambard, in his Perambulation of the same county (3), and Mr. Barrington, in his Observations on the Statutes (4), have given it as their opinion, that, in Germany, the sons succeeded equally to the father; and it is common to account, in that way, for the origin of the custom of *gavel-kind* (5), which prevailed in Kent, and in other counties of England. The words, however, of *Tacitus* already cited are a demonstration of the impropriety of these notions.

It is true, notwithstanding, that the authors under remark found or rely upon another passage of the same writer; but I conceive that the sense of it must have escaped them. The passage is as follows. ‘Haeredes successoresque sui cuique liberi: Et nullum testamentum: Si liberi non sunt, proximus gradus in possessione, fratres, patrum, avunculi.’ *De Mor. Germ. c. 20.* Here, in reality, even allowing that the Germans had been acquainted with a property in land, which they constantly suppose, there is no mention of the *equal partition* of it. The children must have succeeded singly and in course; in defect of these, the brothers; and, on the failure of them, the uncles.

This passage, and the former, throw mutually a light to one another; and, from the consideration of both, I think it clear, that the meaning I impute to them is justly to be inferred.

A difficulty, however, more knotty presents itself. As land was among these nations the property of the state, to what does *Tacitus* allude in the passage before us? Conjectures are to be hazarded where proofs are wanting. In general, I should fancy, he must refer to moveables; and, perhaps, he may allude to the *German house* and the *enclosure* connected with it. ‘Colunt discreti ac diversi ut fons, ut campus, ut

(1) Voc. Gaveletum.

(2) p. 457.

(3) P. 584.

(4) p. 115. 3d Edit.

(5) ‘Gaveletum, *Gavelkind*.] Prisca Anglo-Saxonum consuetudo e Germania delata, qua omnes filii ex aequis portionibus, patris adeunt haereditatem (ut filiae solent, prole mascula deficiente). Fratres similiter defuncto sine sobole fratre, & nullo existente fratre, sorores pariter.’ *Spelman. Gloss. p. 259.*

‘ nemo placuit. . . . *Suam quisque domum spatio circumdat.*’ *Tacit. de Mor. Germ. c. 16.* At least, it is not unnatural to think, that the cabin and its enclosure, as the ideas of property evolved, might be considered as appertaining more peculiarly to individuals, and that thence continuing in their possession, they might go to their posterity.

It was thus in other rude communities. Among the Hindoos, it appears, by very curious laws, that the landed property first acquired by individuals, was what is termed ‘ The glebe-lands, houses, and orchards.’ *Code of Gentoo laws, ch. 3.* In Otaheite, and in Eastern Island, or Davis’s Land, there were plantations laid out by line, of which the beauty struck Captain Cook. These, he conjectures, were the *private property* of the chiefs. *Voyage round the World, vol. 1. p. 294.* His conjecture is very solid. These spots correspond to the enclosure of the German house, and to the glebe-lands of the Gentoo.

(4) ‘ *Dotem non uxor marito, sed uxori maritus offert.*’ *Tacit. de Mor. Germ. c. 18.* This remarkable usage continued after the German nations had made conquests, and is every where to be met with in their laws.

‘ Non amplius unusquisque in puellae vel mulieris nomine *dotis* titulo conferat vel conscribat, quam quod decimam partem rerum suarum esse constiterit.’ *LL. Wisigoth. lib. 3. tit. 1. l. 5.*

‘ Quia mulieres, quibus dudum concessum fuerat de suis *dotibus* judicare, quod voluissent, quaedam reperiuntur, spretis filiis vel nepotibus, easdem *dotis* illis conferre, cum quibus constiterit nequiter eas vixisse: Ideo necesse est illos exinde percipere commodum pro quibus creandis fuerat assumptum conjugium. Denique constituentibus decernimus, ut de *dote* sua mulier habens filios vel nepotes, seu causa mercedis ecclesiis vel libertis conferre, sive cuique voluerit, non amplius quam de quarta parte potestatem habeat. Nam tres partes legitimis filiis aut nepotibus, seu sit unus sive forsitan plures, absque dubio relictura est. De tota interim *dote*, tunc facere quid voluerit, erit mulieri potestas, quando nullum legitimum filium, filiamve, nepotem vel

‘ neptem superstitem reliquerit. Verum tamen faeminas,
 ‘ quas contigerit duobus viris aut amplius nubere, atque ex
 ‘ eis filios procreare, non eis licitum erit *dotem* ab alio marito
 ‘ acceptam, filiis aut nepotibus ex alio viro genitis dare: Sed
 ‘ unusquisque filius filiae, nepos aut neptis, ex ipsa linea
 ‘ procreati, *dotem* quam avus aut pater illorum concefferat,
 ‘ post mulieris obitum per omnia consecuturi sunt.’ *LL. Wisigoth. lib. 4. tit. 5. l. 2. ap. Lindenbrog.*

‘ Mulier si ad alias nuptias tranſierit, omnia perdat:
 ‘ *Dote* tamen ſua quam a marito ſuo acceperat, quamdiu
 ‘ vixerit, utatur, filio proprietate ſervata.’ *LL. Burgund. tit. 62. l. 2.* See farther *LL. Wisigoth, lib. 3. tit. 2. l. 8. lib. 5. tit. 2. l. 4. LL. Ripuar. tit. 37. LL. Saxon. tit. 7. LL. Longobard. lib. 1. tit. 4.* The curious reader may alſo conſult the forms or writings which conſtituted the *dos*, or dower. *Form. Solen. ap. Baluz. tom. 2. See Appendix, No. 1.*

In England, the doctrines and hiſtory of the *dos* are to be ſeen in *Glanvil*, *Brañon*, *Britton*, in the book called *Fleta*, and in *Littleton*. ‘*Dos*, or dower,’ ſays my Lord *Coke*, ‘in the common law, is taken for that portion of lands or tenements which the wife hath for terme of her life of the lands or tenements of her husband after his deceaſe, for the ſuſtenance of herſelfe, and the nurture and education of her children.’ *1. Inſtit. p. 31.* It is curious to find in the woods of Germany, a rite or cuſtom that makes a figure in all the laws of Europe.

My Lord *Kaims*, whom I am aſhamed to contradict ſo often, has ſtrangely miſunderſtood this ſubject. ‘In Germany,’ ſays he, ‘when *Tacitus* wrote, very few traces remained of polygamy. Severa illic matrimonia, nec ullam morum partem magis laudaveris; nam prope ſoli barbarorum ſingulis uxoribus contenti ſunt, exceptis admodum paucis, qui non libidine, ſed ob nobilitatem, plurimis nuptiis ambiuntur. When polygamy was in that country ſo little practiſed, we may be certain, *the purchaſing wives* did not remain in vigor. And *Tacitus* accordingly, mentioning the general rule, *dotem non uxor marito, ſed*

uxori maritus offert, explains it away by observing, that the only *dos* given by the bridegroom, were marriage-presents, and that he at the same time received marriage-presents on the bride's part.' *Sketches*, vol. 1. p. 192.

It would pain me to open up, with minuteness, all the mistakes which are crowded into this passage. I shall just glance at them. Polygamy, in fact, never prevailed among the Germans; and of this, the treatise of Tacitus, and the laws of the barbarians after their conquests, are the most striking and decisive proofs. See *Cb. 1. Sect. 3. Note 14.* Neither were women *bought* in Germany, nor does Tacitus affirm, that the *dos* consisted of marriage-presents. The interchange of presents by the married couple and the *dos*, were separate and distinct. The intention of the former I have already explained. See *Cb. 1. Sect. 3. Note 2.* What the latter was, I have just now said; and I appeal to the authorities which support my notion.

The source of all these errors is, the idea entertained and inculcated by this eminent writer, that the women, in rude times, are of so little consideration, that they are objects of traffic. Hence he conceived, that the *dos* must be the *purchase-money* of the wife. That it was not so, we have seen; but, as the opinion has been pretty generally received, and has got the sanction of Professor Millar, as well as that of his Lordship, it is proper to consider its propriety with some attention.

Though it every where appears, from the examination of the barbaric laws, and from the books of the earliest lawyers, that the *dos* or *dower* was the provision allotted for the maintenance of the wife, it is not to be denied, that, in ancient legal monuments, there occur the expressions *donatio nuptialis*, *pretium uxoris*, & *pretium dotis*. And these, I perceive, have contributed to induce Mr. Millar to go into the fancy, that anciently, in Europe, the *dos* was the price, or purchase-money of the wife. *Observations on the distinction of rank*, p. 30. 2. edit. If, however, I am not very widely mistaken, these expressions apply, in no case, to the purchase-money of the wife;

but exprefs the provision made for her, in the event of the death of the husband. This, I think, appears from the laws of the barbarians.

‘ Si qua mulier duntaxat Burgundia post mariti mortem ad secundas aut tertias nuptias, ut adfolet fieri, fortasse transferit, & filios habuerit, ex omni conjugio, *donationem nuptialem* dum advivit usu fructu possideat: Post ejus mortem ad unumquemque filium, quod pater ejus dederat, revertatur: Ita ut mater nec donandi, nec vendendi, nec alienandi de his rebus quas in *donatione nuptiali* accepit, habeat potestatem.’ *LL. Burgund. tit. 24.*

It is said of one Folco, that he gave to his wife Gerlint all he had; ‘ Omnia sua propter *pretium* in mane quando surrexit.’ *Giannone, Hist. of Naples, vol. 1. p. 274.* But this was not the price or value of the wife. It was the morgengabe, or morning-present, about which there is so much in the barbaric laws, and of which the extravagance was so great, that regulations were made to repress it.

As to the expression, *pretium dotis*, we meet with it in the following ordinance. ‘ Si puella ingenua ad quemlibet ingenuum venerit ea conditione, ut eum sibi maritum acquirat, prius cum puellae parentibus conloquatur; & si obrinuerit, ut eam uxorem habere possit, *pretium dotis* parentibus ejus, ut justum est, impleatur.’ *LL. Wisigoth. lib. 3. tit. 2. l. 8.* The dower, it seems, was at times given to the parent, or to the relation of the woman, to be kept for her use. This is fully explained by the regulation which follows. ‘ *Dotem* puellae traditam pater exigendi vel conservandi ipsi puellae habeat potestatem. Quod si pater aut mater defuerint, tunc fratres vel proximi parentes, *dotem* quam susceperint, ipsi conforori suae ad integrum restituant.’ *LL. Wisigoth. lib. 3. tit. 1. l. 6. ap. Lindenbrog.*

I know that the custom of presenting money at marriages came to prevail among the German and Gothic nations, and among the Franks more particularly. In *Fredegaricus*, for example, we read this description of the espousals of Cotildis. ‘ Legati offerentes *solidum* & *denarium*, ut mos

‘ est Francorum, eam partibus Clodovei sponfant.’ *Gest. Franc. c. 18.* Let us not, however, be deceived. Here no purchase was made. The money presented was only the symbol of a contract. This is illustrated by the *Arra nuptialis* of the Wisigoths. ‘ A die latae hujus legis decernimus, ut cum inter eos qui disponendi sunt, sive inter eorum parentes, aut fortasse propinquos, pro filiorum nuptiis coram testibus praecefferit, definitio, & annulus *arrarum* * nomine datus fuerit vel acceptus, quamvis scripturae non intercurrent, nullatenus promissio violetur, cum quae datus est annulus, & definitio facta coram testibus.’ *LL. Wisigoth. lib. 3. tit. 1. l. 3.*

But what refutes, in the most decisive manner, the notion that the wife was *purchased* with the money of the husband, is the following peculiarity. If a free man married his slave, and intended that his children by her should succeed to his fortune, it was necessary that he should make her a present of her liberty. And, what is remarkable, one of the methods of making her free, was the very act which is talked of as buying the property of the wife; it was the assigning her a *dower* or a *morgengabe*. ‘ Si quis ancillam suam propriam matrimoniare voluerit sibi ad uxorem, sit ei licentia: Tamen debeat eam liberam thingare, & sic facere liberam, quod est *Widerboram*, & legitimam per *garathinx*, id est, per libertatis donationem; vel per gratuitam donationem, id est *morgengabe*; tunc intelligatur esse libera & legitima uxor, & filii qui ex ea nati fuerint legitimi haeredes efficiantur.’ *LL. Longobard. lib. 2. tit. 1. l. 8.* Among the Longobards the *dower* and the *morgengabe* came to be synonymous, and were fixed at the fourth part of the substance of the husband †. *LL. Longobard. lib. 2. tit. 4.*

* *Arrhes* or *arres* in France, *earnest* in England, and *arles* in Scotland, still express the money advanced in token that a bargain is concluded.

† A very singular exception, to the doctrine I advance in this note, is to be found in the records of England, and I am surpris’d that it has escap’d the learned industry of the writers whom I venture to oppose. I trust, notwithstanding, that my general conclusion is not to be affected by it. The case, however, is so odd, that I will give it to the reader in the words of my author.

I might confirm these remarks by attending to the manners and customs of other nations. Among the inhabitants, for example, of Hindostan, while they were in a similar state of manners with the barbaric tribes, the ordinances and usages in matrimonial concerns, have a striking conformity with those I have now described. This is evident from the code of Gentoo laws*.

'The woman's property,' say these laws, 'is whatever she receives during the *ayammi shadee*, the days of marriage.

'When a woman dies, then, whatever effects she acquired during the *ayammi shadee*, even though she hath a son living, shall first go to her unmarried daughter; if there is but one unmarried daughter, she shall obtain the whole; if there are several unmarried daughters, they all shall have equal shares.'

Here there is clearly the *dower* of the barbarians, and its destination on the decease of the wife, in a given or

'John Camois,' says Camden, 'son of Lord Ralph Camois, (a precedent not to be paralleled in that or our own age), *out of his own free will* (I speak from the parliament-rolls themselves, Parl. 30. Ed. I.) gave and demised his own wife, Margaret, daughter and heir of John de Gaidesden, to Sir William Paine, knight; and to the same [William] voluntarily gave, granted, released, and quitclaimed all the goods and chattels which she had, or otherwise hereafter might have, and also whatever was in his hands, of the aforesaid Margaret's goods and chattels, with their appurtenances. So as neither himself, nor any other in his name, might, nor for ever ought to claim or challenge any interest in the aforesaid Margaret, from henceforth, or in the goods or chattels of the said Margaret: Which is, what the ancients said in one word, *ut omnia sua secum haberet*, that she should take away with her all that was her's. By occasion of which grant, when she demanded her dower in the manor of Torpull, an estate of John Camois, her first husband, there commenced a memorable suit. But she was cast in it, and sentence passed, *that she ought to have no dower from thence.*' *Britannia*, vol. 1. p. 205.

Even this example, however, of the sale of a wife, confirms the idea I inculcate as to the *dos* or dower.

* Or Ordinations of the Pundits, from a Persian translation made from the original, written in the ShanScrit language. London, printed in the year 1776.

supposed situation. There is something more. For the woman, among the Hindoos, as well as among our barbarians, might acquire other property beside the dower, during the days of marriage. This is illustrated by the following regulations.

The woman's property among the Hindoos is also 'whatever she may receive from any person, as she is going to her husband's house, or coming from thence.

'Whatever her husband may at any time have given her; whatever she has received, at any time, from a brother; and whatever her father and mother may have given her.

'Whatever jewels or wearing apparel she may have received from any person.'

Here we have, obviously, the marriage-presents of the relations and friends, as among the barbarians; and, in the gifts of the husband, there is a counter-part to the morgengabe of our forefathers, which is still farther explained by the following circumstance.

The form of marriage among the Hindoos, termed *ashore*, is described to be 'when a man gives money to a father and mother, on his marrying their daughter, and also gives something to the daughter herself.'

Here there is not only the *dos* or dower, to be kept by the relations for the use of the bride, but the morgengabe, or morning present, in the disposal of the bride herself; peculiarities which constituted the general characteristics of these transactions among the barbarians.

This coincidence is probably to be found in all nations, in certain ages or periods of their history. It is an evidence of the uniformity of the manners of man in the most distinct and distant regions; and it marks strongly the importance of women in the early times of society and civilization. *Code of Gentoo Laws, ch. 2.*

It would be irksome to prosecute this subject at greater length. Law and history uniformly concur to inform us, that anciently, in Europe, the *dos* was the provision allotted to the wife, and not the price paid for her. The customs of

other nations offer their testimony to the same purpose. And natural affection and reason, the generosity of manners in rude times, and the limited ideas of property which then prevail, all join to support the conclusion. Yielding to the united force of these particulars, I scruple not to contradict positions which have the sanction of distinguished names.

(5) In the process of time, regular forms or acts were invented for the constitution of the *dower*. Four methods of the dower prevailed more particularly over Europe, and, on that account, it is proper to recite and to explain them. These were the dower *ad ostium ecclesiae*, the dower *ex assensu patris*, the dower by the *custom* of particular places, and the dower *de la plus belle*. And from these peculiarities, also, there results the most clear and decisive proof, that the *dos* was not the purchase-money of the wife, but the provision for her maintenance.

1. The dower *ad ostium ecclesiae* took place when the bridegroom, having come to the door of the church or monastery where he was to be married, and having plighted his faith to the woman, and received hers, made public mention of the quantity and proportion of the land he designed for her *dower*. In consequence of this transaction, she might take possession, on his death, of the provision thus allotted to her.

2. The dower *ex assensu patris* took place when the son endowed his wife, with consent of his father, in the lands to which he was to succeed. In this case, the wife, on the demise of the husband, was to enjoy the portion assigned to her in the estate of the father.

3. By the *custom* of some counties, cities, and boroughs, the woman had, for her *dower*, the half of her husband's possessions, or the whole.

4. The dower *de la plus belle* had place when a person, for example, being seized of forty acres of land, of which he held twenty by knight-service, and twenty in soccage, took a wife, had a son, and dying, left him under age. The lord of whom the land was held in knight-service, took possession of the twenty acres, as guardian of the minor *in*

chivalry; and the mother entered into the enjoyment of the other twenty, as guardian *in foccage*. In this situation, the mother might bring a writ of *dower* against the guardian in chivalry, to be endowed of the tenements holden in knight-service. But the guardian in chivalry, pleading in his defence, that she is guardian in foccage, might require from the court that she be adjudged to endow herself in the *fairest of the tenements* she possesses. And, if she could not show that the property in foccage was unequal to the purpose of the dower, the guardian in chivalry retained the lands holden of him during the minority of the heir. The woman, then assembling her neighbours, took possession, in their presence, of *the fairest part* of the foccage-lands, to hold them during her life, under the title of the *dower de la plus belle*. *Littleton, cb. 5. The Comments of Sir Edward Coke, and Monsf. Houard, and the Glossaries.*

It is thus, that the simple regulation, mentioned by *Tacitus*, grew in time various and complicated. It even yet makes a figure in our laws. It is to be seen in the provisions they hold out for the widow. And, it may teach us to suspect, that enactments, which appear to be deeply founded in legislative wisdom, are often nothing more than improvements of the usages which natural reason and expediency have struck out in a barbarous age.

(6) The laws of the different nations of the barbarians vary in the dower or provision they ordained. The Longobardic laws made it the fourth part of the estate of the husband. *LL. Longobard. lib. 2. tit. 4. l. 1.* The Wisigothic constitutions made it the tenth part of the substance of the husband. *LL. Wisigoth. ap. Lindenbrog. p. 53.* And, in England, the legal dower consisted of the third part of the lands or tenements of the husband. *Coke on Littleton, p. 31.*

(7) '*Morgen Germanice significat mane & gab, donatio, unde dicitur morgengab, donatio facta mane.*' *Gloss. Lindenbrog. p. 1441.* '*De civitatibus vero . . . quas Gailseuindam tam in dote, quam in morganegebiba, hoc est, matutinali dono, in Franciam venientem certum est adquisivisse.*' *Greg. Turon. lib. 9. c. 20.* See farther

LL. Burgund. tit. 42. l. 2. LL. Alaman. tit. 56. LL. Ripuar. tit. 37. l. 2. LL. Longobard. lib. 1. tit. 9. l. 12. &c.

A learned and ingenious writer has observed, that, in England, there are no traces of the *morgengabe*. *Observations on the Statutes*, p. 9. 3d edit. This I suspect is a mistake. The *morgengabe* is mentioned in the laws of Canute, and in those of Henry I. *LL. Canut. par. 2. c. 71. LL. Hen. I. c. 70. ap. Wilkins*, p. 144. 267. The pin-money of modern times, it is probable, grew out of this usage.

A peculiar kind of matrimonial engagement was called *matrimonium ad morganicam*, which is to be distinguished from the rite I now mention. This form of marriage did not permit of *dower*, and the wife had only a *morgengabe* or present. It was intended for the benefit of men of rank, who had lost their wives, but had children. In consequence of it, they could legally connect themselves with low women, who, receiving and being entitled to no dower, could not burden their estates. The issue of such connexions had no power of succession, and inherited no dignity. But provisions might be made for them. It was out of this source, chiefly, that the church of old was supplied. Men of influence could there deposit, most securely, the spawn of their concubinage. And it still is, and ever will be, wherever it is wealthy, an asylum for this produce, and for the younger sons of noble families.

This scheme of legal concubinage is prevalent, at this hour, in Germany; and women, married after this odd fashion, are termed left-handed wives; because it is a part of the ceremony for the bridegroom to give his left hand to the bride. Of such connexions, as in ancient times, the issue are bastards, as to inheritance, and bear neither the name nor the arms of the father. *Baron von Lowheu or Nobility*.

Beside the *morgengabe*, or the present by the husband, it was common, at marriages, for the relations, and other persons connected with the parties, to express their satis-

faction by making *gifts*. 'Gaudent *muneribus*,' is a part of the characteristic description of the ancient Germans by Tacitus. 'Franci vero,' says Gregory of Tours, when speaking of the marriage of the daughter of Chilperic, 'multa munera obtulerunt; alii aurum, alii argentum, nonnulli equos, plerique vestimenta, & unusquisque ut potuit, *donativum* dedit.' *Hist. lib. 6. c. 45.*

This custom pervaded all ranks of society. And the *money* or *penny* weddings which still prevail in small villages and hamlets are a remain of it. What, in one age, disgraces not the palace of the prince, is to be confined in another to the hovel of the rustic.

(8) The powers over a *morgengabe*, mentioned in the text, would not probably arise all at once, but gradually. The two former, I imagine, would be long known before the latter; and extensive powers over a *morgengabe*, consisting of money, would sooner be exerted, than over one consisting of land. Of a *morgengabe* in land, there is the following disposition or bequest by Gertrude, a German lady of high rank, in the year 1273.

'Alodium situm in Griezzenpach, ad se donationis titulo pertinens, quod *morgengab* vulgariter nuncupatur, cultum & incultum, quaesitum & inquisitum, cum omnibus attinentiis ecclesiae S. Petri in monte liberaliter & absolute ordinat, testatur, tradit, & legat.' *Boehmer de Secund. Nupt. illustr. Pers. c. 2. § 41. ap. Heinec. Elem. Jur. Germ. p. 121.*

The clergy, by besieging the beds of the dying, procured many legacies of this kind; and their rapacity, though shocking and abominable, contributed to hasten the powers of the alienation of property.

(9) 'Habeat ipsa mulier *morgengab*, & quod de parentibus ejus adduxerit, id est, PHADERPHIUM.' *LL. Longobard. lib. 2. tit. 1. l. 4.* See also *LL. Alaman. tit. 56. LL. Wisgotb. lib. 3. tit. 1. l. 5. LL. Longobard. lib. 1. tit. 9. l. 12.*

In England, and in other countries, the term *Phaderfum*, which signifies *paternal estate*, was unknown; but

the term *maritagium* implied in them the prevalence of the custom. 'MARITAGIUM dicitur id quod viro datur cum uxore; dotem enim appellamus Angli, non quod vir accipit, sed quod femina.' *Spelm. Gloss. p. 405.* In the *Formulare Anglicanum*, there are preserved ancient feofments of land to the husbands of the daughters and sisters of the grantors, in which *maritagium* is the term employed as expressive of the estate of the woman. See *Appendix No. 2.*

The following law of the Longobards, on the subject of the portion, or estate of the woman, seems to be very curious. 'Vidua quae in domo patris aut fratris regressa est, habeat sibi morgangab & methium: De *faderfio* autem, id est, de alio dono, quantum pater aut frater dederit ei, quando ad maritum ambulaverit, mittat IN CONFUSUM cum aliis fororibus." *LL. Longob. lib. 2. tit. 14. l. 15.*

This commixtion of the portions of the women, is treated by *Littleton*, in his tenures, *lib. 3. ch. 2.* But nothing of the history, or the philosophy of the custom, appears there. A woman who had been married, and had received her *faderfium*, might, on the death of her ancestor, if the portions of her sisters were to prove higher, make a commixtion of the tenements, and lay claim to an equal share. If they were to prove less, she might retain her *faderfium*. This commixtion was called *Hotchpot*, from a dish of that name. *Littleton*, p. 167. 'Hotchpot, says *Corwel*, 'is a word that cometh out of the lowe countries, where Hutspot signifieth flesh cut into pretie pieces, and sodden with herbs and roots.' *The Interpreter, Edit. 1607.* This dish is still in particular esteem in Scotland. *Littleton*, as cited above, makes *botchpot*, in its natural meaning, to signify a pudding composed of different ingredients.

The estate brought by the woman to the husband, when a full infeudation, was called *Maritagium liberum*; when otherwise, it was *maritagium servitio obnoxium*. *Glanvil, lib. 7. Regiam Majestatem, lib. 2. Braeton, lib. 2. Fleta, lib. 3. Littleton, lib. 1.*

(10) The *dos*, or *dower*, which had figured so much, was thus to be gradually swallowed up in the *jointure*; and,
in

in this situation, it came to express the estate brought to the husband by the wife. This circumstance is well illustrated by the following example in *Muvatori*, an. 1203.

Azo, Estensis Marchio, in publico conventu baronum Lombardiae, warrantavit & professus fuit, se accepisse in dotem a domina Aliz, filia quondam Rainaldi principis Antiocheni, quam in matrimonio sibi receperit, duo millia marcharum argenti, ac inde jure pignoris & donationis propter nuptias, investivisse dominam Aliz de tantis de suis bonis & possessionibus & immobilibus, ubicumque habeat, vel acquirere debeat, ut valeant duplum suprascriptae dotis & donationis. *Antiq. Estensj. tom. 1. p. 381. ap Heinec. Elem. Jur. Germ. p. 120.*

I pretend not to fix the precise time when *dos* assumed this sense. The meaning of words, varying perpetually with the fluctuation of manners and the intermixture of nations, gives an almost impenetrable darkness to the middle ages. The pale inquirer is often to forsake an interpretation he had chosen, and on which he had built. Language is to deceive him. He is to attend to customs and usages; yet customs and usages prevail for a time, are lost, and start up again. He is involved, and wanders in the double gloom of antiquity and barbarism.

(11) 'Dulcissima filia mea illa, ego ille. Diuturna sed impia inter nos consuetudo tenetur, ut de terra paterna forores cum fratribus portionem non habeant. Sed ego perpendens hanc impietatem, sicut mihi a Deo aequaliter donati estis filii, ita & a me sitis aequaliter diligendi, ut de rebus meis post meum discessum aequaliter gaudeatis.' *Charta ap. Marculp. Form. lib. 2. c. 12.*

'Inter Burgundiones id volumus custodiri, ut, si quis filium non reliquerit, in loco filii filia in patris matrisque haereditate succedat.' *LL. Burgund. tit. 14. l. 1.*

'Si quis Longobardus sine filiis legitimis masculinis mortuus fuerit, & filiam dereliquerit unam aut plures legitimas, ipsae ej in omnem haereditatem patris vel matris suae, tanquam filii legitimi masculini, haeredes succedant. *LL. Longob. lib. 2. tit. 14. l. 19.* See farther, *LL. Saxon. tit. 7.*

LL. Angl. & Werin. tit. 6. La Coutume Réformée du Pays & Duché de Normandie, commentée par Basnage, tome 1. p. 388. Selecta Feudalia Thomafiana, p. 26 — 29.

(12) There are frequent examples of ladies exercising the civil rights and the jurisdictions of fiefs. Of courts held by them, and of decrees they pronounced, there are curious evidences in *Muratori, Antiq. Ital. Medii Ævi, vol. 1. p. 489. 614. 738. 970, 971.*

In a learned work, entitled, *le Droit public de France éclairci par les monumens de l'antiquité*, we meet the following notices, which are authenticated from records.

‘*Mathilde Comtesse d’Artois eut féance & voix délibérative comme les autres Pairs de France, dans le procès criminel fait à Robert Comte de Flandres.*

‘*Jeanne fille de Raymond Comte de Toulouse prêta le serment, & fit la foi & hommage au Roi de cette pairie.*

‘*Jeanne fille de Bauldovin fit serment de fidélité pour la pairie de Flandres. Marguerite sa sœur en hérita & assista comme pair au célèbre jugement des pairs de France, donné pour le Comté de Clermont en Beauvoisis.*’ *Bouquet, p. 338. See farther Brussel, usage général des fiefs, liv. 2. ch. 14.*

In England, in the reign of Edward III. there were summoned to parliament by writ *ad colloquium & tractatum* by their proxies, Mary Countess of Norfolk, Alienor Countess of Ormond, Anna Despenser, Philippa Countess of March, Johanna Fitzwater, Agneta Countess of Pembroke, and Catharine Countess of Athol. *Gurdon’s Hist. of the High Court of Parliament, vol. 1. p. 202. Parliam. Summons, 265.*

(13) The ornaments of the mother went early by succession, to the daughters; and, from the laws which prove this peculiarity, it is also to be inferred, that the passion of the women for dress was keen and strong.

‘*Ornamenta & vestimenta matronalia ad filias, absque ullo fratris fratrumque consortio, pertinebunt.*’ *LL. Burgund. tit. 51. l. 3.*

‘*Mater moriens filio terram, mancipia, pecuniam dimittat; filiae vero spolia colli, id est, murenas, nuscas, monilia,*

inaures, vestes, armillas, vel quidquid ornamenti proprii videbatur habuisse.' *LL. Angl. & Werin. tit. 6. l. 6.*

(14) 'Si quis propter libidinem liberae manum injecerit, aut virgini seu uxori alterius, quod Bajuvarii horgrift vocant, cum vi. solid. componat.' *LL. Baiivar. tit. 7. l. 3.*

'Si indumenta super *genicula* eleverit quod humilzorun vocant, cum xii. solid. componat.' *Ibid. l. 4.*

'Si autem *discriminalia* ejecerit de capite, Wultworf dicunt, vel virgini *libidinosè* crines de capite extraxerit, cum xii. fol. componat.' *Ibid. l. 5.*

'Si qua libera faemina virgo vadit in itinere suo inter duas villas, & obviavit eam aliquis & per raptum *denudat* caput ejus, cum vi. fol. componat. Et si ejus vestimenta levaverit, ut usque ad *genicula* denudet, cum vi. fol. componat: Et si eam denudaverit ut *genitalia* ejus appareant, vel *posteriora*, cum xii. fol. componat.' *LL. Alaman. tit. 58. l. 1.*

'Si quis liberam faeminam per *verenda* ejus comprehenderit iii. solid. componat, & duos solidos pro freda.' *LL. Frison. tit. 22. l. 89.* See farther *LL. Sal. tit. 22. LL. Longobard. lib. 2. tit. 55. l. 16.*

One must smile at the simplicity of these regulations. They are proofs, notwithstanding, of the respect entertained for chastity. They express, immodestly, the delicacies of a rude, but refining people. They offend virtue, in the very act of promoting it.

Similar institutions or regulations, may be seen in the code of Gentoo laws; but, as they are expressed with a still greater freedom of language, I avoid to give any examples of them. *Cb. 19.*

SECTION III.

(1) 'PRINCIPES regionum atque pagorum inter suos jus dicunt, controversiasque minuunt.' *Caesar, de Bell. Gall. lib. 6. c. 22.* See also *Tacit. de Mor. Germ. c. 12.*

These *principes* became lords or barons, after the conquests

of the barbarians, and, in this last state, continued and impoved the privileges they had previously possessed. *Dissert. concerning the Antiquity of the English Constitution, Part 3.* In Germany, there was probably no appeal from their decisions. For, in the German communities, it is said, there was no common magistrate. 'Nullus communis est magistratus.' *Caesar, ibid.* The judging, without appeal, was exercised in all the Gothic kingdoms by the higher division of the nobility. They had the *high* and the *low* justice, the *justice haut & bas, aité & basse.*

It would lead to details improper in this place, if I should attempt to explain the origin and growth of the different privileges of the nobles. But I may hint my surprize, that these topics, so full of curiosity, have so little attracted our antiquaries and lawyers. The jurisdiction and powers exercised by the great, form a remarkable step in the progress of the European governments. Loyseau, indeed, and many French writers, make an easy discussion of this matter, by affecting to treat them as encroachments on monarchy, or on the rights of kings. And Dr. Robertson has given his sanction to this opinion. *Hist. of Charles V. vol. 1. p. 60.*

A perfection, however, of governments, or of regal jurisdiction, is thus supposed, in the moment of its rise; a circumstance, contradictory alike to natural reason and to story. Government is not perfect all at once: It attains not maturity but by slow degrees. The privileges of the nobles were prior to its perfect state. In fact, it was by the abolition of these that it grew to strength and ripeness. The monarchies of Europe were completed, when the high privileges of the nobility were destroyed. But these privileges were exercised before government was understood, and before kings had ascertained their prerogatives.

(2) An old writer, speaking of the greater barons or lords, has these words. 'In omnibus tenementis suis omnem ab antiquo legalem habuere justitiam, videlicet, ferrum, fossam, furcas, & similia.' *Gervasius Dorobern. an. 1195. ap. Du Cange, voc. Fossa.*

'Proditores & transfugas,' says *Tacitus* of the old Germans,

arboribus suspendunt. Ignavos & imbelles, & corpore infames coeno ac palude, injecta insuper cruce, mergunt. De Mor. Germ. c. 12. This description has, doubtless, a reference to the German nobles or chiefs who presided in the courts of the cantons and districts into which a tribe or community was divided. And, does it not call to one's mind the *pit* and *gallows*, or the right to determine *de alto & basso* of the feudal nobility?

The power of mercy, or the pardoning of a criminal after sentence has been pronounced against him, is a curious circumstance in criminal jurisdiction. I should think, that it was exerted by the lord or baron in his dominions before it could be exercised in a general manner by the sovereign. The connexion between the lord and the vassal was intimate; and the felony of the latter being chiefly an injury to the former, it might naturally enough be imagined, that he was intitled not only to forgive the offence, but to suspend the punishment. To his proper vassals, the sovereign might also act in the same way. It was thus, in fact, in the Anglo-Saxon period of our history. For the king had then only the power of pardoning crimes as to himself. But, on what principle did the sovereign begin to exert the general prerogative of pardoning criminals, every where through the state, after condemnation? The question is important, and might be argued with great show, and much ingenuity. But the narrow boundaries within which I must confine my remarks, admit not of either. I can only hint at my idea, and must not wait to insist upon it.

When the territorial jurisdictions of the nobles were to decay, they lost the privilege of giving pardons, as well as the other advantages annexed to their fiefs. The judges who succeeded them, were not to possess their prerogatives. Other, and more cultivated maxims of law and equity, had grown familiar. Unconnected with the distributions and the offices of justice, but as peers, the nobles were to cease to interfere with law and business in their estates or territories. In this condition, their prerogatives could pass no where but to the crown. That of *mercy* was to be swallowed up

with the rest. When regular courts were erected, and when the barons neither levied troops, coined money, nor pardoned crimes, all these privileges were to be exercised, exclusively, by the sovereign. All the members of the community were then under one head. The kingdom seemed as it were to be one great fief, and the people looked up to the sovereign as the only superior.

The act of parliament which had the effect to abridge, for ever, the high prerogatives of the nobles, declares, 'That no person or persons, of what estate or degree soever they be, from the first day of July, which shall be in the year of our Lord God 1536, shall have any power or authority to pardon or remit any treasons, murders, manslaughterers, or any kind of felonies, whatsoever they be; nor any accessaries to any treasons, murders, manslaughterers, or felonies; or any outlawries, for any such offences committed, perpetrated, done, or divulged, or hereafter to be committed, done or divulged by or against any person or persons, in any part of this realm, Wales, or to the marches of the same; but that the King's Highness, his heirs and successors, Kings of this realm, shall have *the whole power and authority thereof*, united and knit to the imperial crown of this realm.' *Stat. 27. Henry VIII. c. 24.*

(3) Du Cange, *Dissert. 29. sur l'Histoire de St. Louis. Brussel, usage général des fiefs, liv. 2.*

(4) 'Suscipere tam inimicitias seu patris seu propinqui, quam amicitias, necesse est.' *Tacit. de Mor. Germ. c. 21.*

Hence the *deadly feuds* of our ancestors. Such is the state of manners in all rude ages. The American carries his friendships and his resentments to extremity, and delivers them as an inheritance to his sons. He is the best friend, and the bitterest enemy. When he is disposed to be hostile, he knows how to conceal his sentiments: 'He can even affect to be reconciled till he catches the opportunity of revenge. No distance of place, and no length of time can allay his resentment, or protect the object of it.' *Europ. Settlement. in Amer. vol. 1. p. 165.*

It was in consequence of the principle or right of revenge, that the Greeks made it a maxim of their creed, that the

gods punish the crimes of the wicked upon their innocent posterity. It was a consequence of it, that, even in modern times, those inclement and ungenerous laws were enacted, which taint the blood of a rebel, which dare to violate the sacred rights of humanity, and to punish a blameless progeny with penalties and forfeitures.

(5) ' In Gallia, non solum in omnibus civitatibus, atque pagis partibusque, sed penetiā in singulis domibus, factiones sunt; earumque factionum sunt principes, qui summam auctoritatem eorum iudicio habere existimantur; quorum ad arbitrium iudiciumque summa rerum consilio- rumque redeat.' *Caesar, de Bell. Gall. lib. 6. c. 10.*

After the Germanic conquests, the words *faida*, *feid*, *feeth*, and *feud*, came to express the hostilities of the combination of kindred, who revenged the death of any person of their blood, against the killer and his race. In the Anglo-Saxon period of our history, these factions and hostilities were prevalent to an uncommon degree. And, what is worthy of observation, when a person was outlawed, and could form no combination of this sort for his protection, but might be put to death by any individual who met him, the term *friendles-man*, expressed his condition. 'Talem,' says *Braeton*, 'vocant Anglici *Urtlaugbe*, & alio nomine *antiquitus* solet nominari, scilicet *FRIENDLES-MAN*.' *Lib. 3. p. 129.*

About the year 944, King Edmund, with a view of repressing the violence and pernicious tendency of such confederacies, enacted the following method for their regulation.

'Memet, & nos omnes taedet impiarum & quotidianarum pugnarum quae inter nos ipsos fiunt, & propterea in hunc modum statuimus. Si quis alium posthac interfecerit, solus cum interfecti cognatis *faidam* gerito, cujuscunque conditionis fuerit, ni ope amicorum integram *weram* intra 12 menses perfolverit. Sin destituerint eum cognati & noluerint: Volumus ut illi omnes [praeter reum] à *faida* sint liberi, dum tamen, nec victum ei prebeant, nec refugium. Quod si quis hoc fecerit suis omnibus apud regem mulctator, & cum eo quem destituit nuper, *faidam*

‘ jam sustineat propinquorum interfecti. Qui vero ab alio
 ‘ cognatam quam a reo sumpserit vindictam, sit in fuida
 ‘ ipsius regis & amicorum suorum omnium, omnibusque
 ‘ bonis suis plectitor.’ *LL. Edmund. ap. Spelm. Gloss.*
 p. 209.

The method of compounding, or of buying away the
 resentment of the injured kindred, is thus described by
 the same prince,

‘ Prudentium est fidas compescere. Primo [de more
 ‘ gentium] orator mittitur interfector ad cognatos interfecti,
 ‘ nunciaturum se velle eisdem satisfacere. Deinde tradatur
 ‘ interfector in manus oratoris, ut coram veniat pacatè,
 ‘ & de solvenda vera ipsemet spondeat. Sponsam solvi satisfadato.
 ‘ Hoc factò, indictetur mundium regis, ab illo die usque
 ‘ in 20 noctes, & collistigi multam dependito; post alias
 ‘ 21 noctes manbotam, & nocte 21 sequenti primam vere
 ‘ solutionem numerato.’ *LL. Edmund. ap. Spelm. Gloss.*
 p. 210. *§ Wilkins, p. 74, 75.*

Transactions of the same nature, characterize the criminal
 jurisprudence of all infant nations. ‘ Criminal matters’ says
 a most acute and elegant writer, ‘ are generally compro-
 ‘ mised among the Americans in the following manner. The
 ‘ offender absents himself; his friends send a compliment
 ‘ of condolence to those of the party murdered. Presents
 ‘ are offered, which are rarely refused. The head of the
 ‘ family appears, who, in a formal speech, delivers the
 ‘ presents, which consist often of above sixty articles, every
 ‘ one of which is given to cancel some part of the offence,
 ‘ and to alluage the grief of the suffering party. With the
 ‘ first he says, *By this I remove the hatchet from the*
 ‘ *wound, and make it to fall out of the hands of him*
 ‘ *who is prepared to revenge the injury;* with the second,
 ‘ *I dry up the blood of that wound;* and so on, in apt figures,
 ‘ taking away, one by one, all the ill consequences of the
 ‘ murder.’ *Europ. Settlement. in America, vol. 1. p. 174.*

The hostilities and factions of which I speak, were sup-
 ported among the Anglo-Saxons, as among the Gauls and
 the Germans, by the authority and countenance of the chiefs

and the nobles. In the Norman times, the barons gave letters or mandates of protection to individuals, whom they were disposed to serve. Even kings gave obligations to abbeys and monasteries, by which they were bound to protect them against violence of every kind. On the consideration of fines, they were even to remit their own animosities, and protect criminals from justice. See *Appendix*, N^o 3. The same things had place in the other kingdoms of Europe. Men, weak, and without strength, bought the assistance and protection of the strong and powerful. *Du Cange*, *voc. Salvamentum Capitalicium. Form. Solen. ap. Baluz.*

(6) After the beautiful discovery of a magistrate, the violence of the injured is corrected; and it is then, probably, that fines and compensations are invented, or at least established. 'Nec implacabiles durant,' says *Tacitus*, of the resentments of the Germans, 'luitur enim etiam homicidium certo armentorum ac pecorum numero, recipitque satisfactionem univ[er]sa domus.' *De Mor. Germ. c. 31.*

These fines or compositions, of which it was the object to satisfy the revenge of the relations of the person who had suffered, were originally settled by their agreement with the offender, or, by the discretion of the magistrate. Afterwards they were fixed by ordinances. The Anglo-Saxon laws, as well as those of the other barbarians, recount not only the stated fines for particular offences, but for particular persons, from the prince to the peasant. When the delinquent could not pay the fine, which was to buy away, or to gratify the resentment of the injured family, the law, before it was improved, delivered him over to their resentment, and the wild state of nature revived again. Compositions of this kind were known, anciently, in Europe, under a variety of names. See in the Glossaries, *Wera, Faida, Compositio, Wergeldum, &c.*

The exaction of fines to the injured, among the ancient Germans, I consider as a proof that, in criminal matters, they had proceeded to appeal to a judge. I therefore differ from Dr. Robertson, when he observes, that, 'among the ancient Germans, as well as other nations in a similar state

of society, the right of avenging injuries was a private and personal right, exercised by force of arms, without any reference to an umpire, or any appeal to a magistrate for decision.' *Hist. of Charles V. vol. 1. p. 274.*

In fact, it was not even solely the fine to individuals that was known among the Germans. They had advanced much farther in criminal jurisprudence. It was thought that the criminal, beside offending a particular family by the injury done to any of its number, had also offended the society, by breaking its peace. A fine, likewise, was, on this account, exacted from him, and went to the public or fisc. And thus Mr. Hume, too, is mistaken, when he will not allow that the Germans had made this step towards a more cultivated life. *Hist. of England, vol. 1. p. 154.*

These different fines, the composition to the individuals, and that to the public, are pointedly and beautifully distinguished in the following passage of *Tacitus*. Having mentioned the methods in which the German nations punished the greater crimes, he adds, 'Levioribus delictis pro modo poenarum, equorum pecorumque numero convicti multantur. Pars multae Regi vel Civitati: Pars ipsi qui vindicatur, vel propinquis ejus, exsolvitur.' *De Mor. Germ. c. 12.* It is impossible for an authority to be more express or satisfactory against these eminent writers.

After the conquests of the Germans, the fine for disturbing the public peace was exacted under the name of *fredum*; and it is observable, that a portion of the profits of it came to constitute the first salary of judges.

The biographer of Charles V. I am sensible, professing to be guided by Baron Montesquieu, denies that 'the *fredum* was a compensation due to the community, on account of the public peace;' and considers it as 'the price paid to the magistrate for the protection he afforded against the violence of resentment.' *Vol. 1. p. 300.* This notion seems not to agree with his former opinion, as he conceives that the *fredum* was paid in the age of *Tacitus* *.

* 'A certain sum, called a *fredum*, was paid to the king or state, as

And I observe he has also affirmed, that the fine to the injured family may, in like manner, be traced back to the ancient Germans *, which appears to be another inconsistency with his former declaration. But, waving any consideration of these inadvertencies, I think there is nothing more evident, than that the *fredum* was originally paid to the fisc, or to the sovereign, for the breach of the peace. The following arguments are stubborn, and perhaps conclusive.

'*Fredum regalis compositio PACIS.*' *Gloss. Vet. ap. Lindenbrog. p. 1404.*

'Hoc quoque jubemus, ut judices supra nominati, five
 'fiscuales, de quacunque libet causa freda non exigant,
 'priusquam facinus componatur. Si quis autem per cupiditatem ista transgressus fuerit, legibus componatur. Fredum
 'autem non illi judici tribuat, cui culpam commisit, sed illi
 'qui solutionem recipit, *tertiam partem* FISCO tribuat, ut
 'PAX perpetua stabilis permaneat.' *LL. Ripuar. tit. 89.*

'Si quis liber liberum infra januas ecclesie occiderit,
 'cognoscat se contra Deum injuste fecisse, & ecclesiam Dei
 'polluisse: Ad ipsam ecclesiam quam polluit lx. sol. componat.
 'Ad FISCUM vero similiter alios lx. sol. pro FREDO solvat:
 'Parentibus autem legitimum weregildum solvat.' *LL. Alaman. tit. 4.*

'Si nobilis furtum quodlibet dicitur perpetrasse, & negare
 'voluerit, cum quinque sacramentalibus juret: Aut si negare
 'non potuerit, quod abstulit in duplum restituat, & ad
 'partem REGIS lxxx. sol. pro FREDO componat, hoc est
 'Weregildum suum.' *LL. Frisionum, tit. 3. l. 1.* See farther *LL. Longobard. tit. 30. l. 13. Capit. Kar. & Lud. lib. 3. tit. 30.*

* Tacitus expresses it, or the Fiscus, in the language of the barbarous laws, *vol. I. p. 300.*

* The payment of a fine, by way of satisfaction to the person or family injured, was the first device of a rude people, in order to check the career of private resentment, and to extinguish those *faidae* or deadly feuds, which were prosecuted among them, with the utmost violence. This custom may be traced back to the ancient Germans. *vol. 1. p. 299.*

Among the Anglo-Saxons, the fine for the violated peace was termed *Griethbrech*. *Spelm. Gloss.* It was, as times became mercenary, that a part of the *fredum*, and sometimes the whole of it, went to the judge. And the salary thus assigned to him, was not for the protection he afforded, for he was the servant of the public; but as the reward of his growing trouble, and the emolument of his office. See *LL. Sal. tit. 52. l. 3. tit. 55. l. 2. LL. Baiivar. tit. 2. l. 16.*

The giving a stipend to judges out of the fines for the violated peace, was common in England, as well as in the other states of Europe. This stipend or allowance was usually the *third penny* of the county. An old book of Battel Abbey, cited by *Mr. Selden*, has these words. ‘*Consuetudinaliter per totam Angliam mos antiquitus pro lege inoleverat, comites provinciarum TERTIUM DENARIUM sibi obtinere.*’ *Tit. Hon. part 2. ch. 5. sect. 7.* Gervase of Tilbury, or whoever wrote the old dialogue concerning the exchequer, speaks thus. ‘*Comes est qui TERTIAM PORTIONEM eorum quae de placitis proveniunt in quolibet comitatu percipit.*’ And the *Earl*, he says, was called *Comes*, ‘*quia Fisco focus est, & comes in percipiendis.*’ *Dial. de Scaccar. lib. 1. c. 17.* This tract is published by *Mr. Matox* in his history of the exchequer. ‘*De istis octo libris, say the laws of the Confessor, [scil. multa violatae pacis] Rex habebat centum solidos, & Consul comitatus quinquaginta, qui TERTIUM habebat DENARIUM de forisfactoris: Decanus autem reliquos decem.*’ *LL. Confess. c. 31. ap. Spelm. Gloss. p. 142.* What shows likewise, beyond a doubt, that the third penny of the county arose out of the fines for the violated peace, is the circumstance, that the *Kings* of England made formal grants of it to subjects whom they favored. This, the book already quoted concerning the exchequer, lays down in these words. ‘*Hii (it had been speaking of Earls, and of the profits of fines,) tantum ista percipiunt, quibus regum munificentia obsequii praestiti, vel eximiae probitatis intuitu comites sibi creat, & ratione dignitatis illius haec conferenda decernit, quibusdam haereditarie quibusdam personaliter.*’ *Dial. de Scaccar. ap. Madox, p. 402.* The

higher Earls, or the Earls palatine, it is observable, had all the profits to their own use. Of the Earls who possessed the *third penny*, there is mentioned the Earl of Kent, who had it under William I. And there is evidence, that it was anciently enjoyed by the Earls of Arundel, Oxford, Essex, Norfolk, and Devonshire. *Selden, Tit. Hon. part 2. ch. 5. Madox, Baron. Anglica, book 2. ch. 1.*

(7) When the right of private war was acknowledged as a legal prerogative of nobility, regulations were made to adjust its nature and exertion. *Beaumanoir, Coutumes de Beauvoisis, ch. 59. Du Cange, dissert. 29. sur l'histoire de St. Louis. Boulainvillers on the ancient parliaments of France, letter 5.* What is surprising, even the neglect of exercising this right, when a proper occasion required its exertion, was an offence to the order who professed it, and an object of punishment. 'Le Duc Sandragésile,' says *Saint Foix*, 'ayant été tué par quelqu'un de ses ennemis, les grands du Royaume citèrent ses enfans qui négligent de venger sa mort, & les privèrent de sa succession.' *Essais histor. tom. 2. p. 88.* In France, this prerogative of the nobles was not entirely abolished in the middle of the fourteenth century. *Brussel, usage général des Fiefs, liv. 2. ch. 2.*

Dr. Robertson seems to imagine, that, in England after the Norman invasion, the nobility lost, or did not exercise the right of private war; and he reasons with a view to account for these particulars. *Hist. of Charles V. vol. 1.** It is to be acknowledged, that the historians of

* After the conquest, the mention of private wars among the nobility, occurs more rarely in the English history, than in that of any other European nation, and no laws concerning them are to be found in the body of their statutes. Such a change in their own manners, and such a variation from those of their neighbours, is remarkable. Is it to be ascribed to the extraordinary power which William the Norman acquired by right of conquest, and transmitted to his successors, which rendered the execution of justice more vigorous and decisive, and the jurisdiction of the King's court more extensive, than under the monarchs on the continent? Or, was it owing to the settlement of the Normans in England, who, having never adopted the practice of private war in

England have not been sufficiently attentive to record the private wars of the nobles. But this elegant writer ought, doubtless, to have remembered, that, in the higher order of its nobility, the right of private war was as much inherent as the coinage of money, the holding of courts, or any other of their prerogatives; and that these received not their last and effectual blow till the age and reign of Henry VIII.

In the appendix, I produce a very curious proof of the exercise of private war in England. It is a truce between two nobles, agreeing to stop hostilities. *Appendix, N^o 4.* The following passage of *Glanville*, is also a striking testimony of the existence of the right of private war. 'Utrum vero ad *guerram suam* maintenendam possint domini hujusmodi auxilia exigere quaero.' *lib. 9. c. 8.* And the dispute between Richard, Earl Marshal, and Henry III. of which there is a singular relation in Matthew Paris, is certainly to be accounted for on the principle of this prerogative.

Nor is there wanting other evidence of its existence. It was in a great measure, from the exercise of the right of private war, that in England, in the age of Stephen, there were above eleven hundred forts and castles. *Lord Lyttelton's History of Henry II. vol. 1. p. 418.* The

'their own country, abolished it in the kingdom which they conquered? It is asserted, in an ordinance of John King of France, that in all times past, persons of every rank in Normandy have been prohibited to wage war, and the practice has been deemed unlawful. *Ordon, tom. 2. p. 407.* If this fact were certain, it would go far towards explaining the peculiarity which I have mentioned. But, as there are some English acts of parliament, which, according to the remark of the learned author of the *observations on the statutes, chiefly the more ancient*, recite falshoods, it may be added, that this is not peculiar to the laws of that country. Notwithstanding the positive assertion in this public law of France, there is good reason for considering it as a statute which recites a falshood.' *Charles V. vol. 1. p. 286, 287.*

The first question that is put by this historian, is founded on a mistake; for William the Norman achieved no conquest over England. The second question is founded on a supposed fact, which he appears to regard as of no moment; and indeed it does not deserve to be considered in any other light.

feudum jurabile & reddibile was likewise a consequence of it, by which a sovereign or a noble put a vassal into any of his castles, in order to defend it, and to guard his stores and his prisoners, and whom he bound by an oath, to restore it in a certain time, or to his call or mandate. This form of fief and tenure was not only known in England, but frequent there; and mention is made of it in the laws of Henry I. The right of private war was, therefore, often exercised in this country; and, what deserves observation, without paying an attention to this right, it is impossible to explain those ordinances of Henry which allude to this feudal peculiarity. Spelman, not attending to it, could not reach their meaning, and pronounces of them, that they are obscure and corrupted. *Gloss. voc. Castellacium*. Their sense, notwithstanding, when tried by this standard, is easy and natural.

(8) The prerogatives of the higher nobility throughout Europe, may be referred to the following heads; the power of making war of their private authority, the right of life and death in their territories, the levying of imposts, the raising of troops, the coining of money, and the making of laws. It is to be wished, that some inquisitive and judicious antiquary would collect from the English laws and records, all the circumstances to be found which have a relation to these topics. He could not offer a more valuable present to the public.

These powers were exercised by the higher nobles among the Anglo-Saxons. For, though *palatinates*, which are generally allowed to have possessed them, were not familiar by name in those times; yet, I cannot but agree with Mr. Selden, that the sense and substance of them were then fully known. The Anglo-Saxon earls, who had their earldoms to their own use, had regal jurisdiction, and the king's writ of ordinary justice did not run in their dominions. Such, for example, was Etheldred Earl of Mercland, under King Alfred, and his son King Edward. *Selden, Tit. Hon. part. 2. cb. 5. sect. 8. Dissert. concerning the Antiq. of the Engl. Constitution, part 3.*

After the Norman invasion, many of the higher nobility were expressly known as *Earls-Palatine*. Cheshire was a palatinate, and possessed by its earls, *ad gladium, sicut ipse rex totam tenebat Angliam ad coronam suam*. The ancient Earls of Pembroke were also palatines, being *domini totius comitatus de Pembroch*, and holding *totum regale infra praecinctum comitatus sui de Pembroch*. This is the language of records. The like *regality* was claimed in the barony of Haverford. The bishops of Durham had, anciently, *omnia jura regalia, & omnes libertates regales infra libertatem suam Dunelmensem*. The archbishop of York had a *regality* in Hexham, which, anciently, was styled a *county-palatine*. The bishopric of Ely was a palatinate, or a royal franchise. The earldom of Lancaster was created *palatine* in the reign of Edward III. Hugo de Belesme Earl of Shrewsbury, under William II. had the title *palatine*. The same thing is mentioned of John Earl of Warren and Surrey, under Edward III. And Humfrey de Bohun, Earl of Hereford and Essex, had a *regality* within the honor of Breknou. *Spelman Gloss. de Comite Palatino, Selden, tit. Hon. part. 2. ch. 5. sect. 8. Madox, Bar. Ang. p. 150. Camden, Britan. p. 661. 935.*

(9) *Marculphus* has preserved a form or writing by which the conversion of allodiality into tenure took place. The inquisitive reader may consult it in *Baluz. Capit. Reg. Franc. tom. 2. p. 382, 383.* with the notes of *Hieron. Bignon. p. 896. 898.*

The agreement of an allodial proprietor and the sovereign, or the feudal lord to whom he was disposed to grant his property, with the view of submitting it to tenure, directed the nature and peculiarity of the obligations to which he was to yield in his new situation. In consequence of the protection of a superior, he was generally to give his military service, and all the aids or incidents of fiefs. At other times, however, he was only bound not to take arms against the superior, but to remain at peace, without any connexion with the enemies of his lord, and without
the

the burden of the feudal incidents. He was simply to be bound to homage, and a passive fidelity.

It is contended for, indeed, strenuously, and at great length, by Monfr. Bouquet, that the greater and lesser jurisdictions were inherent in allodality. *Le droit Public de France*. Dr. Smith, in his most ingenious Inquiries concerning the Wealth of Nations, gives his suffrage for the same opinion. And Dr. Robertson, notwithstanding what he has said concerning fiefs, is, in some measure, disposed to it. *Hist. of Charles V. vol. 1. p. 303.*

If supreme jurisdiction, however, and eminent prerogatives were connected with allodality, it seems altogether inconceivable, why its possessors should have converted it into fiefs. Perhaps these writers have confounded with allodality the *feudum Francum*, or *honoratum*, which expressed a condition of it after its conversion into feudality. 'Ut omnia teneant,' says an old monument cited in Du Cange, 'ab Abbate & successoribus in *francum feudum* five *alodium*, ut pro his homagium francum nobis Abbati & successoribus nostris, amplius facere teneantur.' 'Haec omnia,' says another charter cited by him, 'habeo & teneo a te D. Raymundo Comite Melgorii ad *feudum francum & honoratum*, pro quibus omnibus praescriptis facio vobis hominum & fidelitatem.' *Du Cange, voc. Feudum francum & honoratum.* 'Les fiefs d'honneur,' says *Salvaing*, 'font ceux qui ont tellement conservé la nature de leur origine, qu'ils ne doivent au seigneur que la *bouche* & les *mains*, sans aucune charge de quint, de rachat, ni d'autre profit quelconque.' *cb. 3.*

It is also well known, and might be illustrated by a variety of proofs, that allodial proprietors were so little attended to, and adorned with distinctions, that they could not, without the consent of the king, build, for their protection, a house of strength or a castle. *Brussel, usage général des fiefs, vol. 1. p. 368.* Yet this privilege was originally of so little account, that it was enjoyed indifferently by every feudal lord.

(10) Du Cange, voc. *Gruarium, Pedagium, Rotaticum,*

Feudum Nummorum, Feudum Soldatae. Brussel, Usage général des fiefs, liv. 1. ch. 1. sect. 11. Assises de Jerusalem, avec des notes, par Thaumassière, p. 171. 268.

SECTION IV.

(1) 'DUCES ex virtute sumunt. . . . Duces ex-
 'emplo potius quam imperio, si prompti, si conspicui:
 'Si ante aciem agant, admiratione praefunt.' *Tacit. de*
Mor. Germ. c. 7. 'Ubi quis ex principibus in concilio se
 'dixit ducem fore, ut qui sequi velint profiteantur; con-
 'surgunt ii qui & causam & hominem probant, suumque
 'auxilium pollicentur, atque ab multitudine collaudantur.'
Caesar, de Bell. Gall. lib. 6. c. 22.

(2) 'Nihil autem neque publicae neque privatae rei,
 'nisi armati agunt. Sed arma sumere non ante cuiquam
 'moris, quam civitas suffectorum probaverit. Tum in ipso
 'consilio vel principum aliquis, vel pater, vel propinquus
 'scuto frameaque juvenem ornant.' *Tacit. de Mor. Germ.*
c. 13.

'These military youths,' says *Camden*, 'were called
 'in their language *Knechts*, as they are in ours.' *Introd.*
to the Britannia, p. 245.

(3) 'Patri Regi Rex Ludovicus Ingelheim occurrit,
 'indeque Renesburg cum eo abiit, ibique *ense* jam appetens
 'adolescens tempore, *accinctus est.*' *Vit. Lud. Pii,*
an. 791. Of King Athelstan there is this mention in
Mainsbury, 'Nam & avus Alfredus prosperum ei regnum
 'imprecatus fuerat, videns & gratiose complexus speciei
 'spectatae puerum, & gestuum elegantium: Quem etiam
 'premature militem fecerat donatum *chlamyde coccinea,*
 '*gemmao balteo, ense Saxonico, cum vagina aurea.*'
Lib. 2. 'Henrico nepoti suo David Rex Scotorum *virilia*
 '*tradidit arma.*' *Hen. Huntingdon, lib. 8.* See *Du*
Cange, voc. Arma.

Other particulars, expressive of the antiquity of knight-

hood, may be seen in the Dissertations on the history of St. Louis. And, with regard to our Saxon ancestors in particular, *Mr. Selden* has found frequent mention of knights in the charters of that age. *Titles of honor, part. 2. ch. 5.* Mr. Hume, therefore, reasons hypothetically, when he admits not of chivalry in the Anglo-Saxon times. *Appendix, 11.*

The addition *Sir* to the names of knights, was in use before the age of Edward I. and is from *Sire*, which in old French signifies *seigneur*, or lord. Though applicable to all knights, it served properly to distinguish those of the order who were not barons. To knights-baronet, who are a modern institution, and no part of the ancient chivalry, the addition *Sir* is granted by a clause in their patents of creation. *Asmole on the Garter, ch. 1.*

The most honorable method of receiving knighthood was from the sovereign. But every possessor of a fief could bestow it; and one knight could create another. 'Eorum,' says *Spelman*, 'fuit militem facere quorum fuit feudum dare.' *Dissert. de milite, ap. Reliq. p. 180.* 'Tout chevalier,' says *St. Palaye*, 'avoit le droit de faire chevaliers.' *Mémoires sur l'ancienne chevalerie, tom. 1. p. 70.* A king could receive it from the hands of a private gentleman.

Its value may be remarked in the following peculiarity. 'Scitis,' said a Lombard king to his courtiers, 'non esse apud nos consuetudinem, ut regis filius cum patre prandeat, nisi prius a rege gentis exteræ arma suscepit.' *Paul. Diac. lib. 1. ap. Honoré de Sainte Marie, dissert. sur la chevalerie, p. 182.* 'Liberos suos,' said *Caesar* of the Gauls, 'nisi quum adoleverint, ut munus militiæ sustinere possint, palam ad se adire non patiuntur; filiumque in puerili ætate in publico in conspectu patris assistere, turpe ducunt.' *De Bell. Gall. lib. 6. c. 18.*

'Dans les premiers tems,' says *St. Palaye*. 'la plus illustre naissance ne donnoit aux nobles aucun rang personnel, à moins qu'ils n'y eussent ajouté le titre ou le grade de chevalier. Jusqu'à lors on ne les considéroit point comme membres de l'état, puisqu'ils n'en étoient point

encore les soutiens & les défenseurs : Les Ecuyers appartenent à la maison du maître qu'ils servoient en cette qualité; ceux qui ne l'étoient pas encore, n'appartenoient qu'à la mère de famille dont ils avoient reçu la naissance & la première éducation.' *Tom. 1. p. 298.*

Tacitus, having described the ceremony of investing the German with arms, adds, 'Haec apud illos toga, hic primus juventae honos, ante hoc domus pars videntur, mox reipublicae.' *De Mor. Germ. c. 13.*

This tendency and concurrence of circumstances is striking; and to these institutions we may trace the contempt with which the rights of *minors*, both of high and low condition, were treated, in the middle ages. To be in minority was to be nothing. Before his majority, or the investiture of arms, the individual did not seem a citizen or a subject.

(4) 'Virtutem proprium hominis bonum : Deos fortioribus adesse.' *Tacit. Hist. lib. 4. c. 57.*

(5) 'Est & alia observatio auspicioꝝ, qua gravium bellorum eventus explorant. Ejus gentis, cum qua bellum est, captivum quoquo modo interceptum, cum electo popularium suorum, patriis quemque armis committunt. Victoria hujus vel illius pro praejudicio accipitur.' *Tacit. de Mor. Germ. c. 10.*

An instance of the duel is described in *Livy, lib. 28. c. 21.* And the prevalence of this mode of trial is mentioned by *Paterculus, l. 2. c. 118.* It was by single combat that the Celtic and Gothic nations decided the succession to offices, when the candidates were numerous and of equal merit. This was leaving it to the Deity to determine their pretensions. It was in this manner, that, among the Gauls, the place of the sovereign Druid was supplied, in cases of doubt. 'His autem omnibus Druidibus praestit unus, qui summam inter eos habet auctoritatem. Hoc mortuo, si quis ex reliquis excellit dignitate, succedit. At si sunt plures suffragio Druidum adlegitur : Nonnunquam etiam de principatu armis contendunt.' *Caesar, de Bell. Gall. lib. 6. c. 12.*

This form of deciding controversies and disputes, continued to prevail after the conquests of the barbaric nations; is to be seen every where in their laws; and became an important article in the jurisprudence of the middle times. The following ordinances illustrate its use and purposes.

‘ Qui terram suam occupatam ab altero dixerit, adhibitis idoneis testibus, probat eam suam fuisse: Si occupator contradixerit, *campo dijudicetur.*’ *LL. Saxonum, tit. 15.*

‘ Si quis Adalingum occiderit DC. sol. componat. Qui liberum occiderit, CC. sol. componat. Et de utroque si negaverit, cum xii. juret, aut in *campum exeat*, utrum ille voluerit, ad quem causa pertinet.’ *LL. Angl. & Werinor. tit. 1.*

‘ Qui domum alterius noctu incenderit, damnum triplo faciat, & in fredo solid. lx. aut si negat, cum undecim juret, aut *campo decernat.*’ *Ibid. tit. 8.*

‘ Si aut calumniator, aut ille cui calumnia irrogata est, se solum ad sacramenti mysterium perficiendum protulerit, & dixerit: Ego solus jurare volo, tu si audes nega sacramentum meum, & armis mecum contende. Faciant etiam illud, si hoc eis ita placuerit; juret unus, & alius neget, & in *campum* exeant.’ *LL. Frison. tit. 11. l. 3.*

‘ Si mulier in morte mariti sui consiliata fuerit per se, aut per suppositam personam, sit in potestate mariti sui de ea facere quod voluerit: Similiter & de rebus ipsius mulieris. Et si illa negaverit, liceat parentibus eam purgare aut per sacramentum, aut per *pugnam*, id est, per *campionem.*’ *LL. Longobard. lib. 1. tit. 3. l. 6.*

Even from rude times, it is observable, that this trial took place at the command of the magistrate. And, it is probable, that it was in a good measure at his discretion, whether it took effect. If the truth was to be investigated by witnesses, so that complete evidence appeared, and there was no room for doubt, the battle might be avoided. It was, however, much to the taste of martial times. The barbarians, also, believed firmly that providence actually interfered in their affairs. And this absurdity was encouraged

by the Christian clergy, who, like the priests of all religions, found an interest in deceiving the vulgar.

(6) The word *nidering* or *nidernig*, was a term of dishonor among the Normans and Danes; and, it is told by the historians of William Rufus, that, on an occasion which required the speedy aid of his vassals, including in his summons, that those of them who neglected to repair to him shou'd be accounted *nidering*, his standard was immediately crowded. *Du Cange, voc. Nidering.*

To apply to a person the term *arga* among the Longobards, was to say, that he was a *coward* and a *worthless* fellow; and this offence to his honor could not be pardoned. If the accuser persisted in the assertion, the *combat* took place; and, if he confessed his crime, he was subjected to a fine. *LL. Longobard. tit. 5. l. 1.*

Of *arga*, it is remarkable, that, in its original and proper signification, it meant a person who permitted the infidelities of his wife. 'Proprie *arga* is dicitur,' says *Du Cange*, 'cujus uxor moechatur, & ille tacet.' *Gloss. vol. 1. p. 319. Spelm. p. 40.* A person of this kind was infamous in the extreme, and generally of the vilest condition. The word *cucurbita* had also this sense; and hence the French *coucourd*, and our *cuckold*. Each of these terms, accordingly, in its enlarged acceptation, came naturally enough to signify a *mean*, *cowardly*, and *stupid* fellow. To have a *caput cucurbitinum*, was to be a *block-head*. And, from the confusion of the proper sense of *cucurbita*, and its enlarged one, the infamy seems to have arisen which, to this hour, constantly attends even an *involuntary cuckold*. It is thus, that even words operate upon manners.

The point of honor in Sweden, in early times, is well illustrated by the following law, which I give in the words of *Stiernhook*, whose book is not commonly to be met with.

'Si dicat vir viro probrosum verbum: Non es vir viri compar, aut virili pectore: Ego vero sum vir [inquit alter] qualis tu. Hi in trivio conveniunt. Si comparet provocans, nec provocatus; talis esto [provocatus] sequior ut dictus, fuit, ut qui nec pro facmina nec viro sacramentalis esse

' queat, intestabilis: Si vero comparet provocatus, nec
 ' provocans, quam vehementissime trino immani clamore
 ' exclamet, & signum in terra radat, & sit vir ille [provocans]
 ' eo deterior, quod verba locutus est, quae praestare non
 ' ausus sit. Si jam uterque comparent, justis instructi
 ' armis, & cadat provocatus, dimidio multae pretio [caedes]
 ' expiator. Si vero provocans cadit, imputet temeritati.
 ' Capitalis ei linguae suae petulantia, jaceat in campo inex-
 ' piatus.' *De Jure Sueonum & Gothorum vetusto, lib. 1. c. 6.*

Among the ancient Germans, in the age of *Tacitus*, the
 point of honor was carried so high, that a gamester having
 risked and lost his liberty and person on the last throw,
 submitted to voluntary servitude, allowing himself, though
 stronger and younger than his antagonist, to be bound and
 sold by him. 'Ea est in re prava pervicacia; ipsi fidem vocant.'
Tacit. de Mor. Germ. c. 24. The other words of the passage

are: 'Aleam quod mirere, sobrii inter seria exercent, tanta
 ' lucrandi perdendive temeritate, ut cum omnia defecerunt,
 ' extremo ac novissimo jactu, de libertate & de corpore
 ' contendant. Victus voluntariam servitutem adit: quam-
 ' vis junior, quamvis robustior, alligare se ac venire patitur.'

It is not foreign to the purposes of this work, to remark,
 that the passion for play followed the conquests of the bar-
 barians; that many ordinances were made to suppress it;
 and that, to this hour, it is a *point of honor* to extinguish
 game-debts. There is something interesting in this subject,
 and I cannot leave it without starting a conjecture.

The idea of borrowing under an obligation of repayment,
 was too cultivated for the German gamester. When he
 had lost every thing *, he therefore staked his liberty and
 his person. Having left his woods, he improved upon this
 usage; and, instead of endangering his person, gave a
pledge as a security that he would pay his loss. '*Wadia dabat.*'
Lindembrog. Gloss. voc. Wadium. The usage was not lost.

* It does not appear what the German usually played for. It might
 be, sometimes, the coins of the Romans. 'Jam & pecuniam accipere
 ' docuimus' *Tacit. de Mor. Germ. c. 15.* His chains and ornaments,
 utensils and furs, were probably his common stakes.

En 1368,' says a French historian, 'le Duc de Bourgogne ayant perdu soixante francs à la paume contre le Duc de Bourbon, Messire Guillaume de Lyon & Messire Guy de la Trimouille, leur laissa, faute d'argent, sa ceinture : Laquelle il donna encore depuis en gage au Comte d'Eu pour quatre vingt francs par lui perdu au même jeu.' *Le Laboureur*, ap. *Saint Foix*. tom. i. p. 343.

The custom of *pledges* introduced by gaming, grew common in other transactions, and in debts of every kind. From moveables, which were the first pledges, a transition was soon made to land. Hence the *mortuum-vadium* *, the pawn of land, or the mortgage; and hence also the legal doctrine of *distresses* †. Such a mixture is there of whim and accident in the greater as well as the minuter precautions of civil polity!

(7) The forms of a trial in the *duel* at common law, and in the *duel* for points of honor, were distinct. This subject will be treated in the sequel.

(8) 'Genus spectaculorum unum atque in omni caetu idem. Nudi juvenes, quibus id ludicrum est, inter gladios se atque infestas frameas saltu jaciunt. Exercitatio artem paravit, ars decorem. Non in quaestum tamen aut mercedem. Quamvis audacis lasciviae pretium est, voluptas spectantium.' *Tacit. de Mor. Germ. c. 24.*

There is a remarkable passage in *Procopius* with regard to King *Totilas*, from which we may learn the dexterity which was exhibited in such military sports.

'Ipse equo eximio vectus, inter geminas acies armorum

† 'It is called a *dead-gage*,' says *Cowel*; 'because whatsoever profit it yieldeth, yet it redeemeth not itself by yielding such profit, except the whole sum borrowed be likewise paid at the day.' *The Interpreter*, voc. *Mortgage*.

* '*Namium & namus*] Captio, a Sax. naman, al. nyman capere. Voces prisca fori. haec apud Scotos, illa apud Anglos veteres usitatio: Res, bona, animalia, quae per *distractionem* capiuntur significantes: Hoc est, ea quae a possessore auferuntur, legitimeque retinentur, mulgæ vel *pignoris* nomine, quousque id fecerit vel praestiterit, quod non sine injuria recusaverit.' *Spelm. Gloss.* See farther the other *Glossaries*, and *Coke on Littleton*.

‘Iudum scite ludebat. Equum enim circumagens ac reflectens utroque versum, orbis orbibus impediēbat. Sic equitans, hastam in auras jaculabatur, eamque, cum tremula relaberetur, aripiebat mediam, & ex altera manu in alteram saepe trajiciens, ac dextere mutans, operam huic arti feliciter navatam ostendebat: resupinabat sese, & flexu multiplici nunc huc nunc illuc ita inclinabat, ut appareret diligenter ipsum a pueritia didicisse saltare.’ *Lib. 4. c. 31.*

These ideas make a figure even in the paradise of the Gothic nations. ‘Tell me,’ says *Gangler* in the *Edda*, ‘How do the heroes divert themselves when they are not drinking?’ ‘Every day,’ replies *Har*, ‘as soon as they have dressed themselves, they take their arms; and, entering the lists, fight till they cut one another in pieces: This is their diversion. But, no sooner does the hour of repast approach, than they remount their steeds all safe and sound, and return to drink in the palace of *Odin*.’ *The Edda, or ancient Icelandic or Runic mythology, ap. Northern Antiquities, vol. 2. p. 108.* See also *Keyser, Antiq. Select. Septentr. & Celt. p. 127.*

(9) In the books of the middle times, torneaments are called *iudi militares, militaria exercitia, & imaginariae bellorum prolesiones*. A writer in *Du Cange* says, ‘Torneamenta, dicunt quaedam nundinae, vel feriae, in quibus milites ex edicto convenire solent, & ad ostensionem virium suarum & audaciae temere congregari, vel congregari.’ *Gloss. voc. Torneamentum.*

These exercises were the great schools of discipline and war. Their high antiquity on the continent may be seen in the dissertations on the history of *St. Louis*. And, there is mention of them in England in the days of King *Edgar*, and at a more ancient period. *Selden, duello, ch. 3.* Mr. *Madox* was therefore in a great mistake, when he ascribed the rise of the spirit of torneying to the holy wars. *Bar. Angl. p. 281.*

The frequent accidents which necessarily happened in the exercise of these representations of war, through the impetuosity of valor, and the extravagance of heroism; the

fulminations of the church; and, above all, the jealousy of princes which was excited by armed nobles and their retainers, gave them powerful checks. They continued, notwithstanding, to be long in fashion. In England, they were practised in the reign of Queen Elizabeth; and their total disappearance was preceded, under the elder James and his son Charles, by a gentle method of them, termed *carousals*.

Torneaments originally were celebrated by all warriors at their pleasure. In after-times, the sovereign, as the head of chivalry and arms, claimed their direction, and issued out his licences and prohibitions. Richard I. by the following patent to Hubert, Archbishop of Canterbury, gave licence for lists or torneaments in five places within the kingdom.

Sciatis nos concessisse, quod torneamenta sint in Anglia
 in quinque placeis, inter Sarum & Wilton, inter Warwick
 & Kelingworth, inter Stamford & Walingford, inter
 Brakeley & Mixeber, inter Bly & Tikebill, ita quod pax
 terrae meae non infringetur. Et comes qui ibi torneare
 voluerit, dabit nobis 20 marcas, & baro 10 marcas, &
 miles, qui terram habuerit, 4 marcas, & qui non habuerit,
 2 marcas. Nullus autem extraneus ibi atterneabit. Unde
 vobis mandamus, quod ad diem torneamenti habeatis ibi
 2 clericos & 2 milites vestros, ad capiendum sacramentum
 de comite & barone, quod nobis de praedicta pecunia
 ante torneamentum satisfaciet, & quod nullum torneare
 permittant antequam super hoc satisfecerit; & inbreviari
 faciant quantum & a quibus receperint. Et 10 marcas
 pro carta ad opus nostrum capiatis, unde comes Sarum,
 & comes de Clara, & comes de Warrena plegii sunt.
 Teste meipso, apud villam episcopi 22 die Augusti. *Ex
 lib. Rubro Scaccarii, ap. Selden in the Duello, ch. 3.*

Edward I. and Edward III. granted the liberty of holding yearly a just *viris militaribus comitatus Lincoln*. Richard Redman, and his three companions in arms, had the licence of Richard II. *bastiludere cum Willicmo Halberton cum tribus sociis apud civitat. Carliol*. And a similar liberty

was granted to John de Gray by Henry IV. *Cottoni Posthuma*, p. 63. Edward I. commanded, by proclamation, that no tournaments or jousting, or seeking of adventures, and no feats of arms should be celebrated or undertaken without his permission. 'Publice fecit proclamari, & firmiter inhiberi, ne quis, sub forisfactura terrarum & omnium tenementorum, torneare, bordeare, iustas facere, aventuras quærere, seu alias ad arma ire præsumat, sine licentia Regis speciali.' *Cot. Post* p. 67. There are also prohibitions of tournaments by Henry III. and other princes. They command all ealds, barons, knights, and others, under their faith, homage, and affection, and under pain of losing their lands and tenements, that they presume not to torney, make jousts, seek adventures, or go to feats of arms within the realm, without the King's express leave. See *Appendix*, N° V.

(10) 'Tum ad *negotia*, nec minus sæpe ad *convivia*, procedunt *armati*.' *Tacit. de Mor. Germ. c. 22*.

This usage continued during the middle times. The posterity of the Germans went in armor to their parliaments and public councils, and to their private visits and meetings. Justice, says *Mezeray*, was rendered among the Franks by people in arms: The axe and the buckler were hung upon a pillar in the midst of the *malle* or the court. See *his history under Clotaire II*. From this practice among the Anglo-Saxons, the hundred court was, in some counties, called the *Wapentake*. The hundreder, holding up his lance, it was touched by those of all the members, and thus the assembly was constituted. *LL. Edward. Confes. c. 33*. *Wapnu*, says *Whitelocke*, is arms, and *tac*, touch. *Notes upon the King's writ for members of Parliament*, vol. 2. p. 39.

To this day, in the kingdoms of Europe, the wearing of a sword is a part of dress. We go in arms to a feast as well as to a battle, and retain, in orderly times, a custom which habitual danger, and the defects of legislation, made necessary to barbarians. The clergy, it seems, pertinaciously opposed the custom, and it was retained with obstinacy.

What is more surprizing, they have ceased to exclaim against it, and yet it continues!

(11) 'Scutum reliquisse præcipuum flagitium. Nec aut facris adesse, aut concilium inire ignominioso fas.' *Tacit. de Mor. Germ. c. 6.*

Hence a high composition was allowed to the Frank, who had been reproached injuriously with the loss of his shield. 'Si quis homo ingenuus alio impropèraverit, quod scutum suum jactasset, & fuga lapsus fuisset, & non potuerit adprobare, DC. den. qui faciunt sol. xv. culpabilis judicetur.' *Pactus legis Salicæ, ap. Georgisch. p. 69.* It was by raising him aloft on a shield, and supporting him on their shoulders, that the Germans proclaimed their sovereign, or lifted up a general to command their armies. *Tacit. Hist. lib. 4. c. 15.* It was by the same ceremony that the Kings of the Franks were acknowledged. This was their inauguration. The escutcheon or shield, says *Favinc*, is the essential note of a nobleman, a knight, and an esquire. *Theatre of Honor, book 1. ch. 2.*

The usages which had their rise from arms, make a curious figure in the Gothic nations. We know from *Tacitus*, that the sounding or clashing of arms, expressed approbation in the German assemblies; that a javelin wet with blood, and a war-horse, were the rewards of German valor; that suits of armor were a flattering present to the more distinguished chiefs in the German communities; that an interchange of arms constituted the ceremonial of marriage among this people; and, that their only public amusement was the leaping amidst the threatening points of swords and lances. *De Mor. Germ. c. 11. 15. 18. 24.*

Charlemagne used to seal his treaties with the pommel of his sword: 'With the point of it,' said he, 'I will maintain them.' *St. Foix, Ess. Hist. vol. 2. p. 74.* To take his arms from a free man, was to deprive him of his rank, and to reduce him to the condition of a slave. *LL. Alfr. c. 1.* And to put into the hands of a slave the arms of a free man, was to give him his liberty. When an individual gave his oath in a court, or would bind himself

in the most solemn manner to the performance of his contracts, he laid his hand on his sword. In the judicial combat, the customs growing out of arms were numerous: Thus, to strike a person with a club, or to give him a blow on the face, was to treat him like a villain; because villains were permitted to fight only with clubs, and were not allowed to cover their faces with armor. *L'esprit des Loix*, liv. 28. ch. 20. A free man could not part with his sword as a part of his ransom. *LL. Longobard. lib. 1. tit. 11. l. 33.* And what shows, in a particular manner, the severity of the forest-laws, the killing of a royal stag inferred the loss of the shield, or the reduction of a free-man to a slave. *LL. Forest. Canut. c. 25.* From the change of arms there resulted a change of usages. Thus, when archery was introduced, to wound the finger which sends off the arrow, was punished more severely than the maiming of the other fingers. *Lindenbr. Gloss. voc. Digitus.*

The old Germans rushed to battle with a loud noise, applying their shields to their mouths, that their voices might rise by repercussion into a fuller and more sonorous swell. 'Sunt illis haec quoque carmina, quorum relatu quem *barditum* vocant, accendunt animos, futuraeque pugnae fortunam ipso cantu augurantur; terrent enim, trepidantve, prout sonuit acies. Nec tam voces illae, quam virtutis concentus videntur. Affectatur praecipue asperitas soni, & fractum murmur, objectis ad os scutis, quo plenior & gravior vox repercussu intumescat.' *Tacit. de Mor. Germ. c. 3.*

It merits observation, that, from this usage, there grew the *cri d'armes* of the middle ages. These cries were supposed to incite to valor, and to make the soldier precipitate himself upon the enemy. *Montjoie Saint Denis*, was a famous cry of the Franks. *Deus adjuva*, *Deus vult*, were cries during the crusades. Every banneret, or every knight who had a banner, had a cry peculiar to himself and the troops under him. Barons had also their cries. There were thus general and particular cries. While fiefs and the feudal militia continued, these cries prevailed in Europe. They

were lost on the introduction of an improved military discipline, and of standing armies. Perhaps, it is to these cries, that we must trace the origin of the mottos to ensigns armorial.

(12) 'Scuta lectissimis coloribus distinguunt.' *Tacit. de Mor. Germ. c. 6.*

On the foundation of the *sagum*, or the short vest of the Gaul and German, which covered his arms, shoulders, and breast, *coats of arms* arose. 'La cotte d'armes a été le vêtement le plus ordinaire des anciens Gaulois: il étoit appelé par eux *sagum*, d'où nous avons emprunté le mot de *saye*, ou de *sayon*.' *Dissert. 1. sur l'Histoire de St. Louis, p. 127.* 'Tegumen omnibus *sagum*,' says *Tacitus, c. 17.*

According to this instructive historian, the *sagum* was adorned with spots and with bits of fur. 'Eligunt feras, & detracta velamina spargunt maculis, pellibusque belluarum.' *c. 17.* And we know from *Herodian*, that it was sometimes ornamented with silver. *Lib. 4.*

These things are very curious; and it is impossible not to see in them the *colors*, the *furs*, and the *metals* which are the materials of the science of blazonry.

When *Tacitus* mentions the shield, he takes occasion to remark, that the German warriors had the knowledge of *coats of mail*, and of *head-pieces* or *helmets*, but seldom made use of them. His words are 'Paucis loricae, vix uni alterive cassis, aut galea.' *c. 6.* They were about to be more fashionable.

(13) *Valer. Maximus, lib. 5. c. 6. Florus, Rom. Rer. Hist. lib. 3. c. 3.*

(14) These captives were of the tribe of the *Catti*, a Germanic people; for, it is surely this tribe that *Dio* means, when he speaks of the *Cenni*. 'Horum captae a Romanis uxores, interrogatae ab Antonino, utrum vendi, an occidi mallent, mori se malle responderunt: quumque essent postea venditae, omnes mortem sibi consciverunt: Nonnullae una filios interfecerunt.' *Excerpt. e Dion. p. 876.*

A multitude of examples, to the same purpose, might easily be collected, if it were necessary.

But, while we reflect on these things, it must not be fancied, that the German women were deficient in gentleness. A high independent spirit is not inconsistent with the softest passions. There are a few beautiful and energetic words in *Tacitus* which may be employed on this occasion, and finely express the distinctive characters of the sexes in ancient Germany. 'Lamenta ac lacrymas cito: dolorem & tristitiam tarde ponunt. *Faeminis* lugere honestum est; *viris* meminisse.' *De Mor. Germ. c. 27.*

(15) *Tacit. de Mor. Germ. c. 7.*

(16) Saint Foix, *Essais Historiq. sur Paris*, tom. 5. p. 184.

(17) 'Regnator omnium Deus, cetera subjecta atque parentia.' *Tacit. de Mor. Germ. c. 39.* This testimony of the purity of the German theology, is well illustrated by the following passage of the Icelandic Edda.

'*Ganglerus* orsus est tunc suum sermonem. Quis est supremus, seu primus deorum? *Har.* respondet: Qui nostra lingua Pantopater dicitur. Tunc *Gang.* Ubi est hic Deus? *Au.* quid potest efficere? *Aut* quid voluit ad gloriam suam manifestandam? *Har. resp.* Ille vivit per omne aevum, ac gubernat omne regnum suum, & magnas partes & parvas.' *Edda, ap. Northern Antiq. vol. 2. p. 283.*

(18) 'Auspicia, sortisque ut qui maxime observant.' *Tacit. de Mor. Germ. c. 9.* See also, *Du Cange*, voc. *Aucones* & *Sors*. The following form of divination was common to all the German tribes. 'Virgam frugiferae arbori decidam, in furculos amputant, eosque notis quibusdam discretos super candidam vestem temere ac fortuito spargunt. Mox si publice consulatur sacerdos civitatis, sine privatim, ipse pater familiae precatus deos, coelumque suspiciens, ter singulos tollit, sublato, secundum impressam ante notam interpretatur.' *De Mor. Germ. c. 10.* Of this folly, there is yet a remain in the *Baguette Devinatoire* of the miners in Germany; and it is to be observed, that the heralds of the Franks had consecrated twigs, which

they bore as the emblems of peace. Thus the heralds sent by Gundobald to Guntram appeared 'cum virgis consecratis, juxta ritum Francorum, ut scilicet non contingerentur ab ullo.' *Gregory of Tours, lib. 7. c. 32.* But, what is more remarkable, these twigs came to figure in the investiture of lands. Hence the feoffment or saline *per system & per baculum, per virgam & per ramum.* Hence the *tenure par la verge*, which is formally treated by Littleton. On what a simple foundation does there rise institutions, important and interesting in business and society!

(19) Hence the Gothic ordeals, the fire ordeal, and the water ordeal. Of the antiquity of these trials I have spoken in another work. *Dissert. on the Antiq. of the Eng. Constitut. part 4.* It is observable, that the trials of fire and water, though absurd in the greatest degree, were much encouraged by the Christian clergy. What is more disgraceful to them, they invented modes of trial, founded in the same superstition, and not less absurd. These were the judgment of the cross, the corned or consecrated morsel, the Eucharist, and the *sortes sanctorum.* By the first, the criminal was to remain with his arms extended before a cross for six or seven hours, without motion. If he failed in sustaining this trial, he lost his cause, and was judged guilty. By the second, the accused person swallowed a bit of bread or cheese, over which the priest had muttered a form of execration. If he was guilty, he was suffocated by the morsel; if innocent, he escaped without injury. In the judgment of the Eucharist, the symbols of the blood and body of Christ were employed; and they convicted the guilty, by acting as a poison, which inflicted death or sickness. The *sortes sanctorum* consisted in the opening, at a venture, the Bible, or any holy book, and in considering as oracular the first passage that presented itself. See *Du Cange, voc. Crux, Corned, Eucharistia, Sors.* This impiety, and these impositions on the common understanding of mankind, advanced the temporal emolument of the priesthood; an end, which is at all times more important to them than the interests of religion and virtue.

(20) 'Matrem

(20) 'Matrem Deum venerantur. Insigne superstitionis, formas aprorum gestant. Id pro armis omnique tutela, securus deae cultorem etiam inter hostes praestat.' *Tacit. de Mor. Germ. c. 45.*

'I know a song,' said *Odin*, 'by which I soften and enchant the arms of my enemies, and render their weapons of none effect. I know a song which I need only to sing, when men have loaded me with bonds; for the moment I sing it, my chains fall to pieces, and I walk forth at liberty. I know a song useful to all mankind; for, as soon as hatred inflames the sons of men, the moment I sing it, they are appeased. I know a song of such virtue, that, were I caught in a storm, I can hush the winds, and render the air perfectly calm.' *The Magic of Odin, ap. North. Antiq. vol. 2. p. 217. Du Cange, Literae Solutoriae, & voc. Incantare.*

By secret or magical operations, it was not only supposed, that men could defend themselves against all dangers whatever, and render themselves invulnerable; but that they could even change themselves into wolves, and other animals. The word *werwolf* expressed this metamorphosis, and the extravagancy is to be traced to a distant antiquity. 'Neuri, ut accepimus, statis temporibus in lupos transfigurantur; deinde, exacto spatio quod huic forti attributum est, in pristinam faciem revertuntur.' *Solinus, c. 15.* To late times this ridiculous fancy was continued down among the Irish; and *Camden* was puzzled to account for it. *Britannia by Gibson, vol. 2. p. 1350.*

(21) These things appear clearly and strongly from the laws which were made against them, after the introduction of Christianity, and from other authentic evidence. *Capit. Kar. & Lud. lib. 7. LL. Longobard. lib. 2. tit. 38. Du Cange, voc. Fons Arbor, &c. Pelloutier, Hist. des Celtes, vol. 2. edit. par Mons. de Chiniac.*

(22) *Du Cange, voc. Fodus, Fada, Caragus, Dusii, Folleti Daemones, Tempestarii. Fdda. Keyser, Antiq. Septentr. & Celt.* Here we have the source of the wonders and extravagancies of the old romance.

(23) 'Deo imperante quem adesse bellantibus credunt.' Tacit. de Mor. Germ. c. 7. This deity was called *Teut* or *Tis*. After the age of *Tacitus*, if I am not mistaken, he had usually the name of *Odin*; and, it is of *Odin* that *Wormius* thus expresses himself, 'Suam implorantibus opem in bello, instar fenis monoculi equo insidentis, & albo clypeo tecti, quandoquæ se conspiciendum præbuit.' Monument. Dan. c. 4.

(24) Traces of the spirit of gallantry and love, it is to be remarked, appear in a striking manner, even in the religious system of the Gothic nations.

'Freya,' says the *Edda*, 'is the most propitious of the goddesses. The place which she inhabits in heaven is called "the union of the people." She goes on horseback to every place where battles are fought, and asserts her right to one half of the slain; the other half belongs to *Odin*. Her palace is large and magnificent; thence she sallies forth in a chariot drawn by two cats. She lends a very favorable ear to those who sue for her assistance. It is from her that the ladies have received the name which we give them in our language. She is very much delighted with the songs of lovers; and such as would be happy in their amours, ought to worship this goddess.' p. 76.

In another fable of the *Edda*, there are the following particulars. 'Gefione is a virgin, and takes into her service all chaste maids after their death. Fylla, who is also a virgin, wears her beautiful locks flowing over her shoulders. Her head is adorned with a golden riband. She is intrusted with the toilet and slippers of *Frigga*, and admitted into the most important secrets of that goddess. . . . Siona employs herself in turning men's hearts and thoughts to love, and is making young men and maidens well with each other. Hence lovers bear her name. Lovna is so good and gracious, and accords so heartily to the tender vows of men, that, by a peculiar power which *Odin* and *Frigga* have given her, she can reconcile lovers the most at variance. Varra presides over the oaths that men make, and particularly over the promises of lovers. She is attentive to

all concealed engagements of that kind, and punishes those who keep not their plighted troth. *Ibid.* p. 96, 97.

It is also remarkable, that, in the Gothic Elyfium, it was beautiful virgins named *Valkyriae*, who poured out their liquor to the heroes. *Keysler, Antiq. Septr.* § p. 152.

(25) *St. Palaye*, speaking of the candidates for chivalry, fays, 'Les premières leçons qu'on leur donnoit regardoient principalement l'amour de Dieu & des dames, c'est-à-dire, la religion & la galanterie.' *Mém. sur l'ancienne cheval.* tome 1. p. 7. The Christian knight was not less devout than the Pagan warrior. Anciently, during the celebration of mass in every country of Europe, he drew his sword, and held it out naked, in testimony of his readines to defend the faith of Christ. *Favine, p. 54. Keysler, Antiq. select. Celt.* p. 164.

It was the influence of such manners which induced that agreeable libertine Boccace very seriously to give thanks to *God Almighty* and the *Ladies* for their assistance in defending him against his enemies; and which made Petrarch compare his mistress Laura to Jesus Christ; circumstances which appeared so absurd to Mr. Hume. See his *Essays*, p. 277.

When the Count de Dunois was about to attack the English army which besieged Montargis, la Hire, a knight and a man of fashion who served under him, having received absolution, joined devoutly his hands, and thus prayed. 'Dieu, je te prie que tu fasses aujourd'hui pour la Hire autant que tu voudrois que la Hire fit pour toi, s'il étoit Dieu, & tu fusses la Hire.' *St. Foix, Ess. hist.* tome 1. p. 347.

A picture, not less strange, and still more profane, is in the poetry of *Deudes de Prades*, a canon who had the reputation of being wise and spiritual. He thus laments the death of Brunet, a troubadour, or one of the provençal bards. 'Il chantoit si bien, que les rossignols se taisoient d'admiration pour l'entendre. Aussi Dieu l'a-t-il pris pour son usage. Je prie Dieu de le placer à sa droite. Si la

‘Vierge aime les gens courtois, qu’elle prenne celui-là.’
Histoire littéraire des Troubadours, tome 1. p. 320.

These strokes are expressive, and illustrate, more than the most careful reasonings, the nature and spirit of the devotion of the ages of chivalry. Amidst the decencies and the proprieties which philosophy introduces in cultivated times, we look back, with surprise, to this gross familiarity with the supreme Being, and to this blasphemous insolence. Yet, it is difficult, at the same time, not to remember, that these things are equalled, if not exceeded, among us, by those gloomy and fanatical men, who, having got what they term the *new light*, conceit themselves the society of the *elect*, and the *friends* of God!

SECTION V.

(1) **T**HE character or station which preceded knighthood, was that of the *écuyer*, or armour-bearer. The candidate for chivalry had formerly been a *page*, a *valet*, or a *damoiseau*. The last term was applied to the sons of men of rank. *G. André de la Roque, Traité de la noblesse, p. 7. Mœurs des François par le Gendre, p. 63. Daniel, Hist. de la milice Française, tome 1. p. 94, 95. St. Palaye Mém. sur l’anc. Cheval. partie 1.*

In those times, the terms *page* and *valet* were not expressive of meanness and low condition, as at present. *Dre Cange, voc. Valeti & Domicellus. Sir John Fortescue*, who was chief justice under Henry VI. has observed, when speaking of England, ‘*Sunt Valelli diversi in regione illa qui plus quam sexcenta scuta per annum expendere possunt.*’ *De Laud. Leg. Angliæ, c. 29.*

(2) The age of knighthood, it is probable, varied with the nature and weight of the arms which were in use at different periods. In general, it has been fixed by antiquaries and historians at 21 years. This rule, however, could be infringed in favor of signal merit or high birth. The

noviciate of the knight commenced in his seventh year. In that tender age, he turned his attention to the art of war, his mistress, and his catechism. *Daniel, Milice Française, lib. 3. ch. 4. Reliq. Spelman, p. 174. St. Palaye, Mém. sur l'anc. Cheval, partie 1.*

(3) The power of the German priests did not escape the penetration of *Tacitus*. 'Neque animadvertere, neque vincire, neque verberare quidem nisi sacerdotibus permiffum.' *De Mor. Germ. c. 7.* The Christian priests were no less selfish and ambitious. In every country of Europe, they attained immense wealth, and prodigious influence. They presided in the inferior courts with the civil magistrates; they took their seats in the national assemblies; and, in the preambles of the barbaric laws, they are often mentioned next to the Kings themselves. 'Incipiunt,' says the prologue to the Capitularies of Charlemagne, 'capitula regum & episcoporum, maximeque nobilium omnium Francorum.' *Baluz. Capit. Reg. Franc. tome 1. p. 698.* It is thus, also, in some of the prefaces to the Anglo-Saxon laws. The powers they assumed were exorbitant, and often improperly exercised. To use the strong language of *Bacon*, 'they were lovers of lordships, and troublers of states.' *Hist. and polit. discourse on the laws and government of England.*

(4) *Selden, Tit. hon. part. 2. ch. 5. sect. 34, 35.* *Ashmole, Institutions of the Garter, ch. 1. sect. 9.* *Du Cange, voc. Miles.* *Daniel, Milice Française, lib. 3. ch. 4.* *La Roque, p. 354. 356.* A description of the ceremonies used at the creation of knights of the bath, is inserted in the *Appendix, N° 6.* They were nearly the same with those employed in the creation of the knight-bachelor, and illustrate the manners of old times.

(5) The *festum tyrocini*, which is the name given in the old historians to the rejoicings on the investiture of knighthood, often lasted many days; and, in the cases of persons of distinction, was solemnized with tournaments and shows. The season of tournaments was also embraced as a fit occasion for conferring knighthood on those whose

birth and fortune did not entitle them to exhibit these solemnities. And this, from the principle of giving encouragement to the military art. For the same reason, public entries into cities, coronations, and festivals of every kind, were opportunities for the creation of knights.

(6) Spelman, *voc. Auxilium*. Ashmole, ch. 1. sect. 9. St. Palaye, tom. 1. p. 195. 248. Daniel, *Milice Françoise*, liv. 3. ch. 4.

When the celebrated Joan d'Arc raised the siege of Orleans, the English commander, the Earl of Suffolk, was obliged to yield himself prisoner to a Frenchman called Renaud; but before he submitted, he asked his adversary whether he was a gentleman? On receiving a satisfactory answer, he demanded, Whether he was a knight? Renaud replied, That he had not yet attained that honor. *Then I make you one*, replied Suffolk. Upon which he gave him the blow with his sword, which dubbed him into that fraternity; and he immediately surrendered himself his prisoner. *Hume, vol. 2. p. 340.*

(7) The knights affected great magnificence, and more particularly after the holy wars. *Portabant autem diversi generis species preciosas, aurum & argentum, pallia olivatica, purpuram, siclades, ostrum & multiforium vestium ornamenta; praeterea arma varia, tela multiplicis generis, infinitas loricas, culcitrae de ferico acu variatas operose, papiliones & tentoria preciosissima,* &c. *Brompton, ap. Baron. Angl. p. 281.*

(8) The horse and armour of a knight were called his *contenementum*, or *countenance*. *Selden, Tit. Hon. part 2. ch. 5. sect. 37.*

The respectful behaviour, even to vanquished knights, and indeed the extreme honor in which knights in general were held, is exemplified very strongly in the conduct of Edward III. to Eustace de Ribamont. This prince thought it necessary to leave England privately for the protection of Calais, and carried with him the Prince of Wales. The day after his arrival at Calais, a battle ensued between his troops and the French forces commanded by Geoffrey de

Charni, who, notwithstanding the truce which had been concluded between the contending powers, had bribed the governor of Calais to surrender the place to him. To prevent this circumstance, was the intention of Edward's visit.

This great prince, who fought as a private gentleman under Sir Walter Manny, encountered Eustace de Ribamont, a hardy and valorous knight, who beat him twice to the ground. Pushed to extremity, Edward had occasion for all his strength and address. After an encounter, sharp and dangerous, he vanquished his antagonist, who surrendering his sword, yielded himself his prisoner. The next day the English enjoyed their victory, and in the evening the French prisoners were invited to sup with the Prince of Wales and the English nobility. After supper, Edward himself entered the apartment, and conversed, in a strain of compliment and familiarity, with the prisoners. His behaviour to his antagonist Eustace de Ribamont was more particularly attentive, and is thus described by *Froissard*.

Vint le Roi à Messire Eustache de Ribamont: Vous êtes le chevalier au monde que veïsse onques plus vaillamment assaillir ses enemis, ne son corps deffendré, ni ne me trouvai onques en bataille où je veïsse qui tant me donnaït affaire corps à corps, que vous avez hui fait; si vous en donne le prix sur tous les chevaliers de ma court par droite sentence. A donc print le roi son chapelet qu'il portoit sur son chef (qui étoit bon & riche) & le meist sur le chef de Monseigneur Eustache, & dit: Monseigneur Eustache, je vous donne ce chapelet pour le mieux combattant de la journée de ceux du dedans & du dehors, & vous prie que vous le portez cette année pour l'amour de moi. Je sai que vous êtes gai & amoureux, & que volontiers vous trouvés entre dames & demoiselles, si dites par tout où vous irez, que je le vous ai donné. Si vous quite votre prison, & vous en pouvez partir demain, s'il vous plait.' *an. 1348.*

(9) Favine, Theatre of Honor, book 1. St. Palaye Mém. sur l'anc. Cheval. partie 4. Selden, Tit. hon. part. 2. ch. 5. sect. 37.

(10) The chief strength of armies consisted, at this time, of cavalry. The skilful management of a horse was, of consequence, one of the great accomplishments of a knight or a warrior. It is to be noticed, that this way of thinking characterized some of the German tribes, even in the age of Tacitus. The following energetic description of the Teucteri, is applicable, in a striking manner, to the pure ages of chivalry. *Teucteri super solitum bellorum decus, equitris disciplinæ arte præcellunt. Nec major apud Catos peditum laus, quam Teucteris equitum. Sic instituire majores, postri imitantur. Hi lusus infantium, bæce juvenum æmulatione, perseverant senes.* *De Mor. Germ. c. 32.*

(11) Hence the distinction of knights *banneret* and knights *bachelors*; the latter expression denoting the simple knight; the former, the knight who had a standard and followers. The numbers of knights and esquires who served under the banneret, varied in proportion to his riches, and influence. It is also observable, that this dignity was not always feudal. It was sometimes personal. *Selden, Tit. bon. part 2. ch. 3. sect. 27. and ch. 5. sect. 39. Du Cange, Dissert. sur l'Histoire de S. Louis. Spelm. voc. Banerettus. Daniel, Milice Française, liv. 3. ch. 5.*

(12) Favine, Theatre of Honor, book 10. St. Palaye, Mém. sur l'anc. Cheval. partie 6.

(13) An old ceremonial of chivalry has these words: *Le Roy Artus d'Angleterre, & le Duc de Lencastre ordonnèrent & firent la table ronde, & les behours, tournois, & joustes; & moult d'autres choses nobles, & jugements d'armes, dont ils ordonnèrent pour juger, dames & damoiselles, Roys d'armes & héraux.* *Dissert. 7. sur l'Histoire de S. Louis, p. 179.*

(14) The greater tournaments were those given by sovereigns and princes, to which knights were invited from every part of Europe; for, over Christendom, the honor and privileges of knighthood were the same. The lesser tournaments were those given by the barons.

It deserves observations, that the exhibition of torneaments

ments produced an intercourse between the nations of Europe, which could not but contribute to knowledge and civilization. When there were no express prohibitions, knights followed the more important tournaments wherever they were celebrated, for the purpose of studying the art of war; and that they might find signal and proper opportunities of distinguishing themselves, and of cultivating the friendship and acquaintance of illustrious persons of both sexes. It was even the fashion for knights to avoid the restraint of marriage for some years after their installation into the order, that they might consecrate them to the travelling into distant countries, and the visiting of foreign courts, 'afin de s'y rendre chevaliers parfaits.' *St. Palaye, tom. 2. p. 8.*

From these circumstances, it is obvious, that the strong conclusions of Dr. Robertson, concerning the little intercourse between nations, during the middle ages, are not to be relied upon in all their force, but to be understood with much reserve, and many limitations. *Hist. of Charl. V. vol. 1. p. 325. & seq.*

(15) This present was called *faveur*. *St. Palaye, tom. 1. p. 95.* Hence the pieces of lace or riband which are yet sometimes distributed at marriages, are termed the bride's favors.

(16) It would be tedious to enumerate and to describe the different forms of exercise or combat which were practised in the tournaments; and it is not necessary in this work. The *jouffe* was the combat of one against one; *les armes à outrance*, were the combats of six against six, and consisted occasionally of more or fewer persons. *Le pas d'armes*, was the defence of a pass by one or more persons against every assailant. The curious reader may consult the books which treat expressly of tournaments.

(17) Favine on tournaments. *St. Palaye, Mém. sur l'anc. Cheval. partie 2.*

(18) 'Effigiesque & signa quaedam detracta lucis in prælium ferunt.' *Tacit. de Mor. Germ. c. 7.* The posterity of the Germans were equally superstitious under the light of the gospel. 'Les Germains,' says *St. Foix*, who had this passages of Tacitus in his eye, 'portoient à

‘ la guerre des drapeaux, & des figures qui étoient en dépôt pendant la paix dans les bois sacrés.’ He adds, ‘ Nos Rois alloient prendre de même la chape de S. Martin sur son tombeau, & Poriflamme dans l’église de S. Denis, & les reportoient lorsque la guerre étoit finie.’ *Ess. Hist. sur Paris*, tom. 2. p. 187.

(19) The Edda, Keyfler, *Antiq. select. Septentr.* p. 149.—163. Pelloutier, *Hist. des Celtes*, liv. 3. ch. 18.

(20) The discerning reader will perceive, that I describe Christianity from the writings of the clergy; because, it is always from their representations of it that it acts upon society and manners. I therefore speak politically, and not as an inquirer into theology.

From the pretended friends of Christianity, and from its most zealous partisans, too, I fear, it has received deep and cruel wounds. Its most enlightened and genuine admirers have reason to regret, that it has not been left to defend itself. Were it possible to destroy the comments, the explanations, the catechisms, and the systems of divines, a very considerable blow would be given to infidelity. One can respect the honest doubts of philosophy. But, is it possible to withhold indignation or scorn, when ability stoops to be uncharitable and disingenuous, when bigotry presses her folly, and spits her venom?

(21) It was Gregory VII. whose magnificent mind first formed the plan of the croises. The fanaticism, the heroic spirit, and the wild enterprize of knighthood, suggested, doubtless, the idea of them. The advantages they were to give to the holy see, and the church in general, were numerous and great. The Popes not only conferred remission, or pardon of their sins, on all those who yielded to this madness; but, what was no less interesting, they undertook the protection of their families and affairs. The clergy, of consequence, drew immense wealth, by acting as tutors and trustees for widows, pupils, and minors. The troops designed for these pious projects, could be employed by the church to protect and enlarge its temporalities; and, under the pretence of recovering the holy sepulchre, prodigious sums

were to be extracted from women, the devout, the infirm, and the dying.

From the holy wars it followed, that new fraternities of knighthood were invented. Hence the knights of the holy sepulchre, the hospitallers, templars, and an infinite number of religious orders who shed blood, and deformed society, for the glory of God. Many of these acquired great riches, and all of them increased the influence of the church.

Some writers have fancied, but very absurdly, that the croises gave rise to chivalry. Without chivalry the croises could not have been carried into execution. The Popes and the clergy would in vain have preached, that they were the road to salvation and the gates to heaven.

From the cultivated state of manners in the east, some improvement was imported into Europe by the crusaders. But the crusades deserve not to be considered as the first, or indeed as a very powerful cause of refinement in Europe; though it is to be allowed, that they encouraged a respect for order, and ideas of regular government; and that they made additions to the science of heraldry and the fashions of liveries, and heightened the splendor of equipage and dress.

When the medal, however, is reversed, there appear many and great disadvantages. They drained the kingdoms of Europe of their inhabitants; they took away their riches, and thereby discouraged trade and the arts; they removed kings and nobles beyond the seas, and introduced into states disquiets and disorder; they added to the power of the Roman see, by affording favorable opportunities for the operation of its policy, and for establishing the right of the Popes to interfere in the temporal affairs of nations; and, in fine, they promoted every pious impertinence, and advanced the most abject superstition.

It is also worthy of remark, that some writers, who have no tincture of philosophy, have treated chivalry and the holy wars as primary and distinctive causes of the refinement of the European states; yet the latter, being really the con-

sequences of the former, their influence ought to have been ascribed to them.

The same want of penetration is perceivable in those, who, while they urge as a primary source of improvement, the revival of literature, hold out, distinctively, as another cause of it, the civil code, or the laws of the Romans. They might, with equal propriety, record as particular and distinctive sources of refinement, the writings of Cicero, of Livy, or of Tacitus.

During the prevalence of chivalry, it is likewise to be observed, that the ardor of redressing wrongs seized many knights so powerfully, that, attended by esquires, they wandered about in search of objects whose misfortunes and misery required their assistance and succour. And, as ladies engaged more particularly their attention, the relief of unfortunate damsels was the achievement they most courted. This was the rise of knights-errant, whose adventures produced romance. These were originally told as they happened. But the love of the marvellous came to interfere; fancy was indulged in her wildest exaggerations, and poetry gave her charms to the most monstrous fictions, and to scenes the most unnatural and gigantic.

(23) 'Supplicem aut debilem vel arma abjicientem hostem
'occidere, etiam hodie apud Gothos sempiterno opprobrio
'dignum computatur.' *Jo. Magnus, Hist. Suec. lib. 4.*

In the battle of Poitiers, fought by the heroic Edward Prince of Wales, the King of France was made prisoner; and the behaviour to the captive monarch illustrates, more than any particulars I can mention, the nobleness of the principles of chivalry. The Earl of Warwick conducted the French king, with many demonstrations of respect, to the Prince's tent.

'Here,' says a great historian, 'commences the real
'and the truly admirable heroism of Edward: For victories
'are vulgar things, in comparison of that moderation and
'humanity discovered by a young prince of twenty-seven
'years of age, not yet cooled from the fury of battle, and
'elated by as extraordinary and as unexpected success, as

had ever crowned the arms of any general. He came forth to meet the captive king with all the signs of regard and sympathy; administered comfort to him amidst his misfortunes; paid him the tribute of praise due to his valor; and ascribed his own victory merely to the blind chance of war, or to a superior providence, which controls all the efforts of human force and prudence. The behaviour of John showed him not unworthy of this courteous treatment: His present abject fortune never made him forget a moment that he was a king: More sensible to Edward's generosity than to his own calamities, he confessed, that, notwithstanding his defeat and captivity, his honor was still unimpaired; and that, if he yielded the victory, it was at least gained by a prince of such consummate valor and humanity.

Edward ordered a magnificent repast to be prepared in his tent for the prisoners, and he himself served the royal captive's table, as if he had been one of his retinue. He stood at the King's back during the meal; constantly refused to take a place at table; and declared, that, being a subject, he was too well acquainted with the distance between his own rank, and that of his royal Majesty, to assume such freedom. All his father's pretensions to the crown of France were now buried in oblivion: John, in captivity, received the honors of a king, which were refused him when seated on the throne: His misfortunes, not his title, were respected: And the French prisoners, conquered by his elevation of mind, more than by their late discomfiture, burst out into tears of joy and admiration; which were only checked by the reflection, that such genuine and unaltered heroism in an enemy, must certainly, in the issue, prove but the more dangerous to their native country.' *Hume, Hist. of England, vol. 2. p. 214.* See also *Ashmoie, p. 673.*

Morsels of story like these are precious, and distinguish those historians who can render instructive the details which common writers are only attentive to make agreeable.

(24) The following was one of the oaths administered

by the constable in the duel. 'A. de B. ye shall lay your
 ' hand ayen on the holy gospels, and swere that ye shall
 ' have no moo wepnis or poynts, but tho that ben assigned
 ' you by the constable and mareschall, that is to wite,
 ' gleyve, long swerd, short swerd, and dagger: Nor no
 ' knyfe, small ne grete; ne none engine, ne none othir
 ' instrument with poynt: Nor stone of vertue, nor hearb
 ' of vertue; nor charme, nor experement, nor none othir
 ' enchauntment by you, nor for you, whereby ye trust the
 ' better to overcome C. de D. your adversarie, that shall come
 ' ayens you within these lists in his defence; nor that ye trust
 ' in none othir thyng propirly, but in God and your body,
 ' and your brave quarell; so God you help, and all halowes,
 ' and the holy gospels.' *Dugdale, origin. juridic. p. 82.*

(25) The solemn taking away of the sword, the cutting
 off the spurs, the tearing from the knight's armour, and the
 bruising every piece of the knight's armour, appear to
 have been ceremonies of the degradation. *Selden, Tit. hon.*
part 2. cb. 4. Sect. 38. Ashmole, p. 620.

Religion came also to concern itself in a matter so important.
 Priests pronounced over the culprit a psalm, containing im-
 precations against traitors. Water was thrown upon him to
 wash away the sacred character conferred by his installation
 into the order. And, at length he was dragged on a hurdle
 to the church, where there were said and performed over
 him the prayers and the ceremonies which are used for the
 dead. *St. Palaye, tome II. p. 320.*

Authorities, Controversy, and Remarks.

B O O K II.

C H A P T E R I.

S E C T I O N I.

(1) **T**HE ordinary form of homage and fealty varied in some little particulars in different nations, and in the same nations, at different times; and fidelity, while the fief was precarious, could only be promised during the connexion of the lord and the vassal. The oldest example of these ceremonies which is preserved, and perhaps the most simple, is that of *Tassilon* Duke of Bavaria, to King Pepin, in the year 757. It is thus described. 'Tassilo Dux Bajoariorum cum primoribus gentis suae venit, & more Francorum, in manus regis in *vassaticum* manibus suis semetipsum commendavit; fidelitatemque, tam ipsi regi Pipino, quam filis ejus Carolo & Carlomanno, jure jurando supra corpus Sancti Dionysii promisit.' *Adelmus, Annal. Franc. ap. Brussel, liv. 1. ch. 1. sect. 7.*

From the words *more Francorum* it is to be inferred, that these usages were of a still higher antiquity; and, indeed, there can be little doubt, that they prevailed from the earliest times. We find them, accordingly, in the Anglo-Saxon period of our history. *Nichol. Praefat. ad LL. Anglo-Saxon. p. 6, 7.* It is true, notwithstanding, that some eminent authors contend, that they were consequences of

the perpetuity of the fief. But the homage of Tassilon, and the Anglo-Saxon fealty, were prior to the general establishment of this perpetuity. And there does not appear any solid reason to think, that these ceremonies were a result of it.

When the exercise of the prerogative of private war among the nobles had spread its disorders and calamity, it became common, both in France and England, to insert a reservation in the form of homage, which limited the fidelity of the vassals of a lord or a chief, to the acts which were not derogatory to the faith they owed to the king. This was intended as an obstruction to the prevalence of private war, and discovered an advancement in the ideas of civilization and government. Saint Louis established it in France; and it appears in England, in what is called 'The Statute of Homage,' in the seventeenth year of Edward II. By this form or ordinance, the vassal, after expressing the fidelity he is to bear to his lord for the lands he holds, is made to add, *saving the faith I owe unto our Lord the King.*

Out of these usages, in this state of their restriction, there grew, as fiefs died away, the ligeance, or allegiance, which every subject, whether a proprietor of land or not, was supposed to owe to his sovereign. Thus, the oath of ligeance or fealty was to produce the oath of allegiance.

(2) I have endeavoured to investigate, in another work, the high antiquity of the feudal incidents. *Dissert. on the Antiq. of the Eng. Constitut. part 2.* It is a common mistake, that the feudal fruits or incidents were not known in England till the Norman times. This opinion is to be ascribed to the want of curiosity in some inquirers of great name, who have given a sanction to it without deliberation; and to the narrow prejudices of others, who affect to consider the Norman invasion as the proper era of our political constitution, from the view of paying a compliment to the prerogative of our kings, by holding out Duke William as a conqueror, and by insulting the consequence of the people. It is in this manner that errors have been engrafted upon errors.

The Anglo-Saxon laws, however, oppose the conceit of
the

the late rise of the feudal incidents, with a force that is not to be resisted. They make an actual and express mention of them. And, for formal illustrations of the feudal incidents in the Anglo-Saxon times, the reader may consult, *The case of tenures upon the commission of defective titles, argued by the judges of Ireland, Mr. Selden, in many parts of his works, and Mr. Whitaker, in his history of Manchester.*

One of Canute's laws I cannot forbear to mention, because it illustrates very strongly, in this age, the existence of tenures. It ordains that a vassal who deserts, in an expedition against an enemy, shall forfeit his land to his lord; and that, if he should fall in battle, his heriot shall be remitted, and his land go to his heirs. *LL. Canut. c. 75.* This desertion was, in all feudal countries, one of the causes of the escheat or forfeiture of the fief. *Spelm. Gloss. voc. Felonia.* We thus learn, that, in the age of Canute, there prevailed the feudal incidents of escheat and heriot, and that lands were not only granted in tenure, but might go to heirs; a circumstance which may lead us to conceive, that advances were then made towards the establishment of the perpetuity of the fief. This important law is misinterpreted by Wilkins, and, probably, with design. The learned reader will not require to be informed, that his version of the Anglo-Saxon laws is often defective and unfaithful.

What is worthy of notice, while many writers of England look to Normandy and Duke William for the introduction of the feudal law, and its incidents, into their nation, an author of France, William Rophile of Alençon, in his preface to the grand Coutumier of Normandy, contends, That they were first brought into that duchy from England by Edward the Confessor.

The facts is, that these fruits and this law extended themselves over Europe, from no principle of adoption, but from the peculiarity of manners and situation of the barbaric nations who made conquests. There is no position in history which is clearer than this. And Du Cange, in particular, when we consider the amazing extent of his information, is

very much to blame, while he fondly holds out the tenet, that the usages and institutions of the European states proceeded chiefly from the manners and customs of France.

(3) Even in the days of Bracton, after the feudal association had received its most staggering blows, the doctrines of the reciprocal duties of the lord and the vassal, and their perpetual league, are laid down in strong language.

‘ Nihil facere potest tenens propter obligationem homagii, quod vertatur domino ad exhaeredationem vel aliam atrocem injuriam; nec dominus tenenti, e converso. Quod si fecerint, dissolvitur & extinguitur homagium omnino, & homagii connectio & obligatio, & erit inde justum iudicium cum venerit contra homagium & fidelitatis sacramentum, quod in eo in quo delinquent puniantur, sc. in persona domini, quod amittat dominium, & in persona tenentis, quod amittat tenementum.’ *De leg. & Consuetud. Angl. p. 81.*

(4) The state, I know, of the people of old, as described by Dr. Brady, and Mr. Hume, by Dr. Robertson, and a multitude of other authors, was uniformly most abject; and yet the power of the nobles is represented as most exorbitant. They dwell on what they term the aristocratical genius of the times, and seem to take a pleasure in painting the abjectness of the people.

It is remarkable, that these notions are contradictory and inconsistent. The nobles had immense influence; but, in what did this influence consist? Was it not in the numbers and the attachment of their vassals? These were their power; and, did they oppress them? The reverse is the truth. They treated them with the utmost lenity, and it was their interest to do so. The cordiality, accordingly, of the nobles and the vassals, was maintained during a long tract of time, of which the history has been repeatedly written, without the necessary attention to its nature and spirit. The decay, indeed, of this cordiality, was to create confusions and oppression; and, what confirms my remark, it was in this situation, that the power of the nobles was to be humbled.

The error I mention was first thrown out by a writer of ability, because it suited the theory he inculcates. It was adopted, for the same reason, by a writer of still greater talents; and nothing more is necessary to give currency to an absurdity. For, the authors who do not think for themselves, but who gain a fashionable and temporary reputation, by giving dress and trappings to other men's notions, will repeat it till it is believed.

(5) Mr. Hume has the following very singular passage. 'None of the feudal governments in Europe had such institutions as the *county-courts*, which the great authority of the conqueror still retained from the Saxon customs. All the freeholders of the county, even the greatest barons, were obliged to attend the sheriff in these courts, and to assist him in the administration of justice.' *Append. 11.*

In every feudal kingdom, notwithstanding this strong affirmation, the *comes* was known, and the *comitatus*. The *comitatus*, or county, was the territory or estate of the *comes*; and the court he held, and in which he presided, was the *county-court*, to which the freeholders and feudators were called, and acted as assessors or judges. *Du Cange, and Spelman, voc. Comites.*

There might, indeed, be a *comes* who enjoyed not the property of the county, but only a part of it; and, in this case, he was constituted to exercise jurisdiction in it. The sheriff originally was a very subordinate officer. He was sometimes no more than the deputy of the *comes*. Hence *viccomes* was the term by which he was known. Sometimes he was only vested with the care of the king's interest in particular counties. And, in reality, he began only to figure when the jurisdiction of the nobles, in the decline ofiefs, had died away to a shadow.

It is said by Mr. Hume, That the great authority of the conqueror retained the county-courts from the Saxon customs. He thus infers, that these courts were favorable to the royal authority. The fact, however, is exactly the reverse. The greater jurisdiction there is in the nobles and the people, the more limited is the prerogative of princes. The county-

courts were eminent and formidable supports of the liberty of the subject. And, instead of giving them encouragement, it was the interest of the conqueror to employ his great authority in their suppression.

Mr. Hume adds, in the spirit of a writer who had made a discovery, 'Perhaps this institution of county-courts in England has had greater effect on the government, than has yet been distinctly pointed out by historians, or traced by antiquaries.' *Ibid.*

I have remarked these and other weak places in the works of this illustrious man, that I might show the danger of implicit confidence even in the greatest names. The undue weight of what are called *great authorities*, gives a stab to the spirit of inquiry in all sciences.

(6) The distinguishing freedom of the Germanic tribes was carried with them into their conquests. *Tacitus* said of them, while they were in their woods, 'De minoribus rebus principes consultant, de majoribus omnes.' *De Mor. Germ. c. 11.* This peculiarity of government, and this importance of the people, appear not only in the history of these nations, but in their laws. The prologue to the laws of the Franks has these words. 'Hoc decretum est apud regem, & principes ejus, & apud cunctum populum Christianum, qui infra regnum Merwungorum consistunt.' *Lindenbr. p. 399.* The *lex Alamannorum* begins thus. 'Incipit lex Alamannorum, quae temporibus Chlotarii regis una cum principibus suis, id sunt, xxxiii. episcopis, & xxxxi. ducibus, & lxxii. comitibus, vel cetero populo constituta est.' *Lindenbr. p. 363.* In the same sense, we read of the *infinita multitudo fidelium* who appeared in the Anglo-Saxon parliaments. *Spelman's councils.* Originally, as in Germany, in all the European states, every person who wore a sword had a title to go to the national assembly. The sovereign could enact no new laws, and could repeal no old ones, without the consent of the people.

But, in ancient Germany, a representation of the people was even practised on particular occasions; and we are told by *Tacitus*, that, when *Civilis* declared war against the

Romans, 'convocavit primores gentis, & promptissimos vulgi.' *Tacit. Hist. lib. 4.* See farther *A Dissertation concerning the Antiquity of the English Constitution, part 5.* After the erection of the European states, the inconveniencies arising from great multitudes of armed men in councils of business, discovered fully the advantages of representation. And deputies made their appearance in these to consult and defend the privileges and rights of the people. The exact era of this establishment is not known in any country of Europe. Its antiquity, however, is beyond all doubt. And the commons made a figure in the assemblies of France, termed, les champs de mars, & les champs de mai, in the cortes of Spain, and in the wittenagemots of England.

It is probable, that in France, the people were represented before the age of Charlemagne. That they were important in the reign of this politic and powerful prince, there are proofs, positive and certain. The instructive work of Archbishop Hincmar, de ordine Palatii, places this matter in a strong light; and Abbé Mably, who copies and comments upon it, acknowledges the supreme power of the assemblies of those days, selects examples of it, and of the interference and consideration of the people. In fact, nothing of any moment or value, in peace or in war, or in any subject whatever, could be done without their approbation. 'Lex consensu populi fit, & constitutione regis.' *Capit. Kar. Calv. an. 864. ap. Baluz. tom. 2. ap. 177.* This conclusion is supported by express, numerous, and concurring testimonies of ancient laws, histories, and ordinances. See *Hotoman, Franco-Gallia, ch. 10, 11. Mably Observat. sur l'Hist. de France, lib. 2. ch. 2. Rymer on the antiquity of parliaments, &c.**

* Mr. Hume, notwithstanding a variety of authorities which oppose his assertions, could express himself to the following purpose. 'The great similarity among all the feudal governments of Europe, is well known to every man that has any acquaintance with ancient history; and the antiquarians of all foreign countries, where the question was never embarrassed by party-disputes, have allowed, that the commons were very late in being admitted to a share in the legislative power.' *Append. 11.*

These assemblies were very different from the *Etats Généraux* of after-times, when the rights of the people were insulted, and the legislative power came to reside in the sovereign. Yet, it is not uncommon to confound them; and, on the foundation of this error, improper conclusions have been inferred against the *commons* of England.

At what period the deputies of the people appeared in the cortes of Spain, is uncertain. But the liberty of the Wisigoths, who founded that kingdom, was ferocious; their love of independence was fostered by the ills of the Moorish domination; and their sovereigns, during a long tract of time, were kept in a surprising degree of subjection. Like all the other barbaric tribes who made establishments, the individuals among the Goths who wore swords, assembled originally in the councils of the nation; and when the disadvantages of crowded and tumultuous assemblies were uniformly felt, it is natural to conclude, that the deputies of the people were called to represent them.

From design, however, in the Spanish government, from the ravages of the Moors, or from the waste and havoc of time, no direct proofs of this representation, it is said, are to be found of an earlier date than the year 1133. Of the appearance of the deputies of the people, at this time, the evidence is produced by *Dr. Geddes*; and this writer has also published the writs of summons, which, in the year 1390, required the city of Abula to send its representatives to the parliament of Spain. *Miscellaneous Tracts*, vol. 1. There is likewise evidence of a Spanish parliament in the year 1179, in which the deputies of the people were assembled; and of another in 1210, in which they assisted as a branch of the legislature. *Gen. Hist. Spain. ap. Whitelock, Notes upon the King's Writ*, vol. 2. p. 65.

While liberty and the deputies of the people made a figure, and while the prerogative of the sovereign was restrained and directed by national councils and assemblies in the other countries of Europe, it seems the height of wildness to conclude, as many have done, that, in England, the inhabitants were

in a state of slavery, and that the mandate of the Prince was the law. His condition, so far from being despotic, was every moment exposed to danger and insult. He might be deposed for a slight offence. He was elected to his office. And, his coronation-oath expressed his subjection to the community, and bound him to protect the rights of his subjects.

The Anglo-Saxon laws are proofs, that, instead of governing by his will or caprice, he was under the control of a national assembly. In the preambles to them, we find, that the *wites* or *sapientes* were a constituent branch of the government. The expression *seniores sapientes populi mei*, is a part of the prologue to the ordinations of King Ina, an. 712. And the *sapientes populi*, or deputies of the people, appear in the laws of other princes of the Anglo-Saxons. *LL. Anglo-Saxon. ap. Wilkins.*

It is very remarkable, that the term *sapientes*, as may be seen in Du Cange, in his explanation of it, expressed, in Italy, in ancient times, those who governed the affairs of cities and communities. When men, therefore, of this sort are uniformly mentioned as a part of the Anglo-Saxon wittenagemots, it is impossible, but to prejudice, not to see, that they must have acted as the *representatives* of the people, and must have procured this distinction from the opinion entertained of their wisdom or experience.

By a curious testimony, it is even obvious, that the word *sapientes* must have meant the *commons*. In the supplication *del county de Devonsbire*, to Edward III. there are these expressions, '*que luy please par l'avys des prelates, countees, barons, & autres sages in cest present parliament ordeiner,*' &c. This supplication is printed in the 4. Inst. p. 232. In the reign of the third Edward, from the *autres sages* expressing the commons, it may surely be decisively inferred, that *sapientes* had the same meaning in older times.

In fact, the expressions which denote the Anglo-Saxon assemblies, allude to their nationality. '*Commune concilium, conventus omnium, concilium cleri & populi, amnium principum & omnium sapientum conventus,*' &c.

are appellations which mark forcibly the interference and assistance of the *commons* *.

In the annals of Winchelcomb, an. 811. there is to be seen the term *procuratores*, as expressive of a branch of the wittenagemor. It also occurs in a charter of King Athelstane. And, that the persons denoted by it were the deputies of the people, seems past all doubt, when it is recollected, that, in the Spanish writers, this order of men is expressed by *procuradores de las ciudades y villas*. Nay, in Polydore Virgil, we meet the expression *procuratores civium populique*, p. 478. ap. *Whitelocke*, vol. 1. p. 378.

To these notices I might add a multitude of authorities, respectable and positive. But I mean not now to enter fully into the dispute concerning the importance of the people. To give completeness to the spirit of my present volume, it is sufficient for me to assert the antiquity of the commons, in opposition to an opinion of their late rise, which a modern historian, of great reputation, has inculcated, with that hardness which he displays in all his writings, but with little of that power of thought and of reasoning which does honor to his philosophical works.

Mr. Hume, struck with the talents of Dr. Brady, deceived by his ability, disposed to pay adulation to government, or willing to profit by a system, formed with art, and ready for adoption, has executed his history upon the tenets of this writer. Yet, of Dr. Brady it ought to be remembered, that he was the slave of a faction, and that he meanly prostituted an excellent understanding, and admirable quickness, to vindicate tyranny, and to destroy the rights of his nation. With no less pertinacity, but with an air of greater candor, and with the marks of a more liberal mind, Mr. Hume has employed himself to the same purposes; and his history, from

* Mr. Hume has observed, indeed, that 'None of the expressions of the ancient historians, though several hundred passages might be produced, can, without the utmost violence, be tortured to a meaning which will admit the *Commons* to be constituent members of the great council.' Append. II. It is painful to remark a want of candor so glaring in so great a man.

its beginning to its conclusion, is chiefly to be regarded as a plausible defence of prerogative. As an elegant and a spirited composition, it merits every commendation. But no friend to humanity, and to the freedom of this kingdom, will consider his constitutional inquiries, with their effect on his narrative, and compare them with the ancient and venerable monuments of our story, without feeling a lively surprise, and a patriot indignation.

(7) The general doctrines concerning wardships may be seen in *Craig, lib. 2. Du Cange, voc. Custos, Warda. La Coutume reformée de Normandie, par Basnage, Art. des Gardes.*

In that instructive collection of records, *The history and antiquities of the exchequer of the Kings of England, by Mr. Madox*, there are the following examples of the sale of wardships by the crown, in the times which passed from Duke William to King John.

Godfrey de Cramavill gave xxv l. x s. for the custody of the land of Aketon, which was Ralf de Heldebouill's, and of Ralf's heir during his nonage. Hugh de Flammavill proffered x l. for the custody of his sister, with her land. Ralf de Gernemue gave a fine of lx marks, that he might have the custody and donation of Philip de Niwebote's daughter, with her inheritance. Earl David gave cc marks to have the custody of Stephen de Cameis, with his whole land, till his full age; saving to the King the service of the said land; and Earl David was to make no *destruction* upon it. And Philip Fitz-Robert gave cc l. and c bacons and c cheefs for the wardship of the land and heir of Ivo de Munby, till the heir came to be of full age. *Vol. 1. p. 323, 324.*

In remarking these sales, the value of money in its variations, is to be attended to. From *Mr. Madox*, it appears, that, 'in the reign of Henry III. Simon de Montfort gave ten thousand marks to have the custody of the lands and heir of Gilbert de Unfranville, until the heir's full age, with the heir's marriage, and with advowsons of churches, knight-
' fees, and other pertinencies and escheats;' and my Lord *Lyttleton* has calculated the amount of this payment,

according to the present value of money. 'Ten thousand marks,' he observes, 'containing then as much silver in weight as twenty thousand pounds now; and the value of silver in those days, being unquestionably more than five times the present value, this sum was equivalent to a payment of above a hundred thousand pounds made to the exchequer at this time.' *Hist. of Henry II. vol. 2. p. 297. Madox, vol. 1. p. 326.*

(8) Of reliefs in England, it is sufficient to give the following examples, as they will fully illustrate the oppressions which must have resulted from the exaction of this feudal incident.

In the 5th year of King Stephen, Walter Hait gave v marks of silver for relief of his father's land. Alice, wife of Roger Bigot, gave c and fourscore and xviii l. for her father's land or manour of Belvoir. Humfrey de Bohun paid xxii l. and x s. for relief of his father's land. Waleran Fitz William answered xxxiii l. vi s. and viii d. for relief of his land. In the reign of King Henry II. William Fitz William paid xxv marks for relief of his land; Theobald de Valeines xxx l. for relief of six knight-fees; and Robert de Dudaville x marks for relief. In the reign of K. Richard I. Robert de Odavill's son paid c marks for acceptance of his homage, and for relief and feisin of his land; Walter de Niewenton paid xxviii s. and iiii d. for feisin of the fourth part of a knight's-fee, which was taken into the King's hands for default of paying relief. William de Novo Mercato gave c marks, *that the King would receive his reasonable relief*, to wit, c l. In the reign of K. John, John de Venecia gave ccc marks for feisin and relief, and did homage to the King, and was to make the King an *acceptable present* every year. Geoffrey Wake gave cc marks for his relief. *Madox, Hist. of the excheq. vol. 1. p. 316, 317.*

The minute steps in the history of reliefs, and of the other feudal perquisites, are no part of this work. The reader who would investigate English reliefs still farther, may consult *LL. Guliel. LL. Hen. I. Chart. Johan. &c.* and, for their state in foreign countries, he may consider what is said in

Brussel, usage général des fiefs, liv. 2. Assises de Jerusalem, and the Glossaries.

(9) Lyttleton on tenures, sect. 107. Du Cange, Disparagare. La Coutume reformée de Normandie.

(10) Celestia, wife of Richard son of Colbern, gave xl s. that she might have her children in wardship with their land, and that *she might not be married, except to her own good-liking*. William Bishop of Ely gave ccxx marks, that he might have the custody of Stephen de Beauchamp, *and might marry him to whom he pleased*. William de St. Marie-church gave D marks, to have the wardship of Robert, son of Robert Fitzharding, with his whole inheritance, with the knight's-fees, donations of churches, *and marriages of women thereto belonging*; and that he might marry him to one of his [William's] kinswomen; provided, that Robert's land should revert to him, when he came to full age. Bartholomew de Muleton gave c marks, to have the custody of the land and heir of Lambert de Ybetoft, *and that he might marry Lambert's wife to whom he pleased*, but without disparagement. Geoffrey Crofs gave xl marks, for the wardship of the lands and heirs of *Sampson De Mules*, who held of the King *in capite*, by serjeanty, with the *marriage* of the heirs. John Earl of Lincoln, constable of Chester, fined MMM marks, to have the marriage of Richard de Clare, for the behoof of Maud, eldest daughter to the said Earl. Gilbert de Maisnil gave x marks of silver, that the King would give him leave to take a wife. Lucia, Countess of Chester, gave D marks of silver, that she might not be married within five years. Ceciliz, wife of Hugh Pevere, gave xii l. x s. that she might marry to whom she pleased. Ralf Fitz William gave c marks fine, that he might marry Margery, late wife of Nicholas Corbet, who held of the King in chief, and that Margery might be married to him. And Alice Bertram gave xx marks, that she might not be compelled to marry. *Madox, bist. of the Exchequer, vol. 1. p. 322—326. 463—466.*

These valuable notices are from records in the reigns of Henry II. Rich. I. King John, Henry III. and Edward I.

(11) Henry II. levied an *aid* of one mark *per fee*, for the

marriage of his daughter Maud to the Duke of Saxony. Of this aid, the proportion of the Earl of Clare for his own knight-fees, and for those of his lady the Countess, of the old feofment, was 'fourfcore and fourteen pounds and odd;' and for his fees of the new feofment, it was ciii s. iiii d. The feofments which had been made either to barons or knights, before the death of Henry I. were called *vetus feffamentum*. Fees of the new feofment were from the accession of Henry II. This appears from the Black Book of the Exchequer.

Henry III. had an *aid* of xl s. of every knight's fee to make his *eldest son* a knight. When King Richard was taken and imprifoned on his return from the holy wars, an *aid* was given for the *ransome* of his person. The barons and knights paid at the rate of xx s. per fee. *Madox, hift. of the Excheq. vol. 1. p. 572. 590. 596.*

In all cafes of aids, the inferior vaffals might be called to affift the crown-vaffals. They were even to contribute to extinguish their debts.

(12) Du Cange, voc. Auxilium. Bruffel, Usage général des Fiefs en France. Couft. Norman. *Madox, hift. of the Excheq. vol. 1. p. 614—618.*

(13) Spelman, voc. Felonia. Lib. Feud. Etabliffements de S. Louis, liv. 1. Craig, Jus Feudale, lib. 3.

SECTION II.

(1) IT is to be conceived, that, originally, little ceremony was employed in the duel. *Book I. Chap. 2. Sect. 4. and the Notes.* But, as ranks and manners improved, a thousand peculiarities were to be invented and observed. This institution, accordingly, is one of the most intricate in modern jurisprudence. It would be improper to attempt to exhaust, in a note, a topic which would require a large volume. It is only my province to put together some remarks.

I begin with a distinction which has escaped many inquirers, who have thence wandered in contradiction and obscurity,

The duel was, in one view, a precaution of civil polity; in another, an institution of honor. These distinctive characters it bore in its origin. *Book I. Chap. 2. Sect. 4.* And, in these different respects, it was governed by different forms. The common law, and the ordinary judges, directed it in the one condition; the *court of chivalry*, or the constitutions which gave a foundation to this court, governed it in the other. In reading what many authors have amassed on the duel, it is difficult to know what refers to the former state of the matter, and what to the latter. They either knew not the distinction, or possessed an imperfect notion of it. Even in the researches of Montesquieu, concerning the judicial combat, there is thence, perhaps, a faintness and embarrassment; and, in the observations of Dr. Robertson, on the same subject, the confusion is evident and palpable. See *Note 22. to Charles V.*

It has been affirmed, indeed, that the court of chivalry was not known till the eleventh century, or till a period still later. And, it is probable, that this court, in all its formalities, and in its condition of greatest splendor, existed not in an early age. But there is evidence, that its duties were exercised in very ancient times. And, from an examination of the oldest laws of the barbarians, it is to be inferred, that the business of it, except perhaps in a few instances, was not determined by the common judges. We know, at least, with certainty, in England, in the Saxon era, before a regular court of chivalry was established, points of honor and of war were under the direction of the *heretochs*, while the duel, as a civil rule, was at the direction of the common judges; and that, in the Norman age, when the court of chivalry was formally in existence, with extensive powers, the *constable* and the *marshal* had succeeded to the jurisdiction of the *heretochs*. *Spelman, Gloss. p. 400. Sir Edward Coke on the court of chivalry.*

The determination of a doubt, for which no complete evidence could be produced, was the end of the duel as a civil precaution. The decision of points of honor, and disputes of arms, or the satisfaction of a proud and a wounded spirit, was the end of the duel, as an institution of chivalry. While

the common judges of the land managed the duel in the former instance, as an object of common law; it was governed in the latter by the judges in the court of chivalry, that is, by the constable and the marshal; and the forms of procedure in these cases were essentially different.

Of the court of chivalry, the jurisdiction regarded matters of war, precedence, and armorial distinctions, as well as points of honor; and treasons, and deeds of arms committed without the realm, were objects of its cognizance. In a word, where the common law was defective, the powers of the constable and the marshal were competent. 4. *Institut. c. 17.*

Yet, from these officers, there lay an appeal to the sovereign, as the head of arms, and he might stop, by his power, their proceedings. It is thence that we find the Kings of England superseding combats of chivalry. It was as the head of the civil state they could supersede the combats of right, or at common law. Instances of their jurisdiction, in both cases, are not unusual. An exertion of it, in the duel of chivalry, took place in the intended combat between the Lord Rea and Mr. Ramsay. The Lord Rea, a Scots baron, impeached Ramsay and Meldrum for moving him beyond the seas, to join in the treasons of the Marquis of Hamilton. Ramsay denied the fact, and offered to clear himself by combat. A court of chivalry was constituted, by commission under the great seal; and the parties were on the point of engaging, when Charles I. interposing to prevent the duel, sent them prisoners to the Tower. *Kennet, complete history of England, vol. 3. p. 64.* An interposition in the duel at common law, was exercised in an intended combat in a writ of right between the champions of Simon Low and Jo. Kine, petitioners, and of Thomas Paramore, defendant. The battle was discharged by Queen Elizabeth. *Spelm. Gloss. p. 103.*

In the duel by chivalry, champions were not usual; because questions of honor required the engagement of the parties. In the duels of right, the parties might have champions, because the trial was merely an appeal to the Divinity, who was to decide the truth by assisting, miraculously, the cause of the innocent person; and this assistance might be manifested

either to himself or to his representative. The fashion, however, of martial times, was an inducement to the parties themselves to engage: And, in general, champions were only proper for the old and infirm, for priests, minors, and women. *Du Cange, voce Campiones.*

Anciently, in the duel of right, there was a discretionary power in the judges to determine in what cases it was necessary; and this was a proper restraint on the violence with which the duel was courted, in preference to other modes of trial. *Brussel, Usage général des Fiefs, liv. 3. ch. 13.* Express laws were even made to describe the occasions in which alone it was to be expedient. There is, on this head, the following regulation of Henry I. 'Non fiat bellum sine capitali, ad minus x fol. nisi de furto vel hujusmodi nequitia compellatio sit, vel de pace regis infracta, vel in illis in quibus est capitale mortis, vel diffamationis.' *LL. Hen. I. c. 59.*

In the reign of Henry II. it was the practice to permit the defendant to take his choice between the assize or jury and the duel. 'Habebit electionem,' says *Bracton*, 'utrum se ponere velit super patriam, utrum culp. sit de crimine ei imposito, vel non: Vel defendendi se per corpus suum.' *Lib. 3. c. 18.* This marks the decline of the duel, and accordingly, it gradually gave way to the jury. To this alternative of being tried by one's country, which expresses the form of the jury, or by the duel, which expresses the appeal to the Divinity, there is yet an allusion in the question proposed to a culprit, and in his answer. *Culprit, How wilt thou be tried?* His reply is, *By God and my country.* There is here a rule of law which has survived its cause or necessity. The alternative is suggested in the question, when no alternative exists. And the answer includes both trials, when one only is in practice. Absurdities of this kind, for they surely deserve this name, must be frequent in the progression of jurisprudence in all nations.

The duel of chivalry lost its legality with the fall of the court of chivalry. It left behind it, however, the modern challenge or duel, which it is dishonorable to refuse, and illegal to

accept. The jury, which swallowed up the duel at common law, could here afford no remedy.

A punier, though a more useful relic of the honorable court of chivalry, which was once so high in repute, that it was in danger of inroaching on the jurisdiction of other courts, is yet familiar in the heralds who manage armories, descents, and funerals, and who record admissions to the peerage.

The decay of the manners of chivalry, was the distant cause of the fall of this court; and its immediate one was, perhaps, the jealousy of the great powers of its judges. There has been no regular high constable of England since the 13th year of Henry VIII. And the marshal dwindled down into a personal distinction, or name of dignity.

In France, points of honor were originally under the cognizance of the maire of the palace; and this officer, who was to acquire the greatest powers, appeared in times of a remote antiquity. *Du Cange, voc. Major Domus.* After the age of Hugh Capet, this dignity was suppressed; and out of its ruins four courts arose. One of these was the court of chivalry, or the offices of the high constable and marshal. The other courts were those of the high chancellor, the high treasurer, and the great master of France, or the judge of the King's household. For, in the era of his grandeur, the maire of the palace had engrossed to his jurisdiction whatever related to arms, justice, and finance.

(2) It has been contended, that a knight's fee consisted regularly of a certain number of acres. *Spelman, voc. Feodum. Camden, Introd. to the Britanni. p. 246.* But the value of acres must have varied according to their fertility and situation; and it seem the more probable notion, that a proportion of land, of a determined value, no matter for the quantity of the acres, was what in general constituted a knight's fee. The consideration of the revenue that was necessary for the maintenance of a knight, and for the furnishing of his arms, would direct the extent of the land. The will of the grantor, however, and the consent of the receiver, might constitute any portion

portion of land whatever a knight's fee, or subject it to the service of a knight.

This is put past all doubt by the following remarkable paper in the Black Book of the Exchequer, which certifies Henry II. of the state of the knight's fee of one of his vassals.

Carta Willelmi, filii Roberti.

Karissimo domino suo H. regi Anglorum, Willelmus, filius Roberti, salutem. Sciatis, quod de vobis teneo feodum 1. militis *pauperrimum*, nec alium in eo feodavi, qui vix in sufficientia, & sicut tenuit pater meus. Valet. *Liber Niger Scaccari*, vol. 1. p. 247. Edit. 1771.

In the records of England, there is mention also of the *small fees* of the honor of Moreton; and it is supposed that the fees which were granted previous to the death of Henry I. were in general more extensive than those which were posterior to it. *Madox, hist. of the Exch.* vol. 1. p. 649. In England, as well as in France, there are even frequent examples of whole manors which were held by the service of one knight, and accounted as a single knight's fee. *Dugdale's baronage*, vol. 2. p. 107. *Notes sur les Assises de Jerusalem*, par *Tbaumassière*, p. 252.

But, there were not only poor fees granted out by the crown. There were even grants *in capite* of the half of a knight's fee, and of other inferior portions of it. Of this the charters which follow are an instructive evidence.

*Carta * Guidonis Extranei.*

Gwido extraneus tenet de Rege Alvin delegam per servitium dimidii militis.

Carta Roberti, filii Albrici.

Domino suo Karissimo H. Regi Anglorum, Robertus, filius Albrici Camerarii, salutem. Sciatis, Domine, quod ego teneo de vobis feodum dimidii militis. Valet.

* Guy Strange.

Carta Willelmi Martel.

Ego Willelmus Martel teneo in capite de rege quartam partem feodi 1. militis in Canewic juxta Lincolniam de antiquo feſamento, unde debeo ei facere ſervitium, & nichil habeo de novo feſamento in comitatu Lincolniae. *Lib. Nig. Scaccarii, vol. 1. p. 147. 217. 269.*

It was chiefly the polity or the natural beneficence of princes and nobles that varied the condition of fees. At times, the fee was ſcarcely ſufficient for the ſervice required; and, on other occaſions, it was infinitely plentiful, and beyond all proportion to the military purpoſe of the grant. Its value, on an average, is, however, to be calculated from records and acts of parliament. From William the Norman till King John, it was in progreſſion, a five, a ten, a fifteen, and a twenty pound land*. In King John's times, it grew to be a forty pound land; and, before the era of the act of parliament which took away and aboliſhed the military part of the feudal ſyſtem, the knight's fee was computed at *L. 200 per annum*. Theſe things are very curious, and might lead to political reaſonings of importance. *Spelman, voc. Miles, Aſhmole on the Order of the Garter.*

(3) Baronies and earldoms could be created or made to conſiſt of any number of fees whatever. Thus, the barony of William de Albeneſy Brito conſiſted of thirty-three knight's fees, the barony of Earl Reginald, of two hundred and fifteen knight's fees, and a third part of a fee; and William de Meſchines had a barony of eleven knight's fees. *Madox, Baronia Anglica, p. 91.* Thus the earldom of Geofrey Fitzpeter Earl of Eſſex conſiſted of ſixty knight's fees; and that of Aubry Earl of Oxford, of thirty knight's fees. *Selden, Tit. hon. part. 2. ch. 5. ſect. 26.* Inſtances to the ſame purpoſe might be collected in the greateſt profuſion.

From facts ſo particular, it is, I conceive, to be concluded, that Sir Edward Coke is miſtaken, when he lays it down,

* Sir William Blackſtone ſeems to think, that the knight's fee, in the reign of the Conqueror, was ſtated at *L. 20 per annum*, which is certainly a miſtake. *Book. 2. ch. 5.*

that a barony consisted, in ancient times, of thirteen knight's fees and a third part, and that an earldom consisted of twenty knight's fees. 1. *Institut.* p. 69, 70. According to this way of thinking, some of the barons and earls whose names are now recited, must have possessed many baronies, and many earldoms; an idea which is surely not only strange, but absurd. The supposition that nobility is inherent in a certain and determined number of fees, which this opinion implies, is a notion, that does not correspond with feudal principles. The nobility was given, not by the mere possession of the fees, but by their erection into an honor by the sovereign. Yet Sir Edward Coke had an authority for what he said. It is the old treatise, termed the *Modus tenendi parliamentum*. This treatise, however, is not of so high a date as the Saxon times, to which it pretends; and the circumstance of its assumed antiquity, with the intrinsic proofs it bears of being a fabrication in the times of Edward III. detract very much from its weight. And, in the present case, it is in opposition to indubitable monuments of history.

I am sensible, that Sir William Blackstone has said expressly, 'That a certain number of knight-fees were requisite to make up a barony.' *Book. 2. ch. 5.* He has not, however, entered into any detail concerning this position. I should, therefore, imagine, that he has relied implicitly on the authority of Sir Edward Coke, which ought not, perhaps, to be esteemed too highly in questions which have a connexion with the feudal institutions*.

* That Lord Coke had neglected too much the feudal customs, was a matter of lamentation to Sir Henry Spelman. It is with a reference to them, that Sir Henry thus speaks. 'I do marvel many times, that my Lord Coke, adorning our law with so many flowers of antiquity and foreign learning, hath not, (as I suppose), turned aside into this field, from whence so many roots of our law have of old, been taken and transplanted. I wish some worthy lawyer would read them diligently, and show the several heads from whence those of ours are taken. They beyond the seas are not only diligent, but very curious in this kind; but we are all for profit and *lucrando pane*, taking what we find at market, without inquiring whence it came.' *Reliq. Spelman. p. 99.*

The neglect which produced this complaint, and drew this wish from

Nor is it in England only that examples can be produced to refute this notion about the constitution of baronies and earldoms. In Normandy, five knight's fees might form a barony; and of this the following testimonies are an authentic proof.

1. Ricardus de Harcourt tenet honorem S. Salvatoris de domino rege per servitium 4 militum: Sed debebat quinque, quando baronia erat integra.' 2. 'Guillelmus de Hommet constabularius Normanniae tenet de domino rege honorem de Hommetto per servitium 5 militum, & habet in eadem baronia 22 feoda militum ad servitium suum proprium.' *Registrum Philip. Aug. Herouallianum, ap. Du Cange, voc. Baronia.*

(4) The terms *knight* and *chivaler* denoted both the knight of *honor* and the knight of *tenure*; and *chivalry* was used to express both *knighthood* and *knight-service*. Hence, it has proceeded, that these persons and these states have been confounded. Yet the marks of their difference are so strong and pointed, that one must wonder that writers should mistake them. It is not, however, mean and common compilers only who have been deceived. Sir Edward Coke, notwithstanding his distinguishing head, is of this number. When estimating the value of the knight's fee at L. 20 *per annum*, he appeals to the statute *de militibus, an. 1. Ed. II.* and, by the sense of his illustration, he conceives, that the knights alluded to there, were the same with the possessors of knight's fees; and they, no doubt, had knight's fees; but a knight's fee might be enjoyed not only by the tenants *in capite* of the crown, but by the tenants of a vassal, or by the tenants of a sub-vassal. Now, to these the statute makes no allusion. It did not mean to annex knighthood to every land-holder in the

this learned knight, is still prevalent. The law in Great Britain is no where studied in its history, and as a science. The student is solicitous only to store his memory with cases and reports; and courts of justice pay more regard to authorities than to reasonings. From the moment that the Dictionary of Decisions was published in Scotland, the knowledge of the Scottish law has declined. Yet the respectable author of that compilation did not surely imagine that he was about to do a prejudice to his nation.

kingdom who had a knight's fee; but to encourage arms, by requiring the tenants *in capite* of the crown to take to them the dignity. He thus confounds *knighthood* and the *knight's fee*. *Coke on Lyttleton*, p. 69.

If I am not deceived, Sir William Blackstone has fallen into the same mistake, and has added to it. Speaking of *the knights of honor*, or the *equites aurati*, from the gilt spurs they wore, he thus expresses himself. 'They are also called, in our law, *milites*, because they formed a part, or, indeed, *the whole of the royal army*, in virtue of their feudal tenures; one condition of which was, that *every one who held a knight's fee* (which, in Henry the Second's time, amounted to L. 20 *per annum*), was obliged to be knighted, and attend the king in his wars, or fine for his non-compliance. The exertion of this prerogative, as an expedient to raise money, in the reign of Charles I. gave great offence, though warranted by law and the recent example of Queen Elizabeth: But it was, at the Restoration, together with all other military branches of the feudal law, abolished; and this kind of knighthood has, since that time, fallen into great disrepute.' *Book. I. ch. 12.*

After what I have just said, and what is laid down in the text, I need hardly observe, that this learned and able writer has confounded the knight of *honor* and the knight of *tenure*. And, that the requisition to take knighthood, was not made to *every* possessor of a knight's fee, but to the tenants of knight's fees held *in capite* of the crown, who had merely a sufficiency to maintain the dignity, and were thence disposed not to take it. See farther *the notes to chapter IV.* The idea that the whole force of the royal army consisted of *knights of honor*, or *dubbed knights*, is so extraordinary a circumstance, that it might have shown, of itself, to this eminent writer, the source of his error. Had every soldier in the feudal army received the investiture of arms? Could he wear a seal, surpafs in silk and dress, use ensigns-armorial, and enjoy all the other privileges of knighthood? But, while I hazard these remarks, my reader will observe, that, it is with the greatest deference

I dissent from Sir William Blackstone, whose abilities are the object of a most general and deserved admiration.

In this note, and, perhaps, in other places of this volume, I use the expression 'tenant *in capite* of the crown,' which may seem a tautology to many. The phrase, 'a tenant *in capite*,' may, indeed, express sufficiently the royal vassal. It may, however, express a tenant *in capite* of a subject. And this distinction was not unknown in the law of England. *Madox, Bar. Angl. p. 166, Spelm. Gloss. voc. Caput.*

(5) It is natural to think, that the number of tenants *in capite* who gave no infeudations, could not be great. The following curious records of the age of Henry II. are proofs, however, that tenants *in capite*, who gave no infeudations, did actually exist; and, perhaps, they show, by implication, their uncommonness.

Carta Albani de Hairun.

Domino suo excellentissimo H. Regi Anglorum, Albanus de Hairun. Vestrae excellentiae notifico, quod ego in Hertfordshire feodum 1. militis de veteri feamento de vobis principaliter teneo, & quod de novo feamento nichil habeo, nec militem feofatum aliquem habeo. Valet.

Carta Mathaei de Gerardi Villa.

Mathaeus de Gerardi Villa tenet in capite de Domino Rege feodum 1. militis de veteri feamento, & nullum habet militem feofatum, nec habet aliquid de novo. *Liber Niger Scaccarii, p. 246, 247.*

In the same instructive monument, there are other examples of grants *in capite* of single fees; and, in general, it is to be inferred, that, of such grants, there were sub-infeudations. p. 129, 130. 179.

CHAPTER II.

(1) LIB. Feud. lib. 1. tit. 1. Craig, Jus feudale, lib. 1. Spelman, voc. Feodum.

(2) An instance of the sovereign selecting the son the most agreeable to him, for enjoying the estate, occurs in England so late as the reign of Henry II. This prince gave seifine to Ralf de Mandevill of the barony of Merswude, because he was a better knight than his elder brother Robert de Mandevill. *Madox, Baron. Angl. p. 97.*

It is remarkable, that, among the German nations, similar principles, even in the days of *Tacitus*, had an influence on the rights of succession. 'Inter familiam, & penates, & jura successionum, equi traduntur, excipit filius, non ut cetera maximus natu, sed prout ferox bello & melior.' *De Mor. Germ. c. 32.*

A singular consequence of these usages made its appearance in the law of England. On the devolution of a peerage to heirs female, the King might select the fortunate daughter on whom to bestow it. This privilege, beautiful and interesting, was to grow out of martial customs.

(3) *Beneficium*, and *beneficia*, are frequently mentioned in the laws of the barbarians, and, from the description given of them, it is evident, that they were subject to military service. A law of the Longobards has this passage. 'Per multas interpellationes factas ad nos didicimus, milites beneficia sua passim distrahere.' *LL. Longob. lib. 3. tit. 9. l. 9. ap. Lindembrog.* Ancient charters allude to their service, by calling them '*beneficia militaria.*' *Du Cange, voc. Beneficium.* See also a capitulary, an. 807. It is likewise to be observed, that *vassalli*, a feudal term, denoted, in early times, the possessors of benefices. Of this there are proofs in the years 757, and 807. *Du Cange, voc. Vassalli.*

It is commonly thought, that the word *feudum* was not known till about the year 884, when there is certain evidence of its use. Now, this period was, in some countries, posterior

to the perpetuity of the fief, and thus *beneficium* and *feudum* were to express the same thing. In fact, in a constitution of the Emperor Charles III. who died in 888, *beneficium* and *feudum* are employed alternately in expressing a hereditary grant. In the year 1162, there is a charter by the Emperor Frederic I. to Raimond his nephew, giving him the perpetual grant of a county; and, in this charter, the words *beneficium* and *feudum* are also used alike to express the donation. *Brussel, Usage général des fiefs*, p. 72. 78. Even in the books of the fiefs, these terms are employed promiscuously in the same sense.

(4) *Chantereau le Fevre* contends, that, under the Kings of France of the first and second race, there were only two kinds of landed property, the *domains* of the Prince, and *allodiality*. This notion, which is the foundation of his system, obliges him to assert, that *benefices* were *allodium*. Inferior writers have followed his fancy. For all ingenious men draw after them a train of book-makers, who are more solicitous to defend their opinions, than to understand them.

That *benefices* were not *propriety* or *allodium*, has been just now said. But it may not be improper to produce express proofs of their distinction. The following laws will serve this purpose.

‘*Auditum habemus qualiter & comites & alii homines, qui nostra beneficia habere videntur, comparant sibi proprietates de ipso nostro beneficio, & faciunt servire ad ipsas proprietates servientes nostros de eorum beneficio, & curtes nostrae remanent desertae, & in aliquibus locis ipsi vicinantes multa mala patiuntur.*’ *Capit. Kar. & Lud. lib. 3. tit. 19.*

‘*Audivimus, quod aliqui reddant beneficium nostrum ad alios homines in proprietatem, & in ipso placito dato pretio comparant ipsas res iterum sibi in alodem; quod omnino cavendum est; quia qui hoc faciunt, non bene custodiunt fidem, quam nobis promissam habent. Et ne forte in aliqua infidelitate inveniantur, qui hoc faciunt, deinceps caveant se omnino a talibus, ne a propriis honoribus, a proprio solo, a Dei gratia & nostra, extorres fiant.*’ *Capit. Kar. & Lud. lib. 3. tit. 20. ap. Lindenbrog. p. 877.*

The reader may also consult and compare what is collected in *Du Cange*, under *Alodis* and *Beneficium*.

(5) See Chapter 1. and the Notes to it.

(6) *Spelman*, *Lyttleton*, *Coke*, *Houard*, *Madox*, *Dalrymple*, *Blackstone*, the Judges of Ireland in the case of Tenures upon the commission of defective titles, &c.

In the elaborate treatise on feuds and tenures by Sir Henry *Spelman*, his whole argument to show that hereditary fiefs were unknown to the Anglo-Saxons, or at least the great weight of it, rests on the idea, that the feudal incidents were consequences of the *perpetuity* of the fief. Yet it is observable, that this position is constantly supposed, and never proved. He no where evinces, that wardship, marriage, relief, aid, and escheat, were necessary and certain results of the fief, in its condition of perpetuity; and, in the course of this work, if I do not flatter myself, I have produced evidence, from which it is to be concluded, in the clearest manner, that the feudal incidents were the attendants of the fief in all the steps of its progress.

On a foundation of mere froth, this distinguished antiquary has erected a superstructure that is without solidity, and which the slightest effort may overthrow. Yet it is resorted to as an impregnable castle; and here, vainly secure, many a combatant has thrown down the gauntlet of defiance. If authors were not generally the unthinking copists of each other, it might provoke laughter to consider the gravity with which an opinion is held out as irrefragable, that is in a high degree gross with absurdity, and feeble with weakness.

(7) *Capital. Reg. Franc. an. 877. ap. Baluz. tom. 2. p. 269. Abbé Mably, Observat. sur l'histoire de France, liv. 2.*

(8) *Du Cange, voc. Militia.*

(9) *Madox, Bar. Angl. p. 28. 277, 278. Houard, Anciennes loix des François, conservées dans les coutumes Angloises, recueillies par Lyttleton, discours préliminaire. Craig, Jus feud. Somner, Treatise of Gavelkind. Spelm. Gloss. Hume, Hist. of England, vol. 1. Hale, Hist. of the com. law.*

(10) Sir Ed. *Coke*. The Judges of Ireland in the case of

tenures. Selden, in his titles of honor. Bacon, Discourse on the laws and government of England, &c.

(11) The use of entails, which was not unknown in the Anglo-Saxon times, and the succession which obtained in allodial estates, must have contributed very much to the establishment of the perpetuity of the fief. *LL. Ælfredi, ap. Wilkins*. The general tendency of the fief to this ultimate step, and the immense power of many of the Anglo-Saxon nobles, seem also to confirm the idea, that the existence of its perpetuity might, in some cases, be known in the Anglo-Saxon times. But presumptive arguments, though of great weight, are not to be entirely relied upon in questions of this sort.

There is actual evidence, that Ethelred possessed, as an hereditary fief and earldom, the territory which had constituted the kingdom of Mercland. He had this grant from King Alfred, when he married his daughter Ethelsteda. *Selden, Tit. hon. part 2. ch. 5*. It is testified out of records, that the earldom of Leicester was an inheritance in the days of Æthelbald; and the regular succession of its earls, for a long period, is to be pointed out. *Camden, Britannia by Gibson, vol. 1. p. 542*. It is known from old historians of credit, that Deireland and Bernicia were Saxon earldoms, which were not only feudal, but inheritable. *Tit. hon. part 2. ch. 5*.

The grant of Cumberland by King Edmund to Malcolm King of Scotland, was also feudal and inheritable; and this appears from the Saxon chronicle, and from the following version of the terms employed in it. 'Eadmundus Rex totam Cumberland praedavit & contrivit, & commendavit eam Malcolmo Regi Scotiae, hoc pacto quod in auxilio sibi foret terra & mari.' *H. Huntindon, ap. Praefat. Episc. Derrens. ad LL. Anglo-Sax. p. 7*. The expression *commendare*, indeed, is said by Spelman not to mean a feudal homage. *Feuds and tenures, p. 35*. But the original Saxon evinces this sense; and, in fact, the word *commendare*, notwithstanding of this learned glossographer, is used with the utmost propriety to express a feudal homage. *Commendare se alicui*, was even the marked expression for *faire l'hommage*

à un suzerain. See *Du Cange, voc. Commendare & Brussel, Usage général des fiefs*, p. 35. 276.

(12) 'Volumus etiam, ac firmiter præcipimus & concedimus, ut omnes liberi homines totius monarchiæ regni nostri prædicti, habeant & teneant terras suas, & possessiones suas bene, & in pace, libere ab omni *exactione injusta*, & ab omni *tallagio*, ita quod nihil ab eis exigatur vel capiatur, nisi servitium suum liberum, quod de jure nobis facere debent, & tacere tenentur; & prout statutum est eis, & illis a nobis datum & concessum, jure hæreditario in perpetuum per commune consilium totius regni nostri prædicti.' *LL. Guiel. c. 55.*

It is to be mentioned here as somewhat remarkable, that the laws of Duke William, and especially those of them which relate to the feudal institutions, are represented by many foreign writers, and by our domestic advocates for tyranny, as the mandates or ordinances of a prince who governed by the sword. Yet they were parliamentary acts, and bear this honorable testimony in their bosom.

(13) *LL. Edward. Reg. ap. Wilkins*, p. 197. *Chart. Guil. de leg. Edw. Regis ap. Spelm. Cod. Leg. vet.* p. 290.

(14) *Spelm. Cod. Leg. vet. ap. Wilkins*, p. 295, 296.

(15) *LL. Henry I. ap. Wilkins*, p. 233. & seq.

(16) *Chart. Steph. Reg. de libertatibus, ap. Spelm. Cod. Leg. vet.*

'Sciatis me concessisse, & præsentis charta mea confirmasse, omnibus baronibus & hominibus meis de Anglia omnes *libertates & bonas leges* quas Henricus Rex Angliæ avunculus meus eis dedit & concessit, & omnes *bonas leges & bonas consuetudines* eis concedo quas habuerunt tempore Regis Edwardi.' p. 310.

(17) *Charta libertatum Angliæ Regis Henrici II. ap. Spelm. Cod. p. 318.*

(18) *Magna Charta Regis Johannis de libertatibus Angliæ, ap. Spelm. Cod. p. 367. & seq.*

Many important clauses of the great charter relate to the feudal severities. And, it is worthy of notice, that, from the slight consideration of these severities, it has proceeded, that so many writers have described the feudal institutions

as a system intended and formed for oppression. Yet I have clearly shown, that these severities grew out of these institutions from the change of manners; and that the scheme of benefices or fiefs was not only consistent with liberty, but founded in it.

(19) Hume, Hist. of England, vol. 1. p. 185.

(20) There are laws which bear the name of Edward; but it is acknowledged, on every hand, that their authority is not to be fully trusted. And, in the question treated, they are not of any use, unless it be, perhaps, that they illustrate the existence of fiefs among the Anglo-Saxons. This compilation, however, though posterior to the age of the Confessor, deserves to be examined with more attention than has hitherto been bestowed upon it. M. Houard, a foreign lawyer, whose acquaintance with Norman customs is more intimate than with those of the Anglo-Saxons, is the latest writer who seems to have made a study of it.

(21) The following very curious law of William the Norman makes express mention of the *knight's fee* and *knight-service*. It does more. It alludes to a prior law which actually established this tenure, and which was the act of William and his parliament. It is, of consequence, a decisive proof of the introduction of the *knight's fee*, or of *knight-service*, by this prince, and of this only.

‘ Statuimus etiam & firmiter praecipimus, ut omnes
 ‘ comites, & barones, & milites, & servientes, & universi
 ‘ liberi homines totius regni nostri praedicti, habeant &
 ‘ teneant se semper bene in armis, & in equis, ut decet &
 ‘ oportet, & quod sint semper prompti & bene parati ad
 ‘ servitium suum integrum nobis explendum, & peragen-
 ‘ dum, cum semper opus adfuerit, secundum quod NOBIS
 ‘ debent de feodis & tenementis suis de jure facere, & sicut
 ‘ illis statuimus per commune consilium totius regni nostri
 ‘ praedicti, & illis dedimus & concessimus in feodo jure
 ‘ haereditario.’ LL. Guill. c. 58.

(22) ‘ Terras militibus ita distribuit, & eorum ordines
 ‘ ita disposuit, ut Angliae regnum lx millia militum inde-

' finenter haberet, ac ad imperium regis ; prout ratio
' poposcerit, celeriter exhiberet.' *Ord. Vit. lib. 4.*

Sprott, the monk of Canterbury, makes the knight-fees to amount to 60,215, and of these he relates, that 28,115 were in the hands of the clergy. Some writers have made Doomsday-book agree with Ordericus Vitalis, as to the number of knight's fees. But they produce not, so far as I have observed, the passage or passages of that monument, which illustrate this opinion. And, it is difficult to conceive, that it can give a complete satisfaction on this head or topic.

(23) Selden, Tit. hon. part 2. ch. 5. sect. 17. Madox, *Baron. Anglica*, p. 30.

(24) Coke, 1. *Institute*, sect. 1.

CHAPTER III.

SECTION I.

(1) THE military plan of the feudal institutions, or an idea of the militia created by fiefs, may be seen to the greatest advantage in that curious monument, 'the Black Book of the Exchequer;' of which it was the object to exhibit, not only a list of the feudal tenants, but of the fees and knights held and provided by them. An article from it, therefore, while it may employ the reflections of the reader, will illustrate the general notion inculcated in the text.

Carta Gervasii Paganelli.

Domino suo dilectissimo Henrico, Regi Angliae & Duci Normanniae & Aquitaniae, & Comiti Andegaviae, Gervasius Paganellus salutem.

Isti sunt milites, de quibus vobis debeo servitium.

Petrus de Brevingeham tenet feod. IX. militum.

Giffardus di Turingeham feod. trium militum.

Henricus de Mohun feodum I. militis.

Ricardus Engaine feodum I. militis.

Robertus de Castreton feodum I. militis.

Paganus de Embreton feodum I. militis.

Manifelinus de Ovunges feod. duorum militum.

Petrus de Stamford feodum I. militis.

Willelmus de Jetingeden feodum I. militis.

Elias de Englesfeld feod. III. militum.

Ricardus de Ditton feod. IIII. militum.

Philippus de Hamton feod. II. militum.

Willelmus de Abbenwrthe feodum I. militis.

Willelmus, filius Widonis, feod. III. militum.

Bernardus de Frankelege feod. IIII. militum.

Gervasius de Berneke feod. IIII. militum.

- Willelmus de Bello campo feud. II. militum.
 Willelmus de Haggaleg feud. I. m.
 Milo de Ringeston feudum I. militis & dimid.
 Willelmus Buffare feud. II. militum & dim.
 Robertus de Estingeton feud. I. militis.
 Henricus de Oilli tenebat feudum I. militis.

Haec est summa militum, de quibus Antecessores mei Antecessoribus vestris fecerunt servitium, & ego, vestri gratia, vobis, scilicet. L.

Et isti sunt milites, quibus pater meus & ego dedimus terram de dominio nostro post mortem Henrici, avi vestri, scilicet,

- Henricus de Erdinton feudum I. militis.
 Radulfus Mansel feudum I. militis.
 Willelmus Paganellus feudum I. militis.
 Michael filius Osberti & Willelmus de Lovent. feudum dimidii militis.
 Godwinus Dapifer tertiam partem I. militis.
 Walterus Mansel feudum I. militis.
 Petrus de Surcomunt feudum dimidii militis.
 Galfridus de Rivilli tertiam partem I. militis.

Liber Niger Scaccarii, vol. 1. p. 139, 140.

It is in this form that other vassals of the crown certify, in this work, the services and the knights they were to furnish.

(2) It was enacted by a law of Henry II. 'Ut quicumque habet feudum unius militis, habeat loriam, & cassidem, & clypeum, & lanceam.' *Hoveden, an. 1181.* The variations in the nature of the arms to be provided, at different periods, by vassals and soldiers, are learnedly explained in an author whom the adorers of tyranny affect to despise, in the manly and spirited work of Nathaniel Bacon, on the laws and government of England.

(3) 'In universum aestimanti plus penes peditem roboris.' *Tacit. de Mor. Germ. c. 6.*

(4) Many writers have observed, that it was William the Norman who introduced archers into England. But they were

known in the Anglo-Saxon armies. A law of Alfred has these words, 'Si quis alteri digitum unde sagittatur absciderit, xv sol. comp.' See *LL. Alfr. c. 40.* as interpreted by *Lindenbrogius*, in his *Glossary*, p. 1389. Archery was also of high antiquity in the other states of Europe. See *LL. Sal. tit. 31. l. 6.* *LL. Ripuar. tit. 7. l. 7.* The English were to excel all nations in the use of the bow, and for far shooting. It was the archers who gained the battles of Cressy, Poitiers, and Agincourt.

'King Edward the third,' says *Ascham*, 'at the battaile of Cressie, against Philip the French King, as Gaguinus the French historiographer plainlye doth tell, slewe that day all the nobilitye of Fraunce onlye with his archers.'

'Such like battaile also fought the noble Prince Edward beside Poitiers, where John the French King, with his sonne, and in a manner all the peres of Fraunce, were taken, besides thirty thousand which that daye were slaine, and very few English men, by reason of theyr bowes.'

'Kinge Henry the Fifte, a prince perelesse, and most victorious conquerour of all that ever dyed yet in this parte of the worlde, at the battle of Agincourt, with seven thousand fightinge men, and yet many of them sicke, beinge suche archers, as the chronicle sayth, that most parte of them drewe a yarde, slewe all the chivalrye of Fraunce, to the number of forty thousand and mo, and lost not past twenty-six Englishmen.' *Toxophilus, or the Schole of Shootinge*, p. 112.

(5) 'He,' says *Lyttleton*, 'which holdeth by the service of one knight's fee, ought to be with the King forey dayes, well and conveniently arrayed for the warre.' *Tenures*, book 2. ch. 3. See farther *Du Cange*, voc. *Feudum militare*. *Spelman*, voc. *Feudum Hauberticum*, & *Assises de Jerusalem*, avec des notes, par *Thaumaussière*, p. 266.

(6) *Brussel*, Usage général des fiefs, vol. 1. p. 164. 168. *Daniel*, hist. de la milice Française, liv. 3.

In England, in the time of Edward III. his army in France, Normandy, and before Calais, besides the Lords, consisted of 31294 combatants and attendants; and their pay for one year

year and 131 days amounted to 127201 l. 2 s. 9 d. The following specification of particulars will furnish an idea of the military pay and service of those times.

‘ To Edward Prince of Wales, being in the King’s service in Normandy, France, and before Calais, with his retinue, for his wages of war, 20 s. a day. Eleven banerets, every one taking 4 s. a day. 102 knights, each 2 s. a day. 264 escuires, each 12 d. a day. 384 archers on horseback, each 6 d. a day. 69 foot-archers, each 3 d. a day. 513 Welshmen, whereof one chaplain at 6 d. a day. One physician, one herald or cryer, 5 ensignes, 25 serjeants or officers over 20 men, each 4 d. a day. 480 footmen, each 2 d. a day.

‘ To Henry Earle of Lancaster, being in the King’s service before Calais, with his retinue, for his wages of war, and one other Earle, each 6 s. 8 d. a day. Eleven banerets, each 4 s. a day. 193 knights, each 2 s. a day. 512 escuires, each 12 d. a day. 46 men at armes, and 612 archers on horseback, each 6 d. a day.

‘ To William Bohun, Earle of Northampton, being in the King’s service in Normandy, France, and before Calais, 2 banerets, 46 knights, 112 escuires, 141 archers on horseback. For their wages as above.

‘ To Thomas Hatfield bishop of Durham, 6 s. 8 d. a day. 3 banerets, 48 knights, 164 escuires, 81 archers on horseback, every one taking as above.

‘ To Ralf Baron of Stafford, being in the King’s service in the places aforesaid, with 2 banerets, 20 knights, 92 escuires, 90 archers on horseback. Every one taking as above.’

These things appear in a contemporary record, published by *Dr. Brady* in his history of England. See *vol. 2. Appendix, p. 88.*

SECTION II.

(1) IN rolls of the militia of France in the year 1236, and preceding that period, which were observed by *Père Daniel*, there were entered military tenants who were marked down for the service of 5 days, and for other proportions of the ordinary service of forty days. And these are proofs, not only of fees in France, but of the fractions of fees. *Milice Françoisse*, p. 55.

This learned author, indeed, not attending to the regulations which made the fractions of a fee give their proportion of the ordinary service, has endeavoured to account for the limited number of days which many tenants were bound to serve, by refined reasonings and conjectures; which show how acutely, and yet how absurdly, a man of ability may employ himself in searching out the truth*.

* Pour ce qui est de ceux que l'on voit dans les rôles n'être obligés qu'à cinq, qu'à quinze, ou vingt-cinq jours, ce furent des concessions particulières, dont il est difficile de conjecturer la cause; ce fut pour quelque service signalé rendu à l'état, ou peut-être que leurs ancêtres durant les guerres civiles fournirent au Roi leurs châteaux, ou leurs terres à cette condition, ou qu'ils avoient quelque autre obligation qui suppléoit au service ordinaire; comme, par exemple, de faire la garde en certains lieux lorsque l'ennemi approchoit. On voit en effet dans ces rôles quelques gentilshommes fiefés, obligés seulement à faire le guet en certaines occasions dans quelque forteresses.

Une autre raison peut avoir contribué à la réduction du service à un terme plus court qu'il n'étoit autrefois: C'est que sous la première race, & fort avant sous la seconde, l'empire François étoit beaucoup plus étendu que sous la troisième. Il falloit aller chercher les ennemis & les rebelles dans la Germanie, & au delà; il falloit passer les Alpes, ou les Pyrénées, & entrer bien avant en Italie & en Espagne: Par conséquent les expéditions duroient beaucoup plus long-temps que sous la troisième race, sous laquelle le royaume avoit des bornes beaucoup plus étroites.
Liv. 3. ch. 2.

The wildness of these conjectures does not require to be pointed out minutely, as it will appear from a comparison of the text with this note. Yet I censure not the abilities of this historian. If we could reach the truth in all sciences, we should find, that it is the greatest men who have

Lyttleton, having remarked that the ordinary service of the knight's fee was forty days, is careful to add, 'that he, which holdeth his land by the mo'tie of a knight's fee, ought to be with the King twenty days; and that he which holdeth his land by the fourth part of a knight's fee, ought to be with the King ten days; and so he that hath more, more; and he that hath lesse, lesse.' *Tenures*, p. 69.

In a roll, *de l'ost de Foix*, in the year 1272, there are the following explicite proofs of the fractions of fees, and of the limited service that was to be given for them.

Gaufridus de Baudreville, praesentavit servitium suum per xx dies pro dimidio feodo.

Johannes Morant dicit, quod debet servitium quarti unius militis.

Johannes de Falesia Scutifer dicit, quod tenet dimidium feodum loricae, pro quo debet, sicut dicit, auxilium exercitus & calvacatae quando per Normanniam levatur, aut servitium per xx dies eundo & redeundo; & si servitium dictorum xx dierum captum fuerit, auxilium praedictum non debet capi nec levare. See *Brussel, Usage général des fiefs*, p. 174.

In England, the fractions of fiefs are to be proved by almost every article in the *Black Book of the Exchequer*, and by a multitude of records in *Madox*; and to these authorities I refer the inquisitive reader.

(2) Du Cange, voc. Membrum Loricae. Craig Jus Feudale, lib. 1. Affises de Jerusalem, avec des Notes, par Thaumassière, p. 104.

(3) Cowel, Interpreter, voc. Fee Ferm. Spelman, voc. Feodi Firma. Du Cange, voc. Feudi Firma.

wandered ofteneft. The philosopher, who states sentiments of his own, must necessarily be mistaken at times, and is often to reason hypothetically. The author who would catch the general sense and opinions of the world, has no title to travel out of the right path; and, if his errors are frequent, he deserves to be contemptible. It is not so with the wanderings of the inventive and reflecting mind. Though they merit not approbation, they call for respect. The absurdities of the profound are the results of thought and of courage; those of the shallow are the fruits of mere weakness.

(4) See what is said by *Mr. Baron Dalrymple*, in the masterly sketch he has given of the history of the alienation of land, in his comprehensive and learned treatise concerning feudal property in Great Britain.

(5) Lyttleton, *Tenures*, sect. 96. Daniel, *Hist. de la milice Françoisse*, liv. 3.

(6) In the strictness of the feudal regulations, the estate of the vassal might be forfeited for his neglect of service. But, in general, it seemed equitable, that a fine only should punish his disobedience. *Brussel, tome 1. Affises de Jerusalem, avec des notes par Thaumassière*, p. 267. *Etablissemens de S. Louis*, liv. 1.

In England, in the Anglo-Saxon times, the forfeiture of the benefice or a fine, as in the other countries of Europe, was the punishment of the refractory vassal. The case was the same in the Norman period of our history. When the King's summons *ad habendum servitium*, was issued, it was expected that it would be complied with. The following fines and forfeitures for neglect of service are from records.

'The Abbot of Pershore was amerced, for not sending his knights to serve in the army of Camarun, as he was warned to do. William de Hastings fined in c marks, that he might have the king's favor, because he did not march at the king's summonce in the army of Normandy. William, bishop of Winchester, fined, or was amerced, in c marks, because he was not in the army of Gannok, nor had his service there. Matthew Turpin was disseised of his land and serjeanty in Winterlaw, because he was not in the king's service beyond sea. Duncan de Lafcels was disseised of three knight's fees and a half, because he was not with the king in his army of Scotland, with horses and arms. Roger de Cramavill was disseised of his land, because he did not go with the king in his voyage to Ireland. Malgar de Vavafur was disseised of his land, because he neither went with the king into Ireland, nor made fine for the voyage.' *Madox, Hist. of the Exchequer*, vol. 1. p. 662, 663. See farther *Baron. Anglic. book. 1. ch. 5.*

(7) Lyttleton, *tenures*, sect. 95. Du Cange, *Gloss. voc. Scutagium*.

(8) Daniel, *Milice Françoise*, liv. 3. Du Cange, voc. Ceterelli, Brabanciones, Brabanuni. Hume, *Hist* vol. 1. p. 308.

In France, it is said, that mercenaries were not employed in considerable numbers, till the reign of Philip the August. In England, it is thought, they were first known under Henry II. From the causes I mention, it is probable, that their use must have been familiar, and even extensive, in both countries, in earlier times.

(9) *Baronia Anglica*, book 1. ch. 6. Daniel, *Milice Françoise*, liv. 3.

(10) 'The *religious*,' says *Madox*, 'insisted that they held all their lands and tenements in frankalmoigne, and not by knight-service. This allegation was used with success by the abbot of Leycester, the prior of Novel-lieu without Staunford, and the abbot of Pippewell.' He cites the records which prove these frauds; and, in another place, appealing also to records, he has these words. 'The abbot of St. Austin had a great success in defrauding the king of his services. The abbot, it seems, had been feoffed to hold by the service of fifteen knights. Of these fifteen, he found means to conceal twelve, and answered to the king with three only.' *Baron. Angl.* p. 109. 114.

(11) A record of Henry III. says of Richard Crokell, 'Faciēt servitium tricesimae partis feodi j militis.' A record of the same prince, says of John Hereberd, 'Faciēt servitium sexagesimae partis unius feodi.' *Hist. of the Exchequer*, vol. 1. p. 650, 651. A variety of instances, to the same purpose, are to be collected.

On the supposition that the fractions of a fee beyond the eight parts, were not properly its members, the demands of service for the thirtieth and the sixtieth parts of a fee, must have been encroachments and severities, against the usual practice and usages of fiefs. If *service*, however, was required for such fractions, the assessment of a *scutage* on the tenants of knight-service would necessarily subject them in their proportion of payments. And the difficulties attending either the exaction of these services, or these payments, must have been infinite.

It is to be confessed, that the giving the thirtieth or the sixtieth part of the service of forty days, which was the usual term of the service of the military tenants, has a strange aspect. Perhaps the grants I mention were not regulated by the usual rules which directed fees. It is well known, that there were tenants in knight-service who were bound to give, not the usual service of forty days, but the attendance of themselves and their knights, both at home and abroad, at all times, and wherever it should be demanded. Even in this view, however, it is difficult to comprehend the regulations which must have governed the fractions of such fees.

But there were also vassals in knight-service whose stipulated time in the field and in expeditions was sixty days. See *Etablissements de S. Louis*, p. 23. There might thus, by the agreement of superiors and tenants, be stipulated services for one hundred, two hundred, or any definite number of days whatever. On this principle, it is easy to account for the fractions of fees which gave service for the thirtieth, the sixtieth, or any such proportions of a fee. In this state of the matter, however, the fractions I speak of in the text, though out of the common usage of fiefs, must have been *members* of the fee.

In the courtly and agreeable introduction to the History of Charles the Fifth, in the *View of the Progress of Society in Europe, from the subversion of the Roman Empire, to the beginning of the sixteenth century*, of which the scheme is so comprehensive, it is remarkable, that, amidst a wide variety of other omissions, there is not even the slightest consideration of knight-service, and the knight's fee. Yet these circumstances were of a most powerful operation, both with respect to government and manners. I make not this remark to detract from the diligence of an author whose laboriousness is acknowledged, and whose total abstinence from all ideas and inventions of his own, permitted him to carry an undivided attention to other men's thoughts and speculations; but that, resting on these peculiarities, I may draw from them this general and humiliating, yet, I hope, not unuseful conclusion, that the study and knowledge of the dark ages are still in their infancy. Are we for ever to revel in the sweets of ancient lore? And are we never to dig up the riches of the middle times?

CHAPTER IV.

(1) AMONG the disbursements from the Exchequer of the kings of England, there seems to have been much for the behoof of the knights of honor, whom they retained. This appears from a variety of records in *Madox*, and accounts for the high charges of the sheriffs for palfreys, saddles, gilt-spurs, peacocks-crests, silk toises, robes, gloves, steel-caps, swords, and lances. *Hist. of the Exchequer*, ch. 10.

A pension of L. 40 *per annum* was given by Edward III. to John Atte Lee, who had been invested with knighthood *in auxilium status sui manutenendi*; and that Sir Nele Loring might better maintain the honor of knighthood, he granted to him, and his heirs male, L. 20 *per annum*. An annuity of forty marks was given to Sir John Walfsh, by Richard II. to enable him to support this dignity. And other examples to this purpose are to be collected. *Ashmole on the Garter*, p. 34. See farther *Du Cange*, *voc. Milites Regis*, & *Dissert.* 5. *Jur l'Histoire de St. Louis*.

(2) Information concerning the knights retained by the nobles, is not to be found in that abundance which might be expected. In an account of the household expense of Thomas Earl of Leicester an. 1313, there are charged 70 pieces of blue cloth for his knights, and 28 for the esquires; 7 furs of powdered ermin, 7 hoods of purple, 395 furs of budge for the liveries of barons, knights, and clerks; 65 saffron-colored cloths for the barons and knights; and 100 pieces of green silk for the knights. In this account, there is also a charge of L. 623: 15: 5, as fees to earls, barons, knights, and esquires. *Stow, Survey of London, in Strype's edition*, vol. 1. p. 243. The total expenditure of the Earl of Leicester for one year, which was 7309, is valued by Mr. Anderson, at L. 21,927 of our money; and from the difference of living, or of the efficacy of money, his expense is made to be equal to L. 103,633. *Anderson, Hist. of Commerce*, vol. 1. p. 153. A board for the knights was one of the establishments of the fifth

Earl of Northumberland. *Household-book*, p. 310. See farther, *St. Palaye*, tome 1. p. 312. 364.

(3) 'In the nineteenth year of King Henry III.' says *Madox*, 'all the sheriffs of England were commanded, by close writs of the great seal, to make proclamation in their respective counties, that all they who held of the king in chief, one knight's fee or more, and were not yet knighted, should take arms and get themselves knighted, before the next Christmas, as they loved the tenements or fees which they held of the king.' *Baron. Angl.* p. 130. Proclamations of this kind were frequent.

(4) The writs to take knighthood expressed often, in their bosoms, the single knight's fee, as the estate entitling to knighthood; and they are useful as ascertaining, at different times, the value of the knight's fee. Thus, there are rolls of different dates which state the knight's fee at fifteen, twenty, thirty, forty, and fifty pounds of yearly valuation. A specification of such records may be seen in *Ashmole*, p. 33. and *Coke*, 11. *Institute*, p. 597. And, it is to be wished, that some intelligent person, who has access to the public offices, would publish a series of them. From such a work ingenious men might derive many advantages.

It is not to be conceived, that the knight's fee which was held of a subject, could entitle to knighthood; and yet many learned writers have expressed themselves to this purpose. It was the knight's fee *in capite*, or of the crown. This is illustrated by the writs of summons to take knighthood. And, of this writ, the record which follows, is an example, in the usual or regular form.

Rex Vicecomiti Norf. & Suff. salutem. Praecipimus tibi, quod, visis literis istis, per totam balivam clamari facias, quod omnes illi qui de nobis tenent in CAPITE feudum unius militis, vel plus, & milites non sunt, citra festum natalis Domini anno regni nostri decimo nono, arma capiant & se milites fieri faciant, sicut tenementa sua quae de nobis tenent diligunt. *Claus.* 19. H. 3. m. 25. dorso. ap. *Madox*, *Hist. of the Exchequer*, vol. 1. p. 510.

(5) In the reign of Henry III. the honor of Dudley, and

other lands of Roger de Sumery, were taken into the king's possession, with all the chattels found on them; because Roger did not come to be girt with the belt of knighthood. *Bar. Angl.* p. 131. For the same reason, the same prince seized the estates of Gilbert de Sampford and William de Montagu. And, in the twentieth year of Edward I. the sheriff of Kent was commissioned to seize the lands of such persons as did not appear to take knighthood, and to answer at the exchequer for the issues of them. *Hist. of the Exchequer*, vol. 1. p. 510.

The neglect of the sheriffs to distrain the lands of those who were entitled to knighthood, and refused it, was often to subject them in americiaments and punishments. And, what is remarkable, it appears that the command of the King's writ to his officers was at times accompanied with much severity, in case they should be negligent of their duty, or be tempted to connivance by bribes. This is illustrated by the evidence of the following writ to the sheriff of Northamptonshire.

Rex Vicecom. North. salutem. Praecipimus tibi quod, sicut teipsum & omnia tua diligis, omnes illos in baliva tua, qui habeant viginti libratas terrae, distringas, quod se milites faciendos curent, citra nativitatem Sancti Johannis Baptistae proxime futur. Sciturus pro certo, quod si, pro munere, vel aliqua occasione, aliquam relaxationem eis feceris, vel aliquem respectum dederis, nos ita graviter ad te capiemus, quod omnibus diebus vitae suae te senties esse gravatum. T. R. apud Wyndesor decimo quarto die Aprilis. *Claus. 28. H. 3. m. 12. dorso. ap. Ashmole*, p. 33. See also *Coke*, 11. *Inst.* p. 596.

Thus, by a strange fate, chivalry was to grow into an imposition and a tax. It is a wild circumstance, and shows the unfortunate counsels, and the perverse humor of Charles I. that this unamiable method of raising money was revived in his reign. An act of tyrannical insolence was thus founded upon the pretext of an ancient custom. Charles lived to abolish the oppression he had revived, and to ordain, that no person whatever should be compelled to take the order of knighthood, or to undergo any fine or trouble for not having taken it. *Stat. Car. I. an. 1640, cap. 20.*

(6) In the reign of Henry III. Bartholomew Fitz-William

gave v marks to have respite for taking knighthood; and Thomas de Molton, and several others, gave fines on the same account. *Hist. of the Exch. vol. 1. p. 509.* In the same reign, Robert de Menevil paid v marks for a respite of knighthood for two years; and Peter Fouden 48 shillings and 8 pence for the respite of three years. And, for a suspension from knighthood for the same period, John de Drokensford, in the days of Edward III. paid ten pounds. *Asbmole, p. 33.*

The refusing to take knighthood, when not punished by the seizure of the land, was subjected to fines and amerancements, which seem to have been arbitrary. In the time of Edward III. William, the son of Gilbert de Alton, paid twenty shillings for not appearing and receiving knighthood, according to the command of the King's proclamation; and the fine of forty shillings was set upon Simon de Bradeney, Thomas Trivet, and John de Neirvote. In the days of Henry IV. Thomas Pauncefoot paid four nobles for this neglect or contempt. *Asbmole, p. 34.* See farther *Baron. Angl. p. 131, 132.* *Camden, Introd. to the Britan. p. 246, 247.*

CHAPTER V.

SECTION I

(1) 'FIT interdum,' says the old dialogue concerning the exchequer, 'ut imminente vel insurgente in regnum hostium machinatione, decernat rex de singulis feodis militum summam aliquam solvi, marcam scilicet, vel libram unam; unde militibus stipendia vel donativa succedant. Mavult enim princeps stipendiarios, quam domesticos bellicis apponere casibus. Haec itaque summa, quia nomine scutorum solvitur, *scutagium* nuncupatur.' *Dial. de Scaccar. lib. 1. sect. 9.*

It was according to the number of their fees that the barons and tenants *in capite* were charged with *scutage*. Each knight's fee paid a determined sum to the King. And, as the vassals of the crown were charged with the full payments for their fees, they had recourse for compensation to their knights, from whom they claimed a scutage in proportion to the fees held and possessed by each. The king applied to his vassals, and his vassals applied to their tenants.

(2) It is commonly conceived, on the authority of Alexander de Swereford, an accurate observer of records, that, in England, there was no *scutage* or tax on knight-fees before the reign of Henry II. There is great probability, however, that the scutage preceded the age of this prince. It is to be thought that it was coeval with the use of *mercenaries*; but the period of the introduction of these is not, I believe, to be ascertained with precision.

In the second year of the reign of Henry II. there was a scutage for the army of Wales. It was assessed only on the prelates who held their lands in knight-service. They paid at the rate of xx s. for each knight's fee. There was, in the fifth year of the same reign, a second scutage for the army of Wales; and it was assessed not only on the prelates, but on

all the tenants by knight-service indiscriminately. They paid two marks for each knight's fee. In the thirty-third year of the same prince, there was a scutage for the army of Galway. It was xx s. *per* fee. Under Richard I. a scutage for Wales was assessed at c s. *per* fee. *Madox, hist. of the Excheq. vol. 1. p. 620. & seq.*

I know that the first mode of taxation in England was not the tax on knight's fees, of which I now speak. In the Anglo-Saxon times, Danegeld was an imposition on the landed property of England; and it was established with the consent of the people in the wittenagemot or national council. The earlier Norman princes appear also to have levied this tribute; but, in doing so, they probably exercised an illegal stretch of prerogative.

It was as mercenaries came to be employed, and as the spirit of the feudal institutions declined, that the scutage, or the tax on knight-fees, was to prevail. To this tax the *Magna Charta* gave a blow, which, in time, was to be decisive. The grant of money by the people succeeded to it. Subsidies, tenths, and fifteenths, were adopted, and continued long. The tax of Danegeld was only intended as a temporary expedient. The scutage led the way to a regular, a constant, and a formal method of taxation.

(3) Kennet, Collection of English Historians. *Madox, Hist. of the Exchequer. Hume, History of England.*

(4) It is an important circumstance, that the free gifts of cities and towns should have grown into taxes. In France, in the year 1231, the burgesses of S. Omer paid to S. Louis the sum of 1500 livres; and this payment was called a *donum*; a proof that it was not exigible as a duty. It is likewise evident, that, in France, such presents had been common, and had grown into taxes. *Brussel, Usage général des Fiefs, liv. 2. ch. 32.*

In England, it is clear, from a variety of records produced or appealed to in *Madox*, that the word *donum* must also have been used to express gifts that were free. *Hist. of the Excheq. ch. 17.* After mercenaries were known, the free gifts ceased to be free, and were termed *tallages*. And of tallages, both in

England and France, there are frequent examples in the books I have just cited. See farther *Du Cange, voc. Donum*.

As Kings received gifts which they were to convert into tallages, so the lords and superiors, who were honored with similar presents, did not fail to change them also into taxes or customs. *Du Cange, voc. Talliare*.

What is curious in a peculiar degree, the distant source of these usages, and the spirit of them too, while manners retained their simplicity, may be seen in the following words of *Tacitus*, of which this note may serve as an illustration.

‘*Mos est civitatibus, ultro auctarium conferre principibus vel armentorum vel frugum, quod pro honore acceptum, etiam necessitatibus subvenit.*’ *De Mor. Germ. c. 15.*

A distinction of great moment, as to civil liberty, deserves here to be remarked. During the pure times of the Gothic manners, the towns and boroughs made gifts at their own pleasure. When these manners were altered, they were tallaged at the pleasure of the crown and the barons. The former times were times of liberty; the latter of oppression.

When Dr. Brady, therefore, Mr. Hume, and a multitude of writers, enlarge on the low and insignificant state of the towns, and, treating their inhabitants as little better than slaves, infer thence, the original despotism of our government, they are only active to betray their inattention. It is strange, that men of genius and talents, should take so lame a survey of this subject. Of the two states or conditions of society which prevailed, they have no conception. They knew only the history of towns in their last situation, and could not perceive that the oppressions they saw had only a reference to the change of manners, and the breaking down of the feudal system, which affected, indeed, the administrations of princes, and the conduct of the nobles to their vassals, but did not alter the established form of our government.

From the *Magna Charta*, these authors presume to date the commencement of our liberty; while that monument is a proof, the most indubitable, of the encroachments which had been made upon liberty, since it was its great purpose to destroy them.

(5) 'Nullum *scutagium* vel *auxilium* ponatur in regno nostro, nisi per *commune consilium* regni nostri, nisi ad corpus nostrum redimendum, & ad primogenitum filium nostrum militem faciendum, & ad filiam nostram primogenitam semel maritandam; & ad hoc non fiet nisi rationale *auxilium*.' *Magna Charta, Reg. Joan. ap. Spelm. Cod. vet. p. 369.*

The *scutagium* was the tax on lands held in knight-service. The *auxilium* was any tax whatever. I am sensible, that, after the *Magna Charta*, there are instances of taxes which were levied without the concurrence of the great council of the nation; but these were violations of the constitution, and of liberty. For, from that period, the legal method of assisting government was by a parliamentary subsidy or assessment. The violent exactions of several princes, posterior to the *Magna Charta*, are, indeed, held out, by many authors, as descriptive of the despotism of our government. But of such authors, it is to be said, that they cannot distinguish our constitution from the administrations of our princes. The madness or the folly of a King may disfigure our government by wild, encroaching, and unhappy exertions; but from these we must infer nothing against those principles of liberty upon which it is founded.

(6) 'Simili modo fiat de *auxiliis* de civitate Londinensi. Et civitas Londinensis habeat omnes ANTIQUAS *libertates*, & *liberas consuetudines suas*, tam per terras quam per aquas. Praeterea volumus & concedimus, quod omnes aliae civitates, & burgi, & villae, & barones de quinque portibus, & omnes portus habeant omnes *libertates* & omnes *liberas consuetudines suas*, & ad habendum *commune consilium regni* de auxiliis assidendis.' *Mag. Chart. ap. Spelm. Cod. vet. p. 369.*

The *Magna Charta* was explanatory of the ancient law and custom, as well as correctory of abuses and tyranny. It is to be regretted, that, notwithstanding all which has been written concerning this invaluable record, there should yet, at this late hour, be desiderated a complete illustration of it. Much, I know, has already been executed towards this end; but, if

I am not greatly deceived, there remains still more to be done. And this, I imagine, will appear clearly to the philofophical reader, who will attend to it, in its connexion with history, law, and manners.

SECTION II.

(1) BRUSSEL, Usage général des Fiefs, liv. 2. ch. 6. Bacon, Discourse on the Government of England, part 1. p. 141. 264.

(2) Daniel, Milice François, liv. 4. Hume, History of England, vol. 2. p. 85. Barrington, Observations on the more ancient statutes, p. 379.

(3) Bacon, Discourse on the Government of England, part. 1. ch. 63. 71. Lord Lyttelton, Hist. of Henry II. vol. 3. p. 354.

(4) Père Daniel mentions an array in France in 1302, which called out ' tous les François nobles, & non nobles, de quelque condition qu'ils soient, qui auront âge de 18 ans & plus, jusqu'à l'âge de 60 ans.' He adds, ' Ce n'est pas à dire pour cela que tous marchassent en effet : Mais ceux que le roi commettoit pour faire ces levées, prenoient de chaque ville, & de chaque bourg & village le nombre d'hommes, & tels hommes qu'ils jugeoient à propos en ces occasions.'

Hist. de la Milice François, vol. 1. p. 57.

In England, ' in the sixteenth year of King Edward II. a commission issued out of the exchequer to Geoffrey de St. Quayntyn and John de Kalthorp, ordering them to raise speedily, in every town and place in the wapentake of Dykeryng, as well within the franchises as without, all the defensible men that were between the age of sixteen and sixty, as well of gentz d'armes as of foot, each man being duly arrayed, according to his estate, and to put the said men in array by hundreds and twenties, and being so arrayed, to lead them to the King at York, by such a day, to act against the Scots. The like commissions issued out of the exchequer, to

‘ John de Belkthorp and Geoffrey Stull, for the wapentake of Buckros, and to other persons, for other wapentakes.’ *Madox, Hist. of the Exchequer, vol. 2. p. 111.*

An example of an array, in the reign of Edward I. is also remarked by *Mr. Madox*, and it proceeded on writs from that prince to all the sheriffs of England*. It has been thought, that King John’s reign afforded the first instance of an array. But I think it highly probable, that arrays were prior to his age. Mr. Hume had met with no commission of array till the reign of Henry V. and this circumstance could not fail of leading him into mistakes. *Hist. of England, vol. 2. p. 321.*

Arrays for sailors were practised after the same method as for soldiers. The custom is still retained in *the pressing of seamen*. It is somewhat remarkable, that this illegal power is yet suffered to remain with the crown. If exerted as to soldiers, it would seem the highest tyranny. In apology for it, authors have said, that it is difficult to discover an expedient to answer its purposes, without greater danger to liberty.

(5) Daniel, *Hist. de la Milice Françoise, liv. 3. ch. 8.* Hume, *Hist. of England, vol. 2. p. 224.* Barrington, *Observations on the more ancient Statutes, p. 378. 380.*

I am disposed to believe, that it was chiefly the enormous dissoluteness and irregularity of manners introduced by the mercenaries, which deformed England so much in the reign of Edward I. that the ordinary judges were thought unable to execute the laws. This, it would seem, made Edward invent a new tribunal of justice, which had power to traverse the kingdom, and to inflict discretionary punishments on offenders. *Spelman. Gloss. voc. Trailbaston.* Yet a court so inquisitorial was a daring insult to a free nation, and infinitely a greater calamity, than all the disorders which prevailed. That country is miserable where the discretion of a judge is the law.

(6) Daniel, *Hist. de la Milice Françoise, liv. 4.* The archers were called *frank*, because they were free from taxes.

* In his writ to each sheriff, after having ordered the *array*, and expressed his meaning, he subjoins these words. ‘ Et hoc, sicut indignationem nostram vitare & te indempnem servare volueris, nullatenus omitas.’ *Hist. of the Exchequer, vol. 2. p. 104.*

(7) 3. Institute, p. 85. 87. Barrington on the more ancient Statutes, p. 379, 380.

(8) Bacon, Discourse on the Government of England, part. 1. p. 187. part 2. p. 60.

(9) 2. Institut, p. 3.

(10) Parl. an. 1. Hen. IV. de Deposit. Reg. Ricard: II. ap. Dec. Script. p. 2748.

(11) *Sir John Fortescue*, who resided some time in France with Prince Edward, the son of Henry VI. and who wrote there his excellent treatise, 'De Laudibus Legum Angliae,' describes, from actual knowledge, the exorbitant insolence of the French soldiery, and the miserable condition of the people. The picture he draws is too long for insertion in this place. But, though the features are strong, there is no reason to suspect the likeness. A native of Great Britain, in attending to it, must feel, in a lively degree, the happy advantages of our free constitution.

(12) 12. Charles II. cap. 24.

CHAPTER VI.

(2) **TACITUS** alludes to the historic songs of the old Germans, of which it was doubtless the purpose to record the migrations of tribes, and the exploits of chieftains. Of such songs, there were many in the eighth century; and Charlemagne was fond of committing them to his memory. *Eginbart, Vit. Car. Magn. c. 29.* Of the celebrated Attila, it is said, that he had constantly his poets in waiting, and that their verses in honor of his exploits, were a part of the entertainment of his court. *Priscus, p. 67, 68.* In all rude times, the character of the bard is in repute, and attended with distinctions. This character was not peculiar to our ancestors, as some writers have fancied; for we find it among the Greeks, and in other nations. It is peculiar to the early state of society, when the passions are warm, and language imperfect.

(2) It is a common notion, that the poets and Troubadours were only to be found in France and Italy. They were frequent, however, in all the countries of Europe; and they hastened, by their rivalry, the progress of literature.

Henry III. had a poet or Troubadour in his service, on whom he bestowed a regular pension. This circumstance is to be gathered from the following record. ‘Rex thesaurario & camerariis suis salutem. Liberate de thesauro nostro, dilecto nobis *Magistro Henrico versificatori* centum solidos, qui ei debentur de arreragiis stipendiorum suorum. Et hoc sine dilatione & difficultate faciatis, licet scaccarium sit clausum. T. R. apud Wodstoke xiiij die Julii.’ 35. H. 3. ap. *Madox, Hist. of the Exceq. vol. 1. p. 391.*

There is a commission of Henry VI. *De Ministrallis propter solatium regis providendis*, from which it is to be gathered, that the recitation or chaunting of songs, was an amusement in repute and fashion. *Rymer, 34. Henry VI.* The fifth Earl of Northumberland had his minstrels and players; and it was a qualification of his almoner, that he was ‘a maker of interludes.’ *Household-book, p. 44. 85. 93. 331. 339.*

The reader may consult farther on this subject, an author, who is not more distinguished by the soundness of his knowledge, than by the classical simplicity of his language, Mr. *Warton*, in his history of English poetry.

(3) *Histoire Littéraire des Troubadours*, par M. l'Abbé Millot.

(4) It is to be observed, that it was the married women chiefly who vied in the merits of their poets and Troubadours. An interesting figure, as well as the talent of rhyming, was necessary to the Troubadour; and it was his constant aim to gain the heart or the person of his patroness. Perhaps it would be to refine too much, if one should consider the present infidelity of the married women in France, as a relict of this usage, and the corruptions of chivalry.

Of the Duke of Orleans, the brother of Charles VI. there is a pleasant notice in Brantome, which illustrates very aptly the profligate manners introduced by siefs and chivalry.

‘C'étoit un grand débaucheur de dames de la cour, & des plus grandes: Un matin en ayant une couchée avec lui dont le mari vint par hazard pour lui donner le bon jour, il cacha la tête de cette dame, & lui découvrit tout le corps, la faisant voir & toucher nue à ce mari à son bel aise, avec défense sous peine de la vie d'ôter le linge du visage . . . Et le bon fut que le ma i étant la nuit d'après couché avec sa femme, lui dit que M. d'Orléans lui avoit fait voir la plus belle femme nue qu'il eut jamais vue; mais, quant au visage, qu'il n'en sçavoit que dire, ayant toujours été cachée sous le linge.’ It is added, ‘De ce petit commerce, sortit ce brave & vaillant bâtard d'Orléans, Comte de Dunois, le soutien de la France & le fléau des Anglois.’ *Brantome*, ap. *St. Foix*, *Ess. histor. vol. 1. 319.*

(5) See, in St. Palaye, le voeu du Paon ou du Faïfan, & les Honneurs de la Cour.

(6) *Histoire des Troubadours*, tom. 1. p. 11.

(7) This invention is ascribed to William the ninth Earl of Poitou. ‘Ce fut un valeureux & courtois chevalier, mais grand trompeur de dames.’ *Hist. des Trou. tom. 1. p. 4. 7.*

(8) Le Moine de Foffan, a Troubadour, composed a

song, in which he thus speaks of the *Virgin*. 'Je suis devant
 ' elle à genoux, les mains jointes, comme son très humble
 ' esclave, plein d'ardeur dans l'attente de ses regards
 ' amoureux, & d'admiration dans la contemplation de son
 ' beau corps & de ses agréables manières.' *Hist. des Troub.*
tom. 2. p. 225.

(9) Deudes de Prades, a troubadour, has this sentiment:
 ' Je ne voudrois pas être en Paradis, à condition de ne point
 ' aimer celle que j'adore.' *Hist. de Troub. tom. 1. p. 321.*

(10) It was said wittily, but not without reason, by the
 Troubadour Raimond de Castelnau: 'Si Dièu sauve pour bien
 ' manger & avoir des femmes, les moines noirs, les moines
 ' blancs, les Templiers, les Hospitaliers, & les Chanoines
 ' auront le Paradis; & Saint Pierre & Saint André sont bien
 ' dupes d'avoir tant souffert de tourments, pour un paradis qui
 ' coute si peu aux autres.' *Hist. des Troub. tome 3. p. 78.*

It was in consequence of the depraved manners of the clergy,
 that, in England, the personage who, in the season of
 Christmas festivity, was to preside in the houses of the nobility
 over riotous mirth and indecent indulgencies, was termed
 'the abbot of misrule.' This character appears in the establish-
 ment of the fifth Earl of Northumberland, an. 1552. *Household-*
book. p. 344. See also *Dr. Percy's* notes to this record.

In Scotland, the same character or personage seems to have
 been still more common, and even so familiar in the lowest
 ranks of civil life, that he grew to be a nuisance in towns and
 boroughs. His appellation there was, 'the abbot of unreason';
 and, when the severity and starchness of the reformation soured
 and deformed this country with the hypocritical preciseness,
 and the dismal formality which have not yet left it, an act of
 parliament was thought expedient to suppress and abolish an
 office so highly licentious and profane. *6. Parl. Marry 1555.*

(11) Giannone, History of Naples, vol. 1. p. 283. 446.
 Mezeray, Moeurs de l'Eglise du xi. siècle. Du Cange and
 Spelman, voc Focaria. St. Palaye sur l'anc. cheval. partie 5.

(12) Joinville, Histoire de S. Louis, p. 32.

(13) 'Si quis dixerit conjugii, malam licentiam dando,
 ' vade & concumba cum tali homine; aut si dixerit alicui

‘ homini, *veni* & fac cum muliere mea carnis commixtionem;
 & tale malum factum fuerit, & caussa probata fuerit, quod
 per ipsum maritum factum sit, ita statuimus, ut illa mulier,
 quae hoc malum fecerit & consenserit, moriatur, secundum
 antequam edictum; quia nec talem cussam facere, ne celare
 debuit.’ *Leg. Longobard. p. 1096. ap. Georgisch, Corp.
 Jur. Germ. Antiq.*

This law evinces the antiquity and the heinousness of the
 practice alluded to; but, in posterior times, the fashion was
 thought of more lightly, and too prevalent to be punished
 with severity. See some curious information in *Du Cange*,
voc. Cugus, Cucucia, Licentia Mala, Uxorare.

(14) The *Gynaecium*, by which the apartment was ex-
 pressed where the women were kept to work at the needle, and
 other domestic employments, came to signify a brothel, or
 place of debauch, from the use that was made of it. *Du Cange*,
voc. Gynaecium. Over the doors of a palace which belonged
 to Cardinal Woolsey, there was written, *Domus Meretricum
 Domini Cardinalis.* It has been said, indeed, that *Meretrices*
 stood of old for *Lotrices*; and the advocates for the chastity of
 the Cardinal contend, of consequence, that this inscription
 only served to direct to his *laundry*. But, I am afraid, that
 this plea will not hold. For the terms were convertible; and
 the women who acted in the laundry, and who were employed
 in working in linen and tapestry, were in general the con-
 venient mistresses, to whom their lords paid a temporary
 worship. It was from some mistakes of this sort, that, in the
 reign of Elizabeth, there was an order, that no *laundresses*,
 nor women called victuallers, should come into the gentlemen’s
 chambers of Gray’s Inn, ‘ unless they were full forty years of
 age.’ *Dugdale, Orig. Jurid. p. 286.*

(15) Ranulph. de Hengham, *Summa Magna, cap. 2.* and
Selden’s notes to it.

(16) In the *Britannia*, in the description of Surrey, there
 is this notice. ‘ Hamo de Catton held Catteshull-manour by
 being *Marshal of the whores* when the King should come
 into these parts.’ *Camden, vol. 1. p. 181.* In the reign of
 Edward II. Thomas de Warblynton held the manour of Shirefeld

in Hampshire, of the King in chief, by the serjeanty of being *Marshal of the hoves* in the King's household, and of dismembering malefactors condemned, and of measuring the galons and bushels in the King's household. The words of the record are, 'Tenuit in capite, die quo obiit de Domino E. nuper rege Angliae patre regis nunc, per fargantiam effendi *Marescallus de meretricibus in hospitio regis*, & dismemberare malefactores adjudicatos, & mensurare galones & bussellos in hospitio regis.' *Pass. Fines 1. Edw. III. Rot. 8. a. ap. Bar. Angl. p. 242.*

(17) The vassal forfeited his estate in the following cases :
 ' Si dominum cucurbitaverit (id est, uxorem ejus stupraverit,) vel turpiter cum ea luserit. Si cum filia domini concubuerit, vel nepte ex filio, vel cum nupta filio, vel cum sorore domini sui *in capillo*, id est, in domo sua manente.' *Lib. Feud. ap. Spelman Gloss. voc. Felonia.*

The words *in capillo*, allude to a peculiarity in the Germanic and Gothic manners, which deserves to be explained. All virgins wore their hair uncovered, and with ornaments. Married women concealed their hair, and covered their heads. The ornaments for the hair were many. And, in the progress of time, it was not the hair of their heads only, that the women were curious to deck out. The mother of the fair Gabrielle being assassinated, her body lay, for many hours, exposed, in a public manner, to the spectator, and in a posture so exceedingly *indecent*, that it discovered a strange mode or affectation. In this last fashion, which was probably introduced in the decline of chivalry, the ornaments were ribands of different colors; and, it seems to have been peculiar to women of rank and condition. *St. Foix, Ess. Hist. vol. 4. p. 82.*

In general, it merits remark, that the veneration for their hair entertained by the Germans and their posterity, was very great, and gave rise to a multitude of customs. It was a mark of refined attention in a person to present a lock of his hair to a friend on saluting him; it was to say, that he was as much devoted to him as his slave. To take away the hair of a conspirator, was one of the most afflicting parts of his punishment;

To give a slave the permission of allowing his hair to grow was to offer him his freedom. *Du Cange and Spelman, voc. Capilli.* William Earl of Warrenne, in the age of Henry III. granted and confirmed to the church of St. Pancrace of Lewes, certain land, rent, and tithe, and gave seifine of them 'per *capillos capitis sui, & fratris sui Radulfi de Warr. quos abscidit de capitibus suis cum cultello ante altare.*' *Mag. rot. 24. Henry III. ap. Madox. Hist. of the Excheq. Prefatory Epist. p. 30.* This must have been a compliment in the highest style of flattery; and the clergy of St. Pancrace must have been enchanted with the politeness of this nobleman.

There seems something wild and romantic in such usages; yet they produced the locket and the hair-ring of modern times; and we smile not, nor are surpris'd, that these should teach us to employ our moments of softness in melancholy recollections of absent beauty, or departed friendship. What is distant and remote, affects us with its ridicule. What is present and in practice, escapes our censure. In the one instance, we act with the impartiality of philosophers; in the other, we are carried away by our passions and our habitudes.

(18) *St. Foix, Est. Histor. vol. 1. p. 102. Stow, Survey of London, in the Edition of Strype, vol. 2. p. 7.*

(19) There is evidence of public or licensed stews in England in *Stat. 2. Henry VI. cap. 1. in Corwel, voc. Stews, Spelman, voc. Stuba, and in Coke, 3. Institute, cb. 98.* Henry II. gave his privilege to the stew-houses of Southwark, according to the 'old customs which had been used there time out of mind.' And patents confirming their liberties were granted by other princes. *Stow, in Strype's edit. vol. 2. p. 7.* In Normandy, there was a *custos meretricum*; and this officer seems to have been known in the different countries of Europe. *Du Cange, voc. Custos meretricum, & Panagator.*

It has frequently been a subject of inquiry among politicians, whether public stews, under proper regulations, with a view to the health of individuals, and the peace of society, be not an advantageous institution. In some states of Europe, a tolerated or authorized prostitution is known at this day. And, by the Code of Gentoo laws, this institution was acknowledged as

salutary; and prostitutes forming a community were, in Hindostan, an object of care to the government. I avoid, however, to enter into a question of such infinite delicacy. It is dangerous in a state to give the slightest stab to morality. Yet, I cannot but observe, that, in the most cultivated nations, there are laws and regulations which wound morality more severely than could be done by an authorized prostitution, and with less of utility to mankind.

(20) The licensed stew-houses in the reign of Henry VII. were the Bear's-head, the Crof-keys, the Gun, the Castle, the Crane, the Cardinal's-hat, the Bell, the Swan, &c. *Sir Edward Coke* has preserved this information, 3. *Institute*, p. 205. In the time of Edward VI. Bishop Latimer complained and preached to the following tenor. 'There is more open whoredom, more *stud* whoredom, than ever was before. For God's sake, let it be lookt to.' *Stow*, in *Strype's edit.* vol. 2. p. 8.

(21) 3. *Institute*, p. 206.

(22) *Spelman* voc. *Stuba*, 3. *Institute*, p. 205.

C O N C L U S I O N.

I Presume not to think that I have exhausted the topics I treat in this volume. For, what subject does not stretch to infinity? But it has been my particular care to go back to the sources, and to express the beginnings of law, government, and manners; and I have been solicitous to open up, with a due advantage, the original ideas, which I have ventured to strike out, and which, perchance, may attract the notice of the ingenious and the learned. Yet, when I consider what many great men have written before me concerning human affairs, I know not, whether it ought to flatter my pride, or to fill me with shame, that I, too, have yielded to my reflections and my sentiments; and, though in the obscurity of a private station, and in the fervor of youth, have presented to my fellow-citizens this aspiring fruit of my studies and ambition.