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A N *C. f. 29.*
H I S T O R I C A L
D I S S E R T A T I O N
Lauderdale CONCERNING THE *History &c. A.*
A N T I Q U I T Y
O F T H E
E N G L I S H
C O N S T I T U T I O N .

by Gilbert Stuart L. D.

Si l'on veut lire l'admirable ouvrage de Tacite sur les mœurs des Germains, on verra que c'est d'eux que les Anglois ont tiré l'idée de leur gouvernement politique. Ce beau système a été trouvé dans les bois.

MONTESQUIEU.

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THERE is no subject more interesting to a native of Great Britain, and none that leads to discoveries more curious or important, than an inquiry concerning the antiquity of our laws and constitution. Our historians, however, have very seldom attended to it. They describe the conduct of generals, the valour of armies, and the consequences of victory and defeat; but the manners and way of thinking of our ancestors they have neglected, as unworthy of remark, or incapable of ornament.

Our antiquaries have displayed much critical knowledge, but the spirit of customs and of laws escapes their penetra-

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tion. They often throw together their materials without arrangement ; they are often unable to reason from them ; and, forgetting that the human mind advances in a progress, they ascribe to rude ages the ideas and sentiments of their own times.

The foundation and principles of the Anglo-Saxon constitution, are to be found, it is thought, in the institutions and manners of the ancient Germans ; and it is in these that the author of the following dissertation has endeavoured to investigate them. Nations renounce not all at once the ideas and usages to which they have been accustomed ; and though some differences may be introduced by a conquest, or a change of situation, yet the fabrics of policy that are then erected must bear some resemblance to former establishments.

A

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A peculiarity, which he had occasion to observe concerning property among the Germans, suggested to him the leading sentiments that he has employed in this essay. From the conceptions of our ancestors in relation to this article, from the spirit of independence, and the connection of Prince and Retainer, he has been enabled (if he does not deceive himself) to exhibit in a new light that system of laws, and those constitutions, which the conquerors of Rome established in the countries where they settled.

But though some things that are new, and perhaps not unimportant, may occur in these papers, yet will there be much necessity for the candour and indulgence of the reader. The subject is of great dignity ; a dark antiquity has removed it from remark ; and many writers of character have added to its ob-

b security

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scurity by their glosses and conjectures. The author is conscious of the little force and ability with which he has been able to conceive and to express his sentiments; and he delivers them to the public with fears and wishes.

Edinburgh, April 1768.

C O N-

C O N T E N T S.

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A N

HISTORICAL DISSERTATION

Concerning the ANTIQUITY of the
ENGLISH CONSTITUTION.

PART I.

Of the Ancient Inhabitants of Ger-
many and Britain.

SECTION I.

A general description of the Germans.

NO circumstance in the history
of mankind is more striking
than the progress of manners.
When hunting and fishing are the me-
thods which men employ to maintain
themselves, society consists of a few in-
dividuals,

dividuals, whom their necessities have taught to unite. A little experience informs them of the places most favourable for game at particular seasons; and these, rendered commodious by the erection of huts, acquire an additional value by being frequently visited. When fixed to a certain territory, their subsistence becomes less precarious, their views are extended, and improvements are made. The prey which at first they surpris'd by dexterity, or bore down by force, they secure by art. Animals are tamed, and the pastoral way of life commences. In this age of manners, they pasture their cattle on the grounds occurring to them; present possession being the title by which they occupy fields in which none acknowledge a property. Convenience increasing with the means of life, population advances, and the art of agriculture is discovered.

The general spirit of the age of agriculture is very different from that of those which preceded it. When men
live

live by game, they confine their attention, and divide their numbers, to procure it. In an age, however, when advantages result from their union, they herd into bodies, and subject themselves to laws. Tribes are then formed, and, sensible of their strength and resources, turn their views around them. Emulation, and the pride of superiority, induce them to contend with each other: wars begin; and men carry to the highest pitch the virtues of valour, and love of liberty.

At this state of society the ancient Germans had arrived; and, unattracted by all those objects which are the care of a polished nation, the extent of territory, the improvement of arts, or the enlargement of commerce, they placed at once their business and amusement in scenes of death and destruction. Amidst the heat and alarm of battles, they fought that renown, which, considered alone as honourable, was the end their education consulted, and their ambition aspired to. The chace, the pass-

4 *Of the Ancient Inhabitants* Part I.

ing of rivers loaded with arms, the bearing of cold, fatigue, and hunger, were the hard lessons of their infancy and youth; arms, bloodshed, and devastation, the first objects (1) to which they were accustomed. Hardened in their bodies, bold and magnanimous in their tempers, they were conducted, at the military age, to the public assemblies of their country; and there, having dedicated their lives to military glory, were adorned (2) with the shield

(1) *Cæsar de Bell. Gall. lib. 6. c. 21.* Vita omnis in venationibus, atque in studiis rei militaris consistit: ab parvulis labori ac duritiæ student. *Tacit. de Mor. Germ. c. 4.* Tolerare frigora atque inedia cælo solve assueverunt. *Mela, lib. 3. c. 3.* Maximo frigore nudi agunt, antequam puberes sint: et longissima apud eos pueritia est. — Nandi non patientia tantum illis, studium etiam est. *Tacit. hist. lib. 4. c. 12.* Erat et domi delectus eques, præcipuo nandi studio, arma equosque retinens, integris turmis, Rhenum perumpere.

(2) *Tacit. de M. G. c. 13.* Sed arma sumere non ante cuiquam moris, quam civitas suffecturum probaverit. Tum in ipso concilio vel principum aliquis, vel pater, vel propinquus, scuto frameaque juvenem ornant. Hæc apud illos toga, hic primus juventæ honos: ante hoc domus pars videntur, mox reipublicæ.

and

Sect. I. *of Germany and Britain.* 5

and the *framea*, and admitted to an intimacy and level with all the warriors of their tribe. The rank conferred on them, the emulation of the acts of their ancestors, which on this occasion would be set before them, the honour of their nation, the rivalry of their equals, the hopes of renown, all conspired to inflame their minds with the most generous ardour to excel.

In this critical season, when their minds beat highest with the prospects of glory, the custom of their country ranged them under the banners (3) of some

(3) *Cæsar de B. G. lib. 6. c. 23.* Civitatibus maxima laus est, quam latissimas circum se vastatis finibus solitudines habere. Hoc proprium virtutis existimant, expulso agris finitimos cedere, neque quemquam prope audere consistere: simul hoc se fore tutiores arbitrantur, repentinæ incursionis timore sublato. — Latrocinia nullam habent infamiam, quæ extra fines cujusque civitatis fiunt; atque ea juventutis exercendæ, ac desidæ minuendæ causa fieri prædicant. *Mela, lib. 3. c. 3.* Bella cum finitimis gerunt, causas eorum ex libidine accerfunt: neque imperitandi prolatandique quæ possident, (nam ne illa quidem enixe colunt), sed ut circa ipsos quæ jacent vasta sint. Jus in viribus habent, adeo ut ne latrocinii quidem pudeat, —

distinguished

distinguished hero, who led them forth to signalize their impetuous courage by committing spoil and robbery on the adjoining tribes. Here, the ambitious youth, learning obedience to commanders, tempered their ferocity; here, practised in success, or grown wise from defeat, were formed those generals to whom a free and independent people could submit their fortunes. Spreading desolation and solitude around the territories of their nation, they extended its renown, and their own; and a mutual confidence being produced betwixt soldiers and commanders, they became fitted for more illustrious exploits.

Every mark of honour, and tribute of praise, which a rude people can invent, were lavished on the memorable few, who, braving superior dangers, had risen to the highest estimation. To be most respected at entertainments, to drink the ofteneft, to have their acts recited (4) to an applauding multitude, to receive

(4) *Mela, lib. 2. c. 1.* Inter epulas quot quisque interfecerit

receive the greatest portions of territory, to speak first in the public councils of the state, to be surrounded (5) with the greatest number of wives; these were the distinctions they attained. Nor was their fame confined to their own tribe: foreign ambassadors (6) crowded to give them honours and presents. But to be constantly attended by a chosen band (7) of retainers, who, forgetful

interfecerit referre, lætissima et frequentissima mentio: binisque poculis, qui plurimos retulere, perpotant. Is inter Achetas honos præcipuus est. See also *Herodot. lib. 1. & 4.*

(5) *Tacit. de M. G. c. 11.* — prout nobilitas, prout decus bellorum, prout facundia est, audiuntur, — *Id. c. 18.* — Singulis uxoribus contenti sunt, exceptis admodum paucis, qui non libidine, sed ob nobilitatem, plurimis nuptiis ambiuntur.

(6) *Id. c. 13.* Nec solum in sua gente cuique, sed apud finitimas quoque civitates id nomen, ea gloria est, si numero ac virtute comitatus emineat; expectantur enim legationibus, et muneribus ornantur. — *Id. c. 15.* Gaudent præcipue finitimarum gentium donis, quæ non modo a singulis, sed publice mittuntur: electi equi, magna arma, phaleræ, torquesque.

(7) *Id. c. 13.* Magna et comitum æmulatio, quibus primus apud principem suum locus: et principum, cui

ful of every other tie, were attached to their interest with the most unshaken fidelity, was their chief dignity. These were the guardians of their persons and reputation, and shared equally their prosperity and toils. Had a chieftain met death in the field, his followers, thinking it mean (8) to survive him, and seek glory under another master, turned their swords against themselves, making it a point of honour to give that last proof of their attachment and affection.

The greatest infamy, on the contrary, was connected with cowardice. A peo-

eui plurimi et acerrimi comites. Hæc dignitas, hæ vires, magno semper electorum juvenum globo circumdari, in pace decus, in bello præsidium. Cæsar, lib. 6. c. 15. — eorum ut quisque est genere copiosiusque amplissimus, ita plurimos circum se ambactos clientesque habet.

(8) *Cæsar, lib. 3. c. 22. — Soldurios adpellant: quorum hæc est conditio, uti omnibus in vita commodis una cum his fruuntur, quorum se amicitia dederint: si quid iis per vim accidat, aut eundem casum una ferant, aut sibi mortem consciscant. Neque adhuc hominum memoria repertus est quisquam, qui, eo interfecto, cujus se amicitia devovisset, mori recusaret.*

ple

ple to whom nothing appeared valuable but the military virtues, to whose interest nothing was more prejudicial than the want of resolution, and to whom every art and science which add convenience and embellishment to life, were unknown, could not but esteem it as the greatest crime. Arraigned before their civil tribunal by the public magistrate, the timorous and unwarlike, covered with shame, and glowing with confusion in the presence of so many illustrious warriors, were doomed to the most inglorious death, as a burden (9) and nuisance to the state.

Nor was it a small incitement to their valour, that their armies consisted of families and relations, who confederated into particular bodies. For the force, not only of natural affection, but the defects even of civil government in those early ages, linked individuals in the clo-

(9) *Tacit. de M. G. c. 12. Licet apud concilium accusare quoque, et discrimen capitis intendere. Distinctio poenarum ex delicto. Proditores et transfugas arboribus suspendunt; ignavos, et imbelles, et corpore infames, cœno ac palude, injecta insuper crate, mergunt.*

B

fest

fest union, for the purposes of defence and revenge. Their wives too, and children (10), following to the camp, surrounded them in waggons: so that the loss of a battle involved in it the loss of every thing they valued. Impelled by the most powerful motives, no courage was more impetuous than that of the Germans; no enemy more terrible.

But the circumstances which show, and perhaps indulged most their ferocious and independent character, were the religious sentiments they entertained. On this head it may be proper to say something of the qualifications intitling to their *paradise*, and of its (11) pleasures.

The

(10) *Tacit. de M. G. c. 7.* Quòdque præcipuum fortitudinis incitamentum est, non casus, nec fortuita conglobatio turmam aut cuneum facit, sed familiæ et propinquitates, et in proximo pignora: unde feminarum ululatus audiri, unde vagitus infantium. *Cæsar, lib. 1. c. 51.* — Omnem aciem iuam rhedis et carris circumdederunt; ne qua spes in fuga relinqueretur. Eo mulieres imposuerunt, —

(11) The reader who would be fully informed on this subject, may consult the *Edda Island.*; *Sax. Gram. lib. 1. & 2.*; *Bartholin. de Caus. Contemp. a Dan.*

The free-born, if they fell by the sword, were to be admitted to the hall of *Odim*, the seat of the blessed. Slaves, (12) unless they had voluntarily killed themselves from the intention of accompanying their masters, were entirely excluded from it. Nor had those (13) who died of age or disease any claim to that privilege. Had a celebrated warrior fallen in battle, or put himself to death in the gaiety and exultation of his spirit, his friends often slew themselves from an ambition to attend him; it being accounted most glorious to go to O-

Dan. Mort. lib. 1. c. 4. et lib. 2. c. 7. & 10.; *Keyster, Antiq. Select. Septent. et Celt. c. 2.* and *Pelloutier, Histoire des Celtes, tom. 2.*

(12) Non humile obscurumve genus, non funera plebis Pluto rapit, vilesq; animas, sed fata potentum Implicat, et claris complet Phlegethonta figuris.

Saxo Gram. lib. 2.

(13) Hence it was said of the Cimbri, and it is applicable to all the German nations, "Cimbri læti perire in bello, in morbo cum lamentis;" *Paul. Diac. Hist. Misc. lib. 5.*

din in a croud. Even the women (14) were for ever to be shut out from happiness, if they mounted not the piles, and were consumed with the bodies of their husbands. Odin himself came forth to meet those who had died nobly, or deputed his virgins (15) to that purpose. In proportion to the number and dignity of those slain by a hero, was the honour of his reception and treatment; for all those who had sunk under his prowess, whether kings or nobles, were to act as his slaves and attendants. To what a height must the

(14) *Mela, lib. 2. c. 2.* Ne feminis quidem segnis est animus. Super mortuorum virorum corpora interfici simulque sepeliri, votum eximium habent: et quia plures simul singulis nuptæ sunt, cujus id sit decus, apud judicatos magno certamine affectant. Moribus datur, estque maxime lætum, cum in hoc contenditur, vincere. Mœrent aliæ vocibus, et cum acerbissimis planctibus efferunt. *Cicero, Tuscul. Disput. lib. 5. c. 27.* Mulieres vero in India, cum est cujusvis earum vir mortuus, in certamen judiciumque veniunt, quam plurimum ille dilexerit; plures enim singulis solent esse nuptæ. Quæ est victrix, ea læta, prosequentibus suis, una cum viro in rogum imponitur: illa victa mœsta discedit.

(15) *The Valkyriæ*: See Bartholinus, as above cited.

virtues

virtues of valour and love of liberty, have prevailed in those nations!

Swine's flesh was the food with which they regaled themselves in this blissful region: ale or mead, from the skulls of their enemies, was their delicious beverage: and a total oblivion of past misfortunes allowed them the fullest enjoyment of these pleasures; pleasures, suggested by the intemperance, and passion of revenge, inseparable from the state of the barbarian. To drink wine, and (16) to know what passed on the earth, were the prerogatives of Odin. When not employed in feasting, they exercised themselves in combat. The *valhalla*, or hall, had 550 gates, and out of each 800 heroes might sally to the place of action, where they ambi-

(16) The manner in which Odin was supposed to receive his intelligence is extraordinary: "Corvi duo ejus insidentes humeris, in aures ipsi susurrant omnia quæ vident vel audiunt. Hi vocantur Hugin *cogitatio*, et Munninn *memoria*. Hos primo diluculo emittit Odinus, ut totum pervolent mundum, et circum tempus prandii revertantur; inde de multis certior redditur;" *Edda Island.* 34. ap. Rudbeck, Atlant. tom. 2. p. 352.

tiouly

tiously emulated the exploits of their past lives. And the slain in these encounters, being immediately reanimated by magical incantation, battles, fought without hurt, were renewed without number. Such, they imagined, were the pleasures of the happy! So natural is it for a rude people to fancy, that the joys (17) which they loved when alive, should be their reward after death.

When attending to these matters, and to the form of government of the Ger-

(17) The Laplanders, (*vid. Scheffer. Lapon.*), and other barbarous nations, are so convinced of this notion, that they bury his bow and arrows with the defunct. How beautifully does the pencil of Virgil illustrate this thought, in his description of Elysium!

Pars in gramineis exercent membra palæstris;
Contendunt ludo, et fulva luctantur arena:
Pars pedibus plaudunt choreas, et carmina dicunt.

* * * * *

Stant terra defixæ hastæ, passimque soluti
Per campum pascuntur equi. quæ gratia curruum
Armorumque fuit vivis, quæ cura nitentis
Pascere equos, eadem sequitur tellure repostos.

Æneid. lib. 6.

mans,

mans, one ceases to (18) wonder at the encomiums which ancient authors have paid to their valour. The Romans had never attacked an enemy which opposed them with more firmness, or reduced their armies to greater extremities. With every other people they contended for dominion or glory: with the Germans they fought for safety. The most illustrious commanders, with legions inured to war, and practised in discipline,

(18) *Seneca, lib. 1. de Ira, c. 11.* Germanis quid est animosius? quid ad incursum acrius? quid armorum cupidius? quibus inascuntur, innutriunturque; quorum unica illis cura est, in alia negligentibus. Quid induratus ad omnem patientiam? ut quibus magna ex parte non tegumenta corporum provisâ sunt, non suffugia adversus perpetuum cœli rigorem. *Mela, lib. 3. c. 3.* — Immanes sunt animis atque corporibus, et ad infinitam feritatem vult utraque exercent, bellando animos, corpora adfuetudine laborum. *Quintilianus, declam. de Cimbris:* — Nec minus animorum immanitate, quam corporum bellis suis proximi. *Florus, lib. 2. c. 4.* — Animi ferarum, corpora plus quam humana erant. And *Lucan, lib. 1.*
— Certe populi, quos despicit arctos,
Felices errore suo, quos ille timorum
Maximus, haud urget leti metus; inde ruendi
In ferrum mens prona viris, animæque capaces
Mortis, et ignavum reditura parcere vitæ.

were

were unequally matched with bands of heroes, who, despising every appearance of danger, and every hope of life, fought only an honourable death. I appeal (19) to the struggles of Marius in Italy, to those of Cæsar in Gaul, and those of Drusus, Tiberius, and Germanicus, in Germany. I appeal to the ex-

(19) *Tacitus, de M. G. c. 37.* gives the following short abstract of German history: "Sexcentimum et quadragimum annum urbs nostra agebat, cum primum Cimbrorum audita sunt arma, Cæcilio Metello ac Papirio Carbone coll. Ex quo si ad alterum Imperatoris Trajani consulatum computemus, ducenti ferme et decem anni colliguntur. tamdiu Germania vincitur. Medio tam longi ævi spatio, multa invicem damna. Non Samais, non Pœni, non Hispaniæ, Galliæve, ne Parthi quidem sæpius admonere; quippe regno Arfacis acrior est Germanorum libertas. Quid enim aliud nobis quam cædem Craffi, amisso et ipse Pacoro, infra Ventidium dejectus oriens objecerit? At Germani Carbone, et Cassio, et Scauro Aurelio, et Servilio Capione, M. quoque Manlio fufis vel captis, quinque simul consulareis exercitus populo Romano; Varum tresque cum eo legiones etiam Cæsari abstulerunt. Nec impune C. Marius in Italia, divus Julius in Gallia, Drusus, ac Nero, et Germanicus, in suis eos sedibus perculerunt. Mox ingentes C. Cæsaris minæ in ludibrium versæ. Inde otium, donec occasione discordiæ nostræ et civilium armorum, expugnatis legionum hibernis, etiam Gallias affectare: ac rursus pulsi inde, proximis temporibus triumphati magis quam victi sunt."

ample

ample of the Romans; who, at a time when their power was highest, infringed their constitution from the dread of these barbarians, making it a law, that the priests (20) and superannuated should not be exempted from bearing arms in the event of a German or Gaulic tumult.

What seems most remarkable, even superstition, which at all times, but more especially in rude and ignorant ages, takes so durable a hold of the human mind, had not force to make them think with respect of their deities. So strong was their martial spirit and independence! Some German nations told Cæsar (21), that they were inferior only to the *Suevi*, "to whom even the immortal gods were unequal." And a warrior in *Saxo* (22) scruples not to challenge

(20) *Plutarch. in vit. Marcel. et Camil.*

(21) *Cæsar, lib. 4. c. 7.* — Sese unis Suevis concedere; quibus ne dii quidem immortales pares esse possint: —

(22) Et nunc ille ubi sit, qui vulgo dicitur *Othin* Armipotens, uno semper contentus oculo?

C

Si

challenge his supreme deity to combat.

Animated by example, and directed by the institutions and religion of his country, the German turned the whole power of his mind, to overcome those terrors which are felt so naturally at the thoughts of dissolution, and, filled at the same time with the highest notions of liberty and independence, was capable of acts of the most desperate valour: while in polished times (23) men stirred

Si potero horrendum Friggæ spectare maritum,
Quantumcunque albo clypeo fit tectus, et altum
Flestat equum, *Lethra* nequaquam spes abibit;
Fas est belligerum bello proferere divum.

Saxo Gram. lib. 2.

(23) There is an elegant passage in Tully, which I am inclined to transcribe, as it illustrates this argument: "Atque in primis meditemur illud, ut hæc patientia dolorum, quam sæpe jam *animi intentione* dixi esse firmandam, in omni genere se æquabilem præbeat. Sæpe enim multi, qui aut propter victoriæ cupiditatem, aut propter gloriæ, aut etiam ut jus suum et libertatem tenerent, vulnera exceperunt fortiter et tulerunt, iidem *omissa contentione* dolorem morbi ferre non possunt. Neque enim illum quem facile tulerant, ratione aut sapientia tulerant, sed studio potius et gloria. Itaque barbari quidam et immanes ferro decertare acerrime possunt; ægrotare viriliter

stirred by other views, and accustomed to softer manners, place no longer any pride in the contempt of death, and give themselves up, on its prospect, to alarm and perturbation.

S E C T. II.

The same subject continued.

THE Germans were not less remarkable for their moral character and institutions. Existing in an age of rude manners, before individuals had a property in land, and before the disadvantages attending the barter of com-

ter non queunt. Græci autem homines non satis animosi, prudentes, ut est captus hominum, fatis hostem adspicere non possunt, eidem morbos toleranter atque humane ferunt. At Cimbrî et Celtiberi in præliis exsultant, lamentantur in morbo; nihil enim potest esse æquabile, quod non a certa ratione proficiatur." *Disp. Tuscul. lib. 2. c. 27.*

C 2 modities

modities had impressed the metals (1) with a mark of value, their wants were few, and easily gratified. Rich in the liberty they enjoyed, they knew no wishes beyond the simple produce of the earth; no luxury, which was not afforded by the animals they tamed for their use, or hunted in their forests; no convenience, which they found not in the huts, or coverings, which defended them from the weather. Ignorant of all those distinctions which refinement and civility make known to mankind, they were strangers to the pride of family and possessions, and to the meanness and ridicule inseparable from a divided labour and particular professions; and living entirely at large, and on a footing of equality, paid no respect but to merit; and incapable of fraud and circumvention, possessed a greatness and

(1) *Tacit. de M. G. c. 5.* Argentum et aurum propitiū an irati dī negaverint, dubito.—Ne armentis quidem suū honore, aut gloria frontis, numero gaudent. æque solæ et gratissimæ opes sunt.

extent

extent of mind, which are not generally attained in more advanced ages.

They were courteous to each other, sincere in their dealings, faithful to their word, and firm in their attachments. The use (2) of riches had not taught them to deceive. They were hospitable beyond all nations; and not only esteemed it dishonourable to deny admittance to a guest (3), but made it the object of punishment. Nor was their care limited to their own nation; they

(2) *Tacit. Annal. 13. c. 54.*—“Nullos mortalium armis aut fide ante Germanos esse.”—The Roman Emperors were in use to have a guard of Germans on account of their fidelity. *Tacit. An. 1. c. 24; 13. c. 18. and 15. c. 58.*

(3) *Quicumque hospiti venienti tectum aut focum negaverit, trium solidorum inlacione mulctetur.*—Si in causa privata iter agens, ad Burgundionis domum venerit, et hospitium petierit, et ille domum Romani ostenderit, et hoc potuerit adprobari, inferat illi cujus domum ostenderit, solidos tres: et mulctæ nomine, solidos tres. *Leg. Burgund. ap. Lindenbr. p. 282.* Convictibus et hospitibus non alia gens effusius indulget. Quemcumque mortaliū arcere tecto, nefas habetur. pro fortuna quisque apparatus epulis excipit. *Tacit. de M. G. c. 21.*

extended

extended it to the travellers (4) who might pass through their country, setting aside a division of the public grain and treasure for their entertainment. And what shows a refinement (5) not to be expected from barbarians, they made it a law to prosecute, with greater rigour, the murder of a stranger, than of a citizen. Gentle in the exercise of power, their slaves and inferiors felt not their severity. Mild in the treatment of criminals, they forgot not the modera-

(4) *Damascen. de M. Gent.* "Mofyni frumentum quod ipsis ex agris provenit, æqualiter distribuunt, partemque inde aliquam in commune conferentes pro peregrinis advenientibus.— Prayfi vicinos fame afflictos alimento sublevant." *Cæsar, lib. 6. c. 23.* "Hospites violare, fas non putant: qui, quaque de causa, ad eos venerint, ab injuria prohibent, sanctosque habent; iis omnium domus patent, victusque communicatur." The Indians were also extremely hospitable: "Constituti sunt apud Indos," says *Diodorus Siculus, lib. 2. c. 42.* "advenarum præfecti; qui ne quid injuriæ patiantur, accurate provident. Si quis illorum ægrotat, medicos adhibent, aliamque curam impendunt, et mortuum sepulturæ tradunt. Quicquid ab eo relictum est peculii, propinquis restitunt."

(5) *Damascen. de Mor. Gent.* Graviorem pœnam apud Celtas luit, qui peregrinum, quam qui civem interemerit; ille enim morte multatur, hic exilio.

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tion and equity which attend on liberty. Their fierceness was corrected with humanity, and their generosity unfettered by the narrow boundary of an exact justice. They were unacquainted with that softer luxury which more delicious climates introduce into society, and neither indulged a plurality of wives, nor prohibited their women to attend them to the field, to assist in their councils, and to be useful and active in the different occupations which employed them. For gallantry (6), accommodating every thing to the standard of pleasure, had not yet turned the sex

(6) The connection with the sex is a capital circumstance in the distinction of manners. Lycurgus, to prevent improvement in Sparta, made a community of wives. When Genghizcan would polish a certain tribe of the Tartars, he observed the contrary conduct, and punished adultery with death. The Greeks and Romans, because reserved in this article, arrived slowly at refinement. Thus, in ages otherwise cultivated, Socrates lent his wife Xantippe to Alcibiades, and Cato parted with Marcia to Hortensius.— "Cato Hortensio roganti Marciam suam nostra ætate tradidit, secutus veterem Romanorum consuetudinem." *Strabo, lib. 11.*

from

from business, or made it the object of a criminal voluptuousness. Vice, in those simple and virtuous times, had not lifted her head in triumph over innocence. Ambition had not intruded into the place of modesty; nor were the poor crushed under the proud oppression of the rich. A wasteful expence had not put to shame a temperate frugality: a jarring of interests had not opposed itself to concord and union: nor was a precarious justice (7) to be bought from the corrupted tribunals of judges. The ignorance (8) of crime was a firmer preservative to their manners, than to other nations the strictness of law, and the knowledge of virtue.

(7) *Justin, lib. 2. c. 2.* *Justitia gentis ingenis culta, non legibus. — Aurum et argentum non perinde ac reliqui mortales appetunt. — Hæc continentia, illis morum quoque justitiam edidit, nihil alienum concupiscentibus. Quippe ibidem divitiarum cupido est, ubi et usus.*

(8) *Profus ut admirabile videatur, says the same author, hoc illis naturam dare, quod Græci longa sapientium doctrina, præceptisque philosophorum consequi nequeunt; cultosque mores incultæ barbariæ collatione superari. Tanto plus in illis proficit vitiorum ignoratio, quam in his cognitio virtutis.*

S E C T. III.

Of property among the Germans.

PROPERTY, ever varying with the sentiments of mankind, and ever acting with the greatest influence on manners, is at no period to be described with accuracy. If at present, when learning and science are so generally diffused, the different opinions concerning it are every day the occasion of dispute and animosity, how shall its boundaries be delineated, in times which a remote antiquity has concealed from observation? Sensible of the difficulty of this article, I presume not but to offer a few hints on it.

In the first and simplest period of society, the age of hunters (1), property would

(1) The *Fenni* were in this age of manners: “*Fennis mira feritas, fœda paupertas, non arma, non equi, non penates:*

would be most confined in its extent and privileges. The skins with which the savage covered his body, the club which he used for defence, and the animal (2) he had caught by his swiftness, or his art, would almost include the whole of what may be supposed to have belonged to him. And having once lost possession of these, though contrary to his inclination, it does not appear, that he would retain any right to them. For property, having its foundation in the use or pleasure accruing from subjects to their possessors, these

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 prædæ petunt." *Tacit. de M. G. c. 46.*

(2) *Atheneus, lib. 11. p. 462.* Hellenicum, libro de gentium nomenclaturis, scripsisse novi, Lybicornum Nomadum quibusdam, nihil aliud in bonis esse, quam poculum, gladium, aquale: Mapalia vero ex asphodelo iis construi, angusta umbræ tantum captandæ gratia, quæ, quocunque ierint, circumferant secum. *Damascen. de M. G.* Sardolibyes nullam supellecilem sibi parant, præter calicem et gladium.

subjects,

subjects, no longer in possession, nor operating to such purposes, would, in this period, be considered as entirely derelinquished, and become the prizes of the first occupant. In the age, however, of shepherds, when animals are tamed, and receive the different marks (3) of their proprietors, a property is conceived distinct from possession. Hence, among the Scythians and Tartars (4), no crime was punished more severely than theft. In relation to land, in this period, the members of a tribe

(3) Oves, says *Diodorus Siculus, lib. 5. c. 14.* of a people in this period, certis distinctæ notis, etiam nemine servante, heris salvæ manent.

(4) "Nullum scelus, says *Justin, lib. 2. c. 2.* of the Scythians, apud eos furto gravius; quippe sine tecto munimentoque pecora et armenta inter sylvas habentibus quid salvum esset, si furari liceret?" It was one of the laws of Genghizcan, That he who stole an ox, or any thing of that value, should be punished with death; and no law was more strictly executed. *Petis de la croix, p. 84.* When the Germans, and other barbarians, had made conquests, the receivers of strayed cattle were considered as guilty of theft, and punished severely, if they failed to restore them within a certain time. *Edict. Theod. Reg. l. 58. ap. Lindenb. p. 250.*

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feed

feed (5) respectively their cattle on the fields they find unoccupied; and, after enjoying a temporary property, leave them to be possessed again by others.

In the age of agriculture, at which the Germans had arrived, property assumes other and more enlarged appearances. But in this state, authors, not attending to the history of mankind, have

(5) *Mela, lib. 2. c. 1.* "Vagi Nomades pecorum pabula sequuntur, atque ut illa durant, ita diu statam sedem agunt." *Justin, lib. 2. c. 2.* "Scythis inter se nulli fines. neque enim agrum exercent; nec domus illis ulla, aut tectum, aut sedes est, armenta et pecora semper pascuntibus, et per incultas solitudines errare solitis. Uxores liberosque secum in plaustris vehunt, quibus, coriis imbrium hiemisque causa tectis, pro domibus utuntur." The reader may also consult the description of the *Hunni* and *Alani* in *Ammianus Marcellinus, lib. 31. c. 3.* It was in this manner likewise that the patriarchs lived. See *Genes. ch. 13. from v. 5. to v. 12.* It may be farther observed in this place, that in the earlier times among the Romans, the grounds and pastures, which were considered as belonging to the public, were possessed indifferently by the flocks and herds of the vulgar, as their convenience or rapacity induced them. But the wants and wars of that people soon making them careful of the public revenue, laws were enacted, which imposed a rent

have perhaps failed to describe it with precision. It is certain, that land is first connected with nations; and that some ages (6) necessarily roll away before it can be united, or transferred, to individuals. The history of the Germans will exemplify its connection in the one case, and may lead us to conjecture by what means it arrives at the latter; and how, of consequence, the more refined and extended notions concerning property have birth in society.

rent or fine on the persons who used these advantages. This matter is elegantly described by Ovid:

"Venerat in morem populi depascere saltus :
Idque diu licuit, poenae nulla fuit.
Vindice fervabant nullo sua publica vulgus,
Jamque in privato pascere inertis erat.
Plebis ad Aediles perducta licentia talis
Publicios : animus defuit ante viris.
Rem populus recipit : multam subiére nocentes :
Vindicibus laudi publica cura fuit."

Fast. lib. 5. l. 283.

(6) The respectable author of the *Historical Law-tracts* does not seem to have attended to these facts; (see his *Hist. of Property*); nor are they taken notice of in the *Essay on Feudal property.*

A German tribe, having fixed on a tract of country where to settle, considered the whole as belonging to it; and individuals thought not of appropriating particular possessions. The care of its maintenance ingrossing the first attention of the community, a certain portion of territory was marked out for that end, and given to the one half of the people to be cultivated. The other half spread the glory of the nation, enlarged its dominion, or repelled the attacks of an enemy. And as they alternately relieved each other (7), the tribe

(7) *Cæsar, lib. 4. c. 1.* "Suevorum gens est longe maxima et bellicosissima Germanorum omnium. Hi centum pagos habere dicuntur: ex quibus quotannis singula milia armatorum, bellandi causa, ex finibus educunt. Reliqui, qui domi manserint, se atque illos alunt. Hi rursus in vicem anno post in armis sunt: illi domi remanent. Sic neque agricultura, nec ratio, atque usus belli intermittitur."—By the way, the nation of the Suevi, allowing 2000 to every *pagus*, must have consisted of 200,000 people. According to this rule, one might conjecture the populousness of ancient Gaul and Germany. Thus the *Semnones*, who also inhabited an hundred *pagi*, were of equal force with the *Suevi*: "Semnones centum pagis habitantur;"

tribe became expert both in war and agriculture.

But however natural it may seem, the attachment of nations to a particular residence, follows not immediately their acquaintance with agriculture. For a German nation, though deriving its subsistence from the products of the earth, yet renounced not entirely its wandering way of life. It annually removed to a new situation, always allotting a new territory to be cultivated for its use. Shall we account for this practice from the influence of former habitude? or rather, seeking its foundation in political reasons, ascribe it to the fear, lest, fixing to a certain seat, the nation should be seduced to prefer tillage to arms; lest houses, reared with too anxious a care, should minister to luxury; lest distinctions of rank, introduced by riches,

habitantur;" *Tacit de M. G. c. 39.* The *Helvetii*, whose nation extended to four *pagi*, consisted of 8000: "Omnis civitas Helvetia in quatuor pagos divisa est;" *Cæsar, lib. 1. c. 12.* And so of the rest.

should

should furnish (8) matter of division, and the spirit of commerce succeed to that of war?

When the fruits of their fields had come to maturity, the magistrate (9)

(8) *Cæsar, lib. 6. c. 22.* — Neque quisquam agri modum certum, aut fines habet proprios; sed magistratus, ac principes in annos singulos gentibus, cognationibusque hominum, qui una coierint, quantum, et quo loco visum est, agri adtribuunt, atque anno post alio transire cogunt. Ejus rei multas adferunt causas, ne adfida consuetudine capti studium belli gerundi agricultura commutent; ne latos fines parare studeant, potentioresque humiliores possessionibus expellant; ne adcuratius, ad frugora atque æstus vitandos, ædificent; ne qua oriatur pecuniæ cupiditas, qua ex re factiones, dissensionisque nascuntur: ut animi æquitate plebem contineant, quum suas quisque opes cum potentissimis æquari videat. *Id. lib. 4. c. 1.* — Neque longius anno remanere uno in loco, incolendi causa, licet. — *Tacit. de M. G. c. 26.* Arva per annos mutant, et superest ager. *And Horace says of the Getes, lib. 3. od. 24.* — Nec cultura placet longior annua.

(9) *Diodorus Siculus, lib. 5. c. 34.* remarks of a nation in Spain, "Agros singulis annis divisos colunt: et communicatis inter se frugibus suam cuique partem attribuunt." *And Strabo* remarks of the Indians, *lib. 15.* Per cognationes et communiter agros colunt; et cum fructus colligunt, quisque onus suum tollat in anni alimenta: reliquum vero clement, ne otiosi sint, sed habeant laborandi causam."

and

and leading men of the state divided them among the members of the tribe. But it must not be supposed, that in these divisions every individual was equally considered. Warriors, fierce and independent, and apt to value highly their merits, were not to be satisfied with the same allotments given to the multitude. Hence (10) every share was proportioned to the dignity and virtues of the receiver.

So far ancient authors have instructed us concerning the state of land in Germany. Let us now attend more minutely to the act of dividing it among the individuals of a tribe. To a rude people, uninstructed in arts, and not used to abstraction, this act would of itself be difficult and embarrassing. The adjusting of the character of every individual, in order to determine the share

(10) *Tacit. de M. G. c. 26.* Agri pro numero cultorum ab universis per vices occupantur, quos mox inter se secundum dignationem partiuntur. facilitatem partiendi, camporum spatia præstant.

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to which he was intitled, and the disputes arising from the vanity, ambition, and other passions of each, would render it still more intricate; and as an increase of multitude is unavoidable to a rising people, who find advantage from the number of their children, it would come in time to be altogether impracticable. Hence (11) it would be necessary for a tribe to reduce itself, or to

(11) The difficulty of dividing their lands is perhaps the principal reason of the numerous colonies sent out by ancient nations. Other causes of migration would arise from the spirit of war. The avoiding of an enemy whom they could not resist, the pressing of one tribe upon another, the ardour of victory, the love of plunder, and the hopes of settling in a richer soil, would often make them shift their territories. The point of honour, too, being extremely delicate, disputes among chiefs would be frequent, and ever carried to extremities. The retainers of each taking part in the quarrel, whole nations would be agitated with their passions, and the utmost disorder and alarm be occasioned. To leave his tribe from choice, or to be obliged to that step, would therefore infallibly happen to the weaker party. In either case, collecting his retainers, and their families, he would go in search of new adventures, and a new settlement.

devise

devise some other method by which to obviate this difficulty.

But to diminish its numbers, by sending out a colony, is not at all times proper, and might be often dangerous to a nation. Surrounded, I shall suppose, with many warlike and ambitious neighbours, its total destruction would be the consequence of so imprudent a measure. No longer, therefore, in a capacity to make the usual divisions, and restrained by the fears of an enemy from lessening its forces, to what resource would it direct itself? Settling in a certain territory, it would assign particular spots to particular families; and from this circumstance the union of land with individuals would result. For the descendants of such families, forming an attachment to the possessions of their ancestors, would continue to enjoy them; and land, losing its connection with the community (12), would return

no

(12) I forget my authorities; but I have read somewhere, that in Greece, during the earlier ages, if a possessor

no longer to the tribe. New subdivisions of it would be every day made; and proprietors, in the progress of commerce, acquiring the greatest power over subjects, would not only dispose of them as they pleased when alive, but make settlements to take effect after death. Luxury and the arts would spread themselves; cities be built; different interests be acknowledged; invidious distinctions take place; notions of nobility be conceived; riches become the general pursuit; and (13) the civil code grow with the vices, venality, and corruptions of mankind.

essor of land died without issue, his possession returned to the tribe. The more distant relations of the deceased were not supposed to have formed any connection with his land; nor was the notion of property so far evolved, as that proprietors might name their successors.

(13) I speak here in general, and not of the manner in which individuals acquired a property in land among the German and Gothic tribes.

S E C T.

S E C T. IV.

Of the political institutions of the Germans.

I Now proceed to give a general idea of the political arrangements of this people. It were to little purpose, after so many learned men have written concerning the origin of civil government, to introduce what I would observe of the German polity, with a disquisition on that subject. It may be sufficient to remark, that, if the Mosaic history be just, it must have followed, that on the increase of mankind, when the tie of relation was no longer felt or observed, the patriarchal authority being entirely disregarded, the more powerful would inroach upon the weaker, and the utmost confusion prevail in society. The idea of a public interest thence suggesting itself, more extended connections would

would be thought of. A few leading men, best qualified for the task, would be set over particular territories, to govern them, with a power subordinate to the people. It was thus in Germany.

The more illustrious citizens (1), or the *princes*, as the Roman historian affects to call them, were intrusted by the people with the management of *hundreds* and *counties*. And the office and jurisdiction of these magistrates expired, at first, with the year; as, according to the method just now mentioned, by which a German tribe was regulated, the stay of its members in their own country was but annual; and when they went to war (2), all authority was lodged with the general. This circum-

(1) *Cæsar, lib. 6. c. 23.* — Principes regionum atque pagorum inter suos jus dicunt, controversiasque minuunt. *Tacit. de M. G. c. 12.* — Principes jura per pagos vicofque reddunt.

(2) *Cæsar, lib. 6. c. 23.* Quum bellum civitas aut inlatum defendit, aut infert, magistratus, qui ei bello præsent, ut vitæ necisque habeant potestatem, deliguntur.

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stance was favourable to the people; and the allotments to princes in the annual division of the land being unequal to the expence of maintaining their dignity, and the shares they received in the distributions of booty furnishing to this end a precarious relief, it was the contributions (3) of the populace, which were voluntary, and not subject to exaction, that supported the rude splendour and magnificence in which they were fond to vie with each other. Hence the princes found themselves in a state of subjection and dependence.

In the community the supreme power was vested. The council of the nation, consisting of those who had been presented with a *framea*, for all such had a title to be present, assembled (4) at sta-

(3) *Tacit. de M. G. c. 15.*

(4) *Tacit. de M. G. c. 11.* Coeunt, nisi quid fortuitum et subitum inciderit, certis diebus, cum aut inchoatur luna, aut impletur. nam agendis rebus hoc auspiciatissimum initium credunt.

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ted times: and (5) every man came to it in arms; a sensible mark of his independence. But as the extreme liberty of the people made them flow to convene on more ordinary occasions (6), it was a law, that the person who came last, when matters of importance were under deliberation, should be put to death, with the most ignominious and excruciating (7) torture, as utterly regardless of the honour and interest of his tribe. To none but in this assembly

(5) *Livius, lib. 21. c. 20.* — *Armati (ita mos gentis erat) in concilium venerunt. Tacit. de M. G. c. 11. Ut turbæ placuit confidunt armati. Damascen. de M. G. Celtæ gladiis cincti reipub. negotia tractant.*

(6) *Tacit. de M. G. c. 11.* *Illud ex libertate vitium, quod non simul, nec iusti, conveniunt, sed et alter, et tertius dies, cunctatione coeuntium absumitur.*

(7) *Cæsar, lib. 5. c. 56.* — *Armatum concilium indicit. (hoc more Gallorum est initium belli); quo, lege communi, omnes puberes armati convenire consueverunt: qui ex iis novissimus venit, in conspectu multitudinis omnibus cruciatibus adfectus necatur.*

was

was it lawful (8) to speak of public affairs; and to those alone whom age had rendered wise and venerable, and to whom valour, eloquence, or other merits, had given reputation, was paid a preferable attention. In other respects there subsisted the most entire equality; for no artificial differences of place, or of rank, being known, the only distinctions among men were their personal qualities. In this national assembly they deliberated about peace and war, and concerted the plan of operations for the year. Here the general and princes were elected: here they determined against what nation they should

(8) *Cæsar, lib. 6. c. 20.* *Quæ civitates commodius suam rem publicam administrare existimantur, habent legibus sanctum, si quis quid de republica a finitimis rumore ac fama acceperit; uti ad magistratum deferat, neve cum quo alio communicet: quod sæpe homines temerarios atque imperitos falsis rumoribus terreri, et ad facinus impelli, et de summis rebus consilium capere, cognitum est. Magistratus, quæ visa sunt, occultant; quæque esse ex usu judicaverint, multitudini produnt, de republica, nisi per concilium, loqui non conceditur.*

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turn their arms, and what number (9) of auxiliary troops they should hire out to the neighbouring tribes that might ask their aid. Here new customs got their sanction, old ones were abolished, embassies to foreign powers were ordered, the division of the land directed, and all concerns whatever of state or moment transacted. The majority of voices decided all controversies; and the measures they found most expedient and agreeable were embraced, and prosecuted with a spirit and resolution, which could not fail to be inspi-

(9) Ariovistus made the following offer to Cæsar, which shows, that the Celtic nations were in the practice of hiring themselves out to battle: *Cæsar, lib. 1. c. 44.* "Quod si decessisset, et liberam possessionem Galliæ sibi tradidisset, magno se illum præmio remuneraturum, et quæcunque bella geri vellet, sine ullo ejus labore et periculo confecturum." And it is observable from the speech of Ambiorix to the Roman deputies, that the Germans hired themselves out to the Gauls: "Magnam manum," says that chieftain, "Germanorum conductam Rhenum transisse." *Cæsar, lib. 5. c. 27.* See also this author, *lib. 6. c. 2.*; and *Plutarch in vit. Marcel.*

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red when every man was equally interested in them.

This mode of government, so free and limited, naturally arose from the state of society of the Germans; and it is surprising how their prejudices could so far impose on writers, as to make them fancy, that this people submitted (10) to the will of kings. When individuals have become acquainted with riches, and the state of equality is no longer preserved; when to aspire to superiority is the general ambition, and men struggle to emerge from obscurity, for the pleasure of lording it over others; it is then that we are to look for the kingly authority. So Tacitus would inform us, when talking of a certain people of Germany: *Est apud illos et opibus honos. eoque unus imperitat, nullis jam exceptionibus, non precario jure parendi.* But the Germans, equally ignorant of

(10) Filmer's Patriarcha. Matharel, resp. ad Hottom. Franco-Galliam.

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the means and enjoyments of luxury, disdained all subjection to an arbitrary rule. And their princes or great men, having no way by which to corrupt them, or introduce venality, and thereby foment divisions, and raise themselves to power, studied to become illustrious by martial achievement, and by being elected to the command in expeditions. Accordingly, in the history of those nations, we find few attempts to overturn liberty; and these, always unsuccessful, were inspired from an acquaintance with the Roman manners.

Arminius (11), for example, conceived the ambitious project of advancing himself to a supreme sway over his nation; and he possessed every advantage which could promise him success in so bold an undertaking. Superior vigour of mind, and a genius turned to employment, quick and penetrating, were joined, in this man, with great strength

(11) This commander had served in the Roman armies. *Tacit. an. 2. c. 10.*; and *Paterculus, lib. 2.*

of

of body, majesty of aspect, and illustrious descent; qualities chiefly regarded by barbarians. He had also endeared himself to his country, by the most memorable services. He had conquered Varus, and insulted over the Roman ensigns and eagles: he had opposed and frustrated the designs of his father-in-law Segestes, who had leagued with the Romans: he had stopped the victorious arms of Germanicus; and, securing the rights and liberties of his country, was intitled to the glorious appellation of *Deliverer of Germany*. Yet his nation, too much in love with freedom to be dazzled by his virtues, or his services, declared him an enemy, and a traitor. In vain all the obligations it owed to him were numbered, and his merits and acts so well calculated to gain favour with the people. In vain was his character glorious from recent victory; or did his early youth offer itself to excuse his ambition. Nothing had influence to mitigate his crime; and his
own

own relations expiated, by his death (12), the atrocious insult on his country and family. So strong an aversion did the Germans entertain to tyranny!

But war being the constant business of this people, numbers were every day made known by their valour; and when sufficiently practised in art and stratagem, by the inroads and incursions they exercised on their neighbour nations (13), they became candidates to command

(12) Ceterum Arminius, abscedentibus Romanis, et pulso Maroboduo, regnum adfectans, libertatem popularem adversam habuit: petitusque armis, cum varia fortuna certaret, dolo propinquorum cecidit, liberator haud dubie Germaniæ, et qui non primordia populi Romani, sicut alii reges ducesque, sed florentissimum imperium lacesserit: præliis ambiguus, bello non victus. *Tacit. an. 2. c. 88.*

(13) *Cæsar, lib. 4. c. 3.* Publice maximam putant esse laudem, quam latissime a suis finibus vacare agros: hac re significari, magnum numerum civitatum suam vim sustinere non posse. *Id. lib. 6. c. 23.* — Ubi quis ex principibus in concilio dixit se ducem fore, qui sequi velint, profiteantur; confurgunt ii, qui et causam, et hominem probant, suumque auxilium pollicentur; atque ab
multitudine

command the tribe. And this honour giving scope to the contention and rivalry of the great, as the hero, who in the council of the state suggested the measure the most acceptable, was chosen to conduct it, they were led to flatter the people, from whom alone they could expect preferment, and to be attentive to the designs and behaviour of each other. Hence were those, by the greatest happiness of circumstance, from whom liberty had any thing to dread, made her guardians and protectors. It is true, it sometimes happened, that the dangers and grievances of a tedious war rendered it requisite, that a general should be named for life; yet was this general, or king, as he is often called by the Roman historian, in possession of very limited powers (14),
and

multitudine conlaudantur: qui ex iis secuti non sunt, in desertorum ac proditorum numero ducuntur; omniumque iis rerum postea fides derogatur.

(14) *Tacit. de M. G. c. 7.* "Nec regibus infinita aut libera potestas." — Ambiorix, one of the kings of the Eburones,

and the least suspicion was fatal to him. We may therefore conclude, that liberty was the basis of the German constitution.

birones, apologizes thus for his conduct to Cæsar: — “ Sese, pro Cæsaris in se beneficiis, plurimum ei confiteri debere, — neque id, quod fecerat de obpugnatione castrorum, aut iudicio, aut voluntate sua fecisse, sed coactu civitatis: suaque esse ejusmodi imperia, ut non minus haberet juris in se multitudo, quam ipse in multitudine.” *Cæsar, lib. 5. c. 27.* Licus also, the chief magistrate of the Ædui, told Cæsar, — “ Esse nonnullos, quorum auctoritas apud plebem plurimum valeat, qui privati plus possint, quam ipsi magistratus.” *Cæsar, lib. 1. c. 17.* The Gothones, the most slavish people in Germany, had yet a sense of liberty: “ Trans Lygios Gothones regnantur, paulo jam adductius quam ceteræ Germanorum gentes, nondum tamen supra libertatem.” *Tacit. de M. G. c. 43.* What Nabis, a king of Lacedæmon, said to Flaminius, the Roman general, of the government of his country, may apply to that of Germany: “ Noster legumlator non in paucorum manu rempublicam esse voluit, quem vos senatum appellatis; nec excellere unum aut alterum ordinem in civitate; sed per æquationem fortunæ ac dignitatis fore creditit, ut multi essent, qui arma pro patria ferrent.” *Liv. lib. 34. c. 31.*

S E C T.

S E C T. V.

Of the inhabitants of Britain, and the Saxon conquest.

THE ancient inhabitants of Britain were undoubtedly of the same race of men with the Gauls and Germans. They spoke the same language, submitted to the same form of government, were guided by the same system of manners, and practised the same superstition (1) with these nations. It is

(1) *Pelloutier, hist. des Celtes, tom. 1. Cluver, antiq. Germ. Bullet, Memoires sur la langue Celtique.* It is the opinion of Tacitus, that they were descended of the Gauls: “ Proximi Gallis, et similes sunt: seu durante originis vi; seu procurrentibus in diversa terris, positio cæli corporibus habitum dedit, in univèrsum tamen æstimanti, Gallos vicinum solum occupasse, credibile est. Eorum sacra deprehendas, superstitionum persuasione. Sermo haud multum diversus.” *Agr. c. 11.*

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even probable (2), that they carried their ferocity to greater heights. For the colony of Phocians, which settled at Marfeilles so early as the age of Tarquin, had introduced a polish and softness into Gaul (3); whence they spread into Germany; and these countries, sooner invaded by the Romans, were also improved during their struggles with that intelligent people. But the

(2) This author adds in the same place, "Plus tamen ferociæ Britannii præferunt, ut quos nondum longa pax emollierit."

(3) *Justin, lib. 43. c. 3. & 4.* Temporibus Tarquini regis ex Asia Phocæensium juvenus, ostio Tiberis inventa, amicitiam cum Romanis junxit; inde in ultimos Galliæ finis navibus profecta, Massiliam inter Ligures et feras gentes Gallorum condidit; magnasque res, sive dum armis se adversus Gallicam feritatem tuentur, sive dum ultro laceffunt, a quibus fuerant ante laceffiti, gesserunt. — Ab his Galli, et usum vitæ cultioris, deposita et mansuefacta barbaria, et agrorum cultus, et urbes mœnibus cingere didicerunt. Tunc et legibus, non armis vivere, tunc et vitem putare, tunc olivam ferere consueverunt; adeoque magnus et hominibus et rebus impositus est nitor, ut non Græcia in Galliã emigrasse, sed Galliã in Græciam translata videretur.

Britains,

Britains, confined to an island, and almost unknown to strangers (4), remained long in a state of barbarity, the most fierce and uncomplying. Making no account of agriculture, or the arts of peace, and even ignorant of the conveniences of life (5), they were solely employed in wars, which their states waged against each other, or, dividing into factions (6), carried on within themselves. It is likewise a certain mark of

(4) *Cæsar* speaks of Britain as entirely unknown before his time; and *Virgil* said, in the age of Augustus, "Et penitus toto divisos orbe Britannos." *Ec. 1.*

(5) *Strabo, lib. 4.* Ingenio Gallorum partim similes sunt, partim simpliciores, et magis barbari, adeo ut quidam eorum ob imperitiam caseos nullos conficiant, cum tamen lacte abundant: alii hortos colendi, et aliarum partium agriculturæ ignari sunt. — Urbium loco ipsis sunt nemora. Arboribus enim dejectis ubi amplum circulum sepierunt, ipsi casas ibidem sibi ponunt, et pecori stabula condunt, ad usum quidem non longi temporis.

(6) What *Cæsar* relates of Gaul will apply to Britain: "— Quod in Gallia, a potentioribus, atque his, qui ad conducendos homines facultates habebant, vulgo regna occupabantur."—*de B. G. lib. 2. c. 1.* And Tacitus says expressly of the Britains,—"Per principes factionibus et studiis trahuntur." *Agr. c. 12.*

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their rude manners (7), that the Gauls were in use to resort to this island, in order to acquire a purer and more intimate knowledge of the discipline of the Druids, into which the refining spirit of that people had introduced innovations. Nothing is then worse founded than an opinion industriously propagated by many writers, who, neglecting reason and history, and guided only by prejudice, have asserted (8), that the first

(7) *Cæsar, lib. 6. c. 13.* Disciplina (Druidum) in Britannia reperta, atque inde in Galliam translata esse, existimatur: et nunc, qui diligentius eam rem cognoscere volunt, plerumque illo, discendi causa, proficiscuntur.

(8) See Brady's answer to Petyt, Filmer's Patriarcha, and other writings for prerogative. The writers on this subject seem to confound the first state of the Britains with that in which they afterwards appeared, when conquered by the Romans. Tacitus says expressly, "Ipsi Britanni delectum, ac tributa, et injuncta imperii munera impigre obeunt, si injuriæ absint: has ægre tolerant, jam domiti ut pareant, nondum ut serviant." *Agr. c. 13.* And Dion, or Xiphilin, in the life of Severus, observes to the same purpose: "Apud Britannos populus magna ex parte principatum tenet." The writers just now referred to, by endeavouring to found the royal prerogative so

first government of the Britains was regal and despotic: an opinion from which they infer the absurdest consequences.

When the ambition, however, or avarice of Cæsar (9), had brought him to our island, and succeeding Emperors were fired with the glory of subjecting it to their arms (10), the inhabitants
lost

so high, think to prove, that the liberty we enjoy was derived from the concessions of our monarchs. But allowing that the ancient Britains were subject to the arbitrary will of kings; that this was also the case with the Anglo-Saxons; that William I. was a conqueror; and that the power of the people lessened the despotism, and detracted from the dignity of our kings; can it yet be supposed, that their concessions would form a constitution so wise and consistent in all its parts, as that of England?

(9) Suetonius says of Cæsar, "Britanniam petiisse spe margaritarum, quarum amplitudinem conferentem interdum sua manu exegisse pondus." *Vit. Cæs. c. 47.* And Tacitus gives some colour and strength to this opinion, when he observes, "Fert Britannia aurum et argentum, et alia metalla, pretium victoriæ. gignit et Oceanus margarita." — *Agr. c. 12.*

(10) The Britains were not easily subdued. Cæsar, though remarkable for the modesty with which he seldom
fails

lost their liberty and independence. They were distracted in their councils (11), and inattentive to the policy of confederating their communities, and became an easy prey to a watchful and warlike invader. When pressed hard by the Roman governors, they discovered their inferior force: and, flat-

fails to mention himself, must not be altogether trusted with regard to his success against this people. *Strabo, lib. 4.* observes of him, "Divus Cæsar bis in eam insulam trajecit, ac mox reversus est, nulla magna re confecta; neque longe in insulam progressus."—And Lucan says,

"Territa quæsitis ostendit terga Britannis." *lib. 2.*

It is Tacitus who gives the truest account of this matter:—"Primus omnium Romanorum D. Julius cum exercitu Britanniam ingressus, quamquam prospera pugna terruerit incolas, ac litore potitus sit, potest videri ostendisse posteris, non tradidisse."—And he adds afterwards, "Divus Claudius auctor operis."—*Agr. c. 13.*

(11) *Tacit. Agr. c. 12.* Nec aliud adversus validissimas gentes pro nobis utilius, quam quod in commune non consulunt. Rarus duabus tribusve civitatibus ad propulsandum commune periculum conventus: ita dum singuli pugnant, universi vincuntur.

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tered (12) by the mild treatment their nations received on submitting, they allowed themselves to be reconciled to the Roman dominion. Agricola, discouraging their scattered and distant way of life, which served to keep alive their warlike attachments, instructed them in civility and arts. The Roman language came to be known in Britain, and was spoken, not only with ease, but studied for the purposes of eloquence (13); the Roman dress, and the Roman manners, were

(12) *Tacit. Agr. c. 16.* "Didicere jam barbari quoque ignoscere vitis blandientibus." *Id. hist. lib. 4. c. 64.* "Instituta cultumque patrium," said the Tencteri to the people of Cologne, "resumite, abruptis voluptatibus, quibus Romani plus adversus subjectos quam armis valent."

(13) *Id. c. 21.* Namque ut homines dispersi ac rudes, eoque bello faciles, quieti et otio per voluptates affuescerent: hortari privatim, adjuvare publice, ut templa, fora, domus extruerent, laudando promptos, et castigando segnes. ita honoris æmulatio, pro necessitate erat. Jam vero principum filios liberalibus artibus erudire, et ingenia Britannorum studiis Gallorum anteferre, ut qui modo linguam Romanam abnuebant, eloquentiam concupiscerent. inde etiam habitus nostri honor, et frequens

were affected; and our deluded progenitors even proceeded to exert themselves in a vain emulation, to excel their enemies in the luxury of the table, the sumptuousness of buildings, the elegance of baths, and all the practices of an effeminate voluptuousness. Wars were no longer the pursuit and amusement of their youth: military trophies and military honours no longer gave dignity to the aged. Yielding to the Roman manners, rather than conquered by the Roman arms, they forgot the value of liberty, and stooped in a tame subjection to the will of kings (14), who, raised by the power of that people, advanced their arms, and facilitated their government in this island.

quens toga. paulatimque discessum ad delinimenta vitiorum, porticus, et balnea, et convivorum elegantiam. idque apud imperitos *humanitas* vocabatur, cum pars servitutis esset.

(14) *Tacit. Agr. c. 14.* Quædam civitates Cogiduno regi donatæ. is ad nostram usque memoriam fidiſſimus manſit, vetere ac jam pridem recepta populi Romani conſuetudine, ut haberet instrumenta ſervitutis et reges.

But,

But, in the course of time, that illustrious nation, which had stretched its empire so widely, and risen to such a height of greatness, being itself about to be overthrown by the barbarians, who assailed it on every side, the Emperors were obliged to recall all the distant legions, who maintained, or were extending their conquests. The Roman troops were thus removed from Britain; and the Picts and Scots broke over the Roman wall, wasted the fields of their unwarlike neighbours, and filled every place where they came with carnage and destruction. The Britains had recourse in this extremity to the Romans; who, moved with miseries which themselves had occasioned, several times assisted them to repel their enemies: but too much harassed and employed at home, they at length found it necessary entirely to abandon them. Reduced to despair, the abject Britains looked around for a nation to protect them; and, listening to the pusillanimous advice of

H Vortigern,

Vortigern, they sent to the Saxons, whose fame was at that time considerable, who were mighty at sea, accustomed to war, and unemployed. Hengist and Horsa arrive with troops to their assistance; they march against the Picts and Scots; and, obtaining an easy victory over them, the Britains please themselves in prospect with the peace and security which they are to enjoy, while guided by the counsels, and defended by the arms of that valiant people. These commanders, however, perceiving their negligence and degeneracy, and allured by the riches of the soil, and the hopes of a bloodless conquest, entertain thoughts of settling in this island. Their countrymen, adverted of their design, reinforce them in great bodies; and, joining with the Picts and Scots (15), they commence hostilities with the Britains. It is not to our purpose to give a detail of the fierce wars which ensued: it is sufficient

(15) Hume's hist. vol 1.

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to remark, that they ended in the almost total extirpation of the Britains (16), and in the erection of the Saxon heptarchy.

The Saxons brought along with them into Britain their own customs, language, and civil institutions. Free in Germany, they renounced not their independence, when they had conquered. Proud from victory, and with their swords in their hands, would they surrender their liberties to a private man? Would temporary leaders, limited in their powers, and unprovided in resources, ever think to usurp an authori-

(16) No conquest made by any tribe of the barbarians was half so terrible as that of the Saxons. The other nations lived and mixed with the ancient inhabitants of the countries they subdued: but the Britains were so entirely exterminated, that few traces remain of their own laws, and peculiar customs, or of those which were imposed on them by the Romans. And philologers have observed, that there is not a single *British* word in our language. The Saxons were forced to this policy by the obstinate resistance of the Britains, and in order to give territory and subsistence to those numerous bodies of their countrymen who came over into England.

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ty over warriors, who considered themselves as their equals, were impatient of controul, and attached with devoted zeal to their privileges? or would they find leisure to form resolutions, or opportunities to put them into practice, amidst the tumult and confusion of those fierce and bloody wars, which their nations first waged with the Britains, and then engaged in among themselves? Sufficiently flattered in leading the armies of their countrymen, the ambition of commanders could as little suggest such designs, as the liberty of the people could submit to them. The conquerors of Britain retained their independence; and this island saw itself again in that free state in which the Roman arms had discovered it.

The same firmness of character, and generosity of manners, which in general distinguished the Germans, were possessed in an eminent degree by the Saxons; and while we endeavour to unfold their political institutions, we must

must perpetually turn our observation to that masterly picture in which the Roman historian has described these nations. In the woods of Germany shall we find the principles which directed the state of land in the different kingdoms of Europe; and there shall we find the foundation of those ranks of men, and of those civil arrangements, which the barbarians every where established; and which the English alone have had the good fortune, or the spirit, to preserve.

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HISTORICAL DISSERTATION

Concerning the ANTIQUITY of the
ENGLISH CONSTITUTION.

PART II.

Of the State of Land in the Ger-
man and Gothic kingdoms.

SECTION I.

*Of the origin and progress of the Feudal
Polity.*

THE state of land in the Ger-
man and Gothic kingdoms has
been chiefly regulated by
the feudal polity: and this system, so
important and interesting, has been
often

Sect. 1. *Of the state of Land, &c.* 63

often examined with equal ingenuity
and learning. But authors, not at-
tending to the earlier history of the
northern tribes, have generally ascri-
bed its origin to their conquests. It
existed, however, at a higher period;
and before they had sallied from their
woods, it directed their political con-
duct, and the confederacies into which
they entered. The appearances it ex-
hibited on their conquests, and its after
progress, were but the improvement of
institutions to which they had formerly
been accustomed.

It may seem to a superficial observer,
that the great number of nations with
which Gaul and Germany were peopled
had little or no connection with each
other; and that, depending on their
own force and arms, they fought their
battles unassisted by those leagues and
alliances which take place in more po-
lished times. Insincerity, it may be
thought, and want of cultivation, con-
cealed from them the knowledge, or re-
strained them from the practice, of
such

such arts. No conclusion, however, is more rash, or is less supported by history. Cæsar and Tacitus perpetually contradict it. These historians inform us, that the Gaulic and German nations were often linked together among themselves in the closest confederacy and union; and they furnish frequent examples of these connections.

The Ceutrones, says Cæsar, the Grudii, Levaci, Pleumoxii, and Geiduni, were under (1) the protection and tutelage of the Nervii. The Segusiani, Ambivareti, Aulerci Brannovices, and the Brannovii (2), had joined themselves to the Ædui. The Senones (3) had

(1) *Cæsar de B. G. lib. 5. c. 38. & 39.* Facile — Nervii persuadet. Itaque, confestim dimissis nunciis ad Ceutrones, Grudios, Levacos, Pleumoxios, Geidunos, qui omnes sub eorum imperio sunt, quam maximas manus possunt, cogunt: —

(2) *Id. lib. 7. c. 75.* Imperant Æduis, atque eorum clientibus, Segusianis, Ambivaretis, Aulercis Brannovicibus, Brannoviis, millia xxxv.; —

(3) *Id. lib. 6. c. 3. & 4.* — Eodem die cum legionibus in Senones proficiscitur, magnisque itineribus eo pervenit.

had also intrusted themselves to the care of that people: and the Carnutes (4) had formed connections with the Rhemi. The Arverni were the guardians (5) of the Eleutheri Cadurci, Gabali, and Velauni. The Eburones (6) and Condrufii were the *clientes* of the Treveri: and even all the states of Gaul, when Cæsar first entered it (7), were divided into two powerful factions, which mutually

venit. — Legatos, — deprecandi causa, ad Cæsarem mittunt; adeunt per Æduos, quorum antiquitus erat in fide civitas.

(4) *Cæsar de B. G. lib. 6. c. 4.* Eodem Carnutes legatos obfidesque mittunt, uti deprecatoribus Rhemis, quorum erant in clientela; —

(5) *Id. lib. 7. c. 75.* — parem numerum Arvernibus, adjunctis Eleutheris Cadurcis, Gabalis, Velaunis, qui sub imperio Arvernorum esse consueverunt; —

(6) *Id. lib. 4. c. 6.* — in finis Eburonum, et Condruforum, qui sunt Treverorum clientes, pervenerant.

(7) *Id. lib. 6. c. 11. & 12.* — namque omnes civitates in partes divisæ sunt duas. Quum Cæsar in Galliam venit, alterius factionis principes erant Ædui, alterius Sequani.

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contended for dominion. The Ædui were at the head of the one faction, the Sequani at that of the other; and the superiority remained with either of these people, in proportion to the number and strength of the communities attached to them.

By such connections, which the tribes in Gaul and Germany could form for their defence, a political equality was preserved between nations of unequal power and advantages; and civil intercourse was kept existing in countries, where the more populous and overgrown societies would otherwise have destroyed and swallowed up the inferior ones. Policy, as well as passion, was a source of war; and these barbarians, perceiving the convenience and utility which result from balancing the power of nations, attained, in part, that happy secret, which, in later times, has been employed with so much success to give peace and security to Europe.

But

But what were the circumstances which more immediately suggested these connections? and by what principles were they regulated? One tribe, having conquered another, the territories of the vanquished accrued to the victors: but, unacquainted with a private property in land, the chiefs or warriors of the expedition seized not possessions, on this occasion, which might advance, or continue their greatness. Accustomed (8) to join land with a large and corresponding object, their imaginations could only connect it with communities. To what end, however, would they add this new acquisition to the other possessions of their state? They despised agriculture, and the arts of peace; and their own feats furnished them with more territory than they enjoyed, or laboured. To retain it, also, for any length of time, was impossible; and new conquests, and new feats, called

(8) I have shown, in the former part, that land was first the property of nations.

them to another quarter. Must they drop then the laurels they had gathered, and, allowing the vanquished to recruit, receive nothing by their victory but toils and losses?

The case was critical and pressing; and they embraced an expedient, the only one fitted to their purpose, and which alone could occur to a warlike people in such a situation. They supposed their community to be vested in the conquered territory, and returned the use of it to the vanquished (9), annexing the burden of assisting them in their wars. And when the idea of giving service for land had been gradually evolved, inferior and feeble nations, not waiting for the medium of conquest, resigned their lands to a power-

(9) It is expressly mentioned in some of the examples just now cited, that the inferior tribe furnished assistance to the superior one; and the fact is perfectly clear from the whole of the German and Gaulic history.

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ful people (10), receiving them back again with protection. Hence those connections which every where subsisted both in Gaul and Germany. The safety of the vanquished, or inferior state, made it ready to submit to this kind of homage; and the pride and ambition of the victors, or more powerful people, made them fond to impose it. Thus service for land being stipulated on one side (11), and protection

(10) The presents, perhaps, which one nation was in use to bestow on the chiefs of another, were the marks of its submission: and the *electi equi, magna arma, phalerae, torquesque*, (see *Tacit. de M. G. c. 15.*), of which these presents consisted, resemble very much the more modern symbols or expressions of vassalage. It is certain, at least, that the superior nation imposed a tribute on the inferior one. "Ambiorix," says *Cæsar, lib. 5. c. 27.* "in hunc modum locutus est: sese, pro Cæsar's in se beneficiis, plurimum ei confiteri debere, quod ejus opera stipendio liberatus esset, quod Aduatucis, finitimis suis, pendere consueisset; —" It seems likewise to have been a practice for a superior nation, in some instances, to impose a king on its vassal. Of this there is an example in *Livy, lib. 5. c. 34.*

(11) Some of the Roman Emperors appear to have adopted this way of thinking. Severus, for example, distributed land

tection afforded on the other, the firmest attachment was produced between nations, who, warlike themselves, or amidst warlike neighbours, were either extending their arms, or defending their territories.

So generally had this practice prevailed, and so deeply rooted was this way of thinking, that the Usipetes and Tenchtheri, two German tribes, who had fled from the oppression of the Suevi, to seek a settlement in Gaul, where they were opposed by Cæsar, sent to acquaint that commander (12), "That if the Romans, accepting their alliance,

land to his soldiers, under the condition of military service: and he ordained, that all persons who led a private life should be particularly excluded from such land. See farther *Les Recherches de la France, par Pasquier, fol. p. 122. Selden's Titles of Honour, or Lampridius in vit. Severi.*

(12) *Cæsar, lib. 4. c. 1. & 7.* — Usipetes Germani, et item Tenchtheri, magna cum multitudine hominum, flumen Rhenum transierunt, non longe a mari, quo Rhenus influit. Causa transeundi fuit; quod ab Suevis complures

alliance, would assign them land to cultivate, they might use them in wars, in which their valour would be of the greatest advantage." In like manner (13) the Cimbri, Theutoni, and Tigurini, who had been forced from their

res annos exagitati, bello premebantur, et agricultura prohibebantur. — Legati ab his venerunt, quorum hæc fuit oratio. "Germanos neque priores populo Romano bellum inferre; neque tamen recusare, si laceffantur, quin armis contendant: quod Germanorum consuetudo hæc sit a majoribus tradita, quicumque bellum inferant, resistere, neque deprecari: hæc tamen dicere, venisse invitos, ejectos domo. Si suam gratiam Romani velint, posse eis utiles esse amicos: vel sibi agros adtribuunt, vel patiantur eos tenere quos armis possederint; sese unis Suevis concedere; — reliquum quidem in terris esse neminem, quem non superare possint."

(13) *Florus, lib. 3. c. 3.* "Cimbri, Theutoni, atque Tigurini, ab extremis Galliarum profugi, cum terras eorum inundasset Oceanus, novas sedes toto orbe quærebant: exclusive Gallia et Hispania, cum in Italiam remigrarent, misere legatos in castra Silani; inde ad senatum, petentes, *Ut martius populus,*" &c. This passage of Florus has been remarked by Selden and Blackstone, (see *Titles of Honour, part 2.* and *Commentaries on the Law of England, book 2.*). But these authors, not considering that land was first the property of nations, have failed in explaining it.

country

country by the inundation of the ocean, having entered Italy, petitioned Silanus, and afterwards the Roman Senate, for lands to be held by this service: *Ut martius populus aliquid sibi terræ daret quasi stipendium: cæterum, ut vellet, manibus atque armis suis uteretur.* And the Romans, learning this method from the barbarians, actually employed it to bind to them nations that were too fierce to pay tribute or taxes. *Exempti*, says Tacitus (14) of the Batavi, *oneribus et collationibus, et tantum in usum præliorum sepositi, velut tela atque arma, bellis reservantur.* It is added (15), *Est in eodem obsequio et Mattiacorum gens.* Such, then, we may well

(14) *de M. G. c. 29.* Omnium harum gentium virtute præcipui Batavi, non multum ex ripa, sed insulam Rheni amnis colunt, Cattorum quondam populus, et feditione domestica in eas sedes transgressus, in quibus pars Romani imperii fierent. Manet honos, et antiquæ societatis insigne. nam nec tributis contemnuntur, nec publicanus atterit. *Exempti oneribus, &c.*

(15) *Id.* — — Sede finibusque in sua ripa, mente animoque nobiscum agunt, cætera similes Batavis, nisi quod ipso adhuc terræ suæ solo et cælo acrius animantur.

conclude

conclude was the first appearance under which the feudal system presented itself. While land was yet the property of states (16), tribes were the vassals of tribes.

Amidst the silence, however, of ancient historians, and the remoteness and obscurity of the times, it is impossible to determine concerning the continuance or duration of the feudal connections among the states of Gaul and Germany; and concerning the maxims by which,

(16) It is surprising how a writer, so profound and penetrating as Montesquieu, (*L'esprit des Loix, liv. 36. ch. 3.*), could find *fiefs* in the war-horses and *framed's*, which the German princes bestowed on their retainers; and thence imagine, that *retainers* were the *vassals* of princes. If military service had been the customary and requisite return for such gifts, *fiefs* must have been common to every warlike people. But this opinion is not peculiar to Montesquieu. Pasquier has given an account of one very like it, which its author seems to have supported very ingeniously. See *Recherches de la France, liv. 2. ch. 15.* The other notions on the rise of feuds are still, perhaps, worse founded. The reader may see them in *Craig, lib. 1.* in *Spelman voc. Feodum*, and in the croud of authors who write on this subject.

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under certain circumstances, they were regulated. The importance of the subject calls for the fullest and most ample discussion; but a dark antiquity conceals it from remark. Yet the system, we may easily imagine, could not be governed, in such a period, by rules very nice or intricate. The necessities and advantages of states induced them to enter into alliances; but their situation, it is probable, allowed not those alliances to subsist for any time. Tribes, ever changing their territories (17), were constantly withdrawing from the protection of tribes; nations, advancing in greatness, were shaking off the dependence to which they had submitted, and aspiring to a dominion over nations; and accident and caprice were ever giving occasion to sudden and un-

(17) Tacitus, on observing that the Gauls might have passed into Germany, makes the following remark: "Quantulum enim amnis obstabat, quo minus, ut quæque gens evaluerat, occuparet permutaretque sedes promiscuas adhuc, et nulla regnorum potentia divisas?"

expected

expected revolutions. Their own interest, therefore, and convenience, more than fixed or certain laws, may have guided the connections of communities.

The fluctuating state of those nations continuing no longer when they had settled in the Roman provinces, their conduct and affairs acquired greater form and order. They distinguished their territories by known and determined boundaries; they directed their emulation by other views than military glory; and yielding to the influence of new and unexperienced circumstances, their system assumed a more regular aspect; and spreading in a moment over Europe, overturned the forms and proceedings of the Roman law.

Rude, originally, and simple, their institutions seemed solely calculated for the practice of arms; but they advanced in method and intricacy, as those objects multiplied, which attract the ambition, and divide the pursuits, and

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the cares of men. Ages rolled on; alterations and additions took place; one improvement suggested another; and indignant, or applauding (18), we behold, in its progress from the forests of Germany to its final perfection, that prodigious fabric which has been the cause of so much misfortune and advantage.

The northern tribes abandoned, as by

(18) The author of the *Spirit of Laws* introduces his account of the feudal scheme with the following beautiful description of it. "Je croirois qu'il y auroit une imperfection dans mon ouvrage, si je passois sous silence un événement arrivé une fois dans le monde, et qui n'arrivera peut-être jamais; si je ne parlois de ces loix que l'on vit paroître en un moment dans toute l'Europe, sans qu'elles tinssent à celles que l'on avoit jusques alors connues; de ces loix qui ont fait des biens et des maux infinis; qui ont laissé des droits quand on a cédé le domaine; qui, en donnant à plusieurs personnes divers genres de seigneurie sur le même chose ou sur les mêmes personnes, ont diminué le poids de la seigneurie entière; qui ont posé diverses limites dans des empires trop étendus; qui ont produit la règle avec une inclinaison à l'anarchie, et l'anarchie avec une tendance à l'ordre et à l'harmonie." This description is short; but it comes from the pen of Montesquieu. *L'esprit des Loix*, liv. 30. ch. 1.

concert,

concert, their own habitations, to fix establishments in the Roman provinces: and the hurry and agitation of mind, which times of tumult and alarm never fail to produce, and the disorder inseparable from great bodies of men; the dangers which threatened them, and the hopes they conceived; ignorance of the countries in which they found themselves, and surprize at the progress they had made; all joined to turn their attention towards the leaders who conducted their enterprises, and shared their toils. These were the ties which bound them together; and the multitude of warriors, irresolute and wavering, depended on their wisdom for direction. The formation of courts, as in their own countries, was not presently attended to; nor perhaps was expedient: and, ignorant of commerce, and professed enemies to taxes (19), they knew

(19) The Gothini and Osi, says Tacitus, were not German nations, as they submitted to be tributary: "Gothinos

knew not those sources of order and government which are applied to in cultivated times. In this situation, military men, in love with the virtues of their princes, and yielding them during war an unlimited submission, were induced, by the easiest transition, to consider them as representing their states or nations. Land, which formerly belonged to communities, was now vested in leaders; and grants of territory (20), which tribes at first bestowed on one another, flowed to individuals.

The

“Gothinos Gallica, Osos Pannonica lingua, coarguit non esse Germanos; et quod tributa patiuntur: partem tributorum Sarmatæ, partem Quadi, ut alienigenis, imponunt.” *de M. G. c. 43.*

(20) Hence arose the notion, that a feudal king was proprietor of all the lands in his kingdom; a notion which the advocates for tyranny have fondly inculcated. The specious show of power, which this notion ascribes to a monarch, is, at first view, very apt to impose; but vanishes the moment we ascend to its origin. Land originally belonged to nations or bodies of men, and afterwards devolved to the representatives of those nations or bodies of men: and if liberty was enjoyed in the one case, there is little doubt but it was enjoyed in the other.

To

The office of a general, which before was uncertain and temporary, was now continued during life; and commanders were distinguished by the more pompous appellations of *Kings* and *Monarchs*. Their powers, however, were narrow and limited; and they retained but a scanty proportion of territory. The expences of government were as yet inconsiderable; and royalty awed not with its lustre. The remainder was assigned to inferior orders; and the

To suppose, that land immediately descended from nations to individuals, is extremely unnatural; and not less so is it to suppose, that it devolved exclusively to one man, and that in this man were lodged the riches and the power of a whole people. The mind passes not easily from great objects to small ones: and the principles of analogy and resemblance are ever directing, in the different stages of refinement, the varying conceptions and opinions of mankind.

It conflicts, however, with the prejudices of authors to adopt this opinion; and Loyseau, Dubos, and Chantreau le Fevre, have written learned volumes to support it. The appearances of liberty which the laws and the history of the barbarians are perpetually presenting, these writers consider as usurpations on royalty.

allotments

allotments to the great corresponded to their dignity and services. These again parcelled out their lands to their retainers (21): and as military service was connected with land in Germany, when given by one tribe to another; so it was not now forgot to be annexed to the grants of it. Every man was to furnish a force suitable to his ability and possessions; and he performed with cheerfulness a task so fitted to his temper. In the countries of enemies whom they had not exterminated, and also exposed to danger from nations like themselves, who, invited by their successes, might come in search of settlements, it was necessary they should be in a posture of defence. And, ambitious to excel in the arts of war, all men were fond of a government, which flattered their inclinations, and pleased their pride, by the military service it

(21) See Dr Robertson's history of Scotland, b. 1.; Hume, Appendix 2.; Wright on Tenures, ch. 1.; and the Glossaries,

injoined,

injoined, and the subordination it established. Hence princes, on the smallest alarm of danger, could soon assemble a strength to repel it; and thus they fixed themselves in territories which their valour procured to them.

The gifts of land, at first precarious, followed the will of the grantor. In this state, the partiality of sovereigns to relations, their weak and frivolous attachment to favourites, their whim, their vanity, and resentment, made them constantly recall, and give away, what they supposed was the grant of their bounty. The warlike qualities of a vassal, which intitled him to remain in his fief, furnished often the grounds of his dismissal: disgust followed on neglect; and where (22) princes were

(22) The following law is a proof that interest prevailed very much in the conferring of *benefices*; and it could not but prevail, in a higher degree, when the grants of land were more dependent. *Capitul. Karol. et Ludov. Imp. lib. 5. l. 224.* "— ut nullus de consiliariis nostris, propter beneficium cuilibet a nobis impetrandum, munera accipiat: quia nos volumus illi beneficium dare, qui nobis bene servierit."

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most

most courted, there they bestowed their favours. The retainers of a feudal lord, among whom he had subdivided his fief, felt strongly his losses, and shared in his disgrace; but being attached to his person, they could not think to quit him in misfortune, or renounce the train in which they had been distinguished; and his munificence was not equal to support them. The spirits of men were inflamed by opposition, the fashion of the times allowed them to resist, and they set themselves to humble their princes.

The first advantage extorted from sovereigns, by this direction of the united powers of lords and retainers, was a confirmation to the former of their grants for the year. But why, it may be asked, was a year in particular the time allotted? A cultivated people, to whom the most extensive notions of property are familiar, would, in such a situation, have claimed and acquired the entire disposal of their possessions. The barbarians, however, had no such knowledge

ledge of a private property in land; and their communities in Gaul and Germany, having yearly cultivated a new piece of ground (23), the distributions of territory to individuals were at that time *annual*. Land too, producing slowly its fruits, a vassal, if his fief was recalled within the year, was subjected to loss: the king's officers, it may be added, recommended themselves by an attention to find pretences to remove him (24); and the smallest (25) were sufficient. Hence ancient custom, and the reason of the thing, suggested, that fiefs should advance from being uncertain to be *annual*.

The lords and retainers were not likely to stop in their acquisitions. The

(23) See part 1. sect. 3.

(24) Beneficia qualiter administrantur, inquirant missi. Capit. 3. tit. 81.

(25) See L.L. Longob. lib. 3. tit. 8. l. 1. or the above-cited Capitulary, lib. 4. tit. 38. ap. Lindenbr.

employments of peace were rising gradually in repute; commerce was beginning to show itself; and the knowledge and the love of wealth were introduced. Desires and wants had multiplied; and demands to gratify them were frequent and pressing. Hence fiefs were next continued for a term of years. Furnished now with opportunity and encouragement, men bestowed their attention and labour on particular places. The time of the grants elapsed slowly: but princes forgot not to recall them; and vassals gave up, with a double reluctance, possessions, which were increased in their value, and for which they had contracted a fondness. They therefore proceeded to demand, and were allowed to enjoy them during life. The descendants of vassals were now ambitious to support, and to emulate the lustre of their ancestors; and the places of their birth, and the scenes of their youthful pleasure and amusement, drew them with a secret charm. Hence the

the son (26), grandson, brother (27), and more distant relations, came to claim and possess the grant. Fiefs, at different times, and in different places, descended

(26) It appears, that in early times, when a feud was granted to a vassal and his sons, all the sons succeeded *in capita*: "Feudum æqualiter ad omnes filios pertinet," says a commentary on the books of the fiefs; and, on the failure of any of them, the vacant share returned to the lord. See *Wright on Tenures*, p. 17. It appears likewise, that a lord might advance to the feud the son the most agreeable to him. See *lib. feud. i. tit. i.* But as the eldest son was soonest able to bear arms, and to perform services, it seemed hard to deprive him of the land; and the right of primogeniture was acknowledged. I need not remark, that infants, women, and monks, as incapable of military service, were in such times excluded from feuds.

(27) These changes are marked distinctly in the books of the fiefs. *Lib. feud. i. tit. i.* "Antiquissimo tempore sic erat in dominorum potestate connexum, ut quando vellent possent auferre rem in feudum a se datam. Postea vero eo ventum est, ut per annum tantum firmitatem haberent. Deinde statutum est, ut usque ad vitam fidelis produceretur. sed cum hoc jure successione ad filios non pertineret, sic progressum est, ut ad filios deveniret: in quem scilicet dominus hoc vellet beneficium confirmare. Quod hodie ita stabilitum est, ut ad omnes æqualiter veniat. Cum vero Conradus Romam proficisceretur,

descended to several generations, sometimes in a lineal, sometimes in a collateral succession. Princes, perpetually disappointed, grew careless of refusing grants, which the power of the subject was perpetually extending. Limitations were at length neglected; and the remoter heir was, without intermission, invested in the grant.

The inferior fiefs followed constantly the fate of the superior ones. Lords parcelled out their land in the form in which they received it (28): and those advantages

proficeretur, petum est a fidelibus qui in ejus erant servitio, ut lege ab eo promulgata, hoc etiam ad nepotes ex filio producere dignaretur, et ut frater fratri sine legitimo herede defuncto (vel filius) in beneficium quod eorum patris fuit, succedat." See farther *the Constitutions of Conrad. lib. feud. 5. tit. 1.* or *Lindenbr. p. 679.* The reader may also consult *Montesquieu, liv. 30. ch. 16.* *Hume, Appendix 2. Spelman voc. Feodum. Dalrymple, ch. 5. sect. 1.* and *Craig, lib. 1. dieg. 4.*

(28) It may be proper to mention, in this place, the different names which accompanied and distinguished this progress of the feudal law. When feuds were in their first and most dependent state, they were called *munera*; when

advantages were successively communicated to retainers, which their influence had assisted to produce.

It was thus that land was first connected with sovereigns: it was thus that it devolved to the people. The confined notions of property peculiar to a barbarous age, and the particular situation of the conquered nations, substituted leaders in the place of communities: An extensive territory was vested in them; and, perceiving the advantages to be derived from it, they hastened to be powerful. The people were alarmed; they claimed the direction of this territory; the grants of land submitted to a progress; additions flowed to the

when they were given for a term of years, and for life, they had the name of *beneficia*: and these stages of feuds occur under these terms in *Marculphus*, who lived about the year 660. Three centuries, and something more, after this period, the perpetuity of the feud was fully established: and the appellation of *feudum* and *feuda* came to be used. It may be remarked, however, that this last expression is generally employed in a more enlarged meaning; and often includes every stage of this progress.

power

power of the vassals; and laws were enacted to secure their rights. Princes forgot that they represented the people; and the people crushed their ambition. Liberty followed the conquerors out of Germany; it was in danger on their conquests; and this danger, like convulsions and rebellions in a state, served to confirm and strengthen it.

S E C T. II.

Of the origin and decline of the feudal ceremonies and incidents.

IF authors have erred in assigning the origin of the feudal polity, they have been no less mistaken in accounting for the ceremonies of *fealty* and *homage*; and for the incidents of *wardship* and *marriage*; of *relief*, *aid*, and *escheat*. They ascribe to the perpetuity of the feud,

feud, what prevailed in the forests of Germany (1), and grew from the connection of prince and retainer.

While the barbarians were in their own countries (2), the most intimate connection subsisted between a prince, or great warrior, and his retainers. The military spirit, which throws a contempt on every thing that is joined to labour (3), occasioning a neglect of agriculture; men, in such a period, derived, in part, their subsistence from war and plunder. Without experience of a private property in land, and unacquainted, of consequence, with the use of money, or with commerce, there was no other method to supply it. At-

(1) See Spelman's treatise on Feuds and Tenures; Montesquieu, liv. 31. ch. 33. & 34. &c.

(2) Part I. sect. 1.

(3) Tacit. de M. G. c. 14. Nec arare terram, aut expectare annum, tam facile persuaseris, quam vocare hostes et vulnera mereri. pigrum quinimmo et iners videtur sudore acquirere, quod possis sanguine parare.

tacking (4), therefore, their peaceful neighbours, or leaguings with nations already at war, they gratified their love of arms, and of rapine; and the great furnishing direction, and the vulgar force, their mutual advantage bound these ranks in the closest confederacy.

This connection was likewise promoted by the imperfection of civil government in those early ages. Before the right of revenge is delivered up by the individual to the magistrate, and before the public acquires authority to carry its decisions into execution, men depend on their own arms for redress and protection; and society is often disfigured by the violence of private resentment. To warriors, jealous and provoked, the least neglect bore the marks of con-

(4) Si civitas, in qua orti sunt, longa pace et otio torpeat; plerique nobilium adolescentium petunt ultra eas nationes, quæ tum bellum aliquod gerunt, quia et ingrata genti quies, et facilius inter ancipitia clarescunt, magnumque comitatum non nisi vi belloque tueare. Tacit. de M. G. c. 14.

tempt;

tempt; the least exultation, or assumed superiority, was held as a defiance; and the sword must decide disputes which no laws had been framed to determine. The injured, if unable of himself to retaliate on his enemy, engaged his friends to assist him; and his friends claimed his aid in a like situation. If a retainer had sometimes occasion for the arm and influence of his prince, a prince was often no less indebted to the number and valour of his retainers. The little community (5) conceived itself injured by

(5) *Caesar, lib. 6. c. 11.* "In Gallia non solum in omnibus civitatibus, atque in omnibus pagis, partibusque, sed pene etiam in singulis domibus, factiones sunt: earumque factionum principes sunt, qui summam auctoritatem eorum judicio habere existimantur: quorum ad arbitrium judiciumque summa omnium rerum consiliorumque redeat. idque ejus rei causa antiquitus institutum videtur, ne quis ex plebe contra potentiores auxilii egeret: suos enim quisque obprimi, et circumveniri, non patitur; neque aliter si faciant, ullam inter suos habent auctoritatem." *Polybius, lib. 2.* has observed of the Senones, "Sodalitatibus colendis præcipue studebant. Is namque apud illos plurimum timetur, et potentissimus censetur, quem plurimi colunt." The propinquity of blood, and

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other

by an insult on any of its members; duty, as well as passion, called it to revenge; and a stain indelible covered its honour, if the indignity remained unatoned.

The similitude of occupation and amusement still farther corroborated this connection. In a rude period of manners, the tempers of men, less warped and weakened by prejudice, less timorous, distant, and unequal, than when the pursuits of pleasure, ambition, and avarice, have spread out their allurements, move, without reserve, to the voice of passion; and friendships, where there could be no interest to deceive, were at once lasting and ardent. While retainers fought by each other in the field; while they attended the same train in peace; and, equally attracted

other causes, it may be remarked, might bind particular individuals in the closest intimacy; but such attachments rather strengthened than derogated from the general associations of princes and retainers.

by

by the same military sports (6), were equally adventurous to attain distinction; their minds, bending in a similar direction, disposed them to enter into habitudes, and linked them to each other, by the friendly intercourse of office. And while the great, without losing their dignity, could mingle with the vulgar, princes were ambitious to share in these intimacies; and displayed their zeal and affection, by the encomiums they bestowed on their followers, and by those honours (7), and presents (8), which are so flattering to a warlike people.

These

(6) The amusements of a barbarous people are constantly connected with danger. *Tacitus* says of the Germans, "Genus spectaculorum unum atque in omni coetu 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." *de M. G. c. 24.*

(7) *Tacit. de M. G. c. 13.*

(8) "Exigunt" (observes the same author concerning the German retainers) "principis sui liberalitate illum bellatorem

These causes bound a prince and his retainers in Gaul and Germany; and when the barbarians had conquered, and the relation of *superior* and *vassal* had succeeded to that of *prince* and *retainer*, the grants of land, which the former bestowed on the latter, contributed, with a powerful efficacy, to advance and confirm this union. Land, at all times, fills the mind, and makes a durable impression on the affections. The novelty, however, of this object, and the ardour with which the possession of it would strike the barbarian, enhanced to him its value. A prince, or dignified warrior, viewed himself with triumph, as coming in the place of a nation; and dealt out, as to his subjects, with a swelling heart, his land and his greatness. His followers received his presents with an equal passion: and this bond of connection continued

bellatorem equum, illam cruentam victricemque frameam.
— *Materia munificentiae per bella, et raptus.*” *de M. G.*
c. 14.

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its energy, when the former causes were no longer exerted, when the military spirit had decayed, when regular governments were established, and when commerce and luxury had given birth to a more varied, but less virtuous scene of manners.

The attachments, however, of prince and retainer were strong and lively, before land was transferred to individuals, and had produced their effects. The young men directed to them their first ambition; and the state, conceiving a concern in associations which formed its force, ceremonies were invented to add to their importance. The council of the warriors assembled; and if the youthful candidates were able to endure fatigue, and discovered the presages of greatness (9), princes received them into their retinues; they presented to

(9) *Tacit. de M. G. c. 20.* Dominum ac servum nullis educationis deliciis dignoscas. Inter eadem pecora, in eadem humo degunt; donec ætas separet ingenuos, virtus agnoscat.

them

them the shield and the *framea* (10); and the foundations (11) were laid of the firmest commerce. The state considered them as citizens; and their minds were agitated with hope and glory.

From this moment they accompanied, on every occasion, those princes to whom they had joined their affections. To guard their reputations against the insidious attacks of a secret foe; to defend their persons against the more honourable assaults of an open e-

(10) See part I. sect. I.

(11) The strong connection of prince and retainer is well exemplified in the story of Chnodomarius: — “Compulsus,” says the historian, “ad ultimos metus, ultro se dedit, solus egressus.” And he adds, “Comitesque ejus ducenti numero, et tres amici junctissimi, flagitium arbitrati post regem vivere, vel pro rege non mori, si ita tulerit casus, tradidere se vincendos.” *Ann. Marcell. lib. 14. c. 12.* “Litavicus,” says Cæsar, “cum suis clientibus, quibus, more Gallorum, nefas est etiam in extrema fortuna deserere patronos, Gergoviam profugit.” *lib. 7. c. 40.*

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nemy (12); to add to their lustre in peace, and to their power in war; to fight by their side in battle, to equal their courage, to increase their renown, and never to forsake or survive them: these were the duties to which they submitted.

By receiving from their princes the shield and the *framea*, they had acknowledged their superiority: and they cheerfully professed their readiness to comply with injunctions and orders, which, communicating to them the means of action, led them to distinction and honours. No mean submissions were claimed, or expected; but the purposes of society and government required

(12) *Tacit. de M. G. c. 14.* “Cum ventum in aciem, turpe principi virtute vinci; turpe comitatu virtutem principis non adæquare. Jam vero infame in omnem vitam ac probrosum, superstitem principi suo ex acie recessisse. Illum defendere, tueri, sua quoque sortia facta gloriæ ejus assignare, *præcipuum sacramentum* est. Principes pro victoria pugnant; comites pro principe.” See the same author, *c. 13.*

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subor-

98 *Of the state of Land in the* Part II,
subordination, and the offices of com-
mand and obedience.

The same attachments prevailed, as
we observed, when the barbarians had
conquered; and the grants of land di-
minished not their influence. The same
ceremonies likewise continued, and
were distinguished by the appellations
of *fealty* and *homage* (13). But a nicer
care attended their practice; as retain-
ers, separating to enjoy their lands, and
solicited by more various passions, and
more occupied, might forget their du-
ty to their princes, might refuse the ser-
vice to which they had submitted, and
renounce the tenure by which they
held: and no longer at hand to approve,

(13) The oath of *fealty*, and the *precipuum sacramen-
tum*, just now described, were expressly similar; and *homage*
was no more than an acknowledgement of the superiori-
ty of the lord. See *Wright on Tenures*, p. 55.; *Coke on
Littleton*, p. 64. & 67.; and the *Glossaries of Spelman and
Du Cange*.

and

Sect. 2. *German and Gothic kingdoms.* 99

and to act in the measures proposed (14),
a summons from the princes called them
to arms.

In Germany, it was the great ambi-
tion of the princes to excel in the num-
ber and bravery of their retainers; and
they naturally employed their care to
bring up to hardships and military dis-
cipline, those youths whom they desti-
ned for their train, or who, incited by
military glory (15), had already offered
themselves to attend their fortunes.

(14) — Ligno suspenditur alté
Erecto clypeus, tunc præco regius omnem
Convocat a dominis feudalia jura tenentes.
Spelman, voc. Feodum.

The obligation to military service was known among the
Anglo-Saxons by the *Profectio militaris et expeditio*; in
the Empire by *Herebannum*; and in France by *Escuagium*;
under which title it was known in England after the Nor-
man conquest. See the *Glossaries*.

(15) *Tacit. de M. G. c. 13.* “Insignis nobilitas aut mag-
na patrum merita principis dignationem etiam adolescen-
tulis assignant.” But he adds, “Ceteris robustioribus ac
jam pridem probatis aggregantur.”

The same ambition followed them in their conquests; and, producing the same consequences, the halls of superiors were filled with future vassals (16), whose early merits had recommended them, or who had found that distinction from the prejudice of princes, or the connection of families.

But, unfettered by the possession of land in their own country, princes were ever adding to their retainers. The young men attained to the military age, and joined in their retinues. The grants of land set a boundary afterwards to their number: and while these were precarious, the power of the lord raised up at pleasure the expectants to his fiefs. This power was likewise exerted at the return of the fiefs, when they had been granted for life, or a term of years:

(16) I have sometimes been ready to imagine, that the word *juniores*, which occurs very often in ancient papers and volumes, might refer, in some instances, to those youths who were candidates to succeed to fiefs. See *Du Cange, voc. Juniores.*

and

and when they descended with limitation in a certain family, and law directed the choice of the superior, he resumed, on the death of the feudatory, the possession of the land, and took the infant-heir under protection. It was the court of the lord which, in those ruder and more violent times, afforded the greatest security to the person of the vassal: it was there he found the fittest opportunities of improvement. Such was the rise and the progress of *wardship*.

When it is remembered, that it was a law among the Germans, to preserve inviolably the friendships of their ancestors and kindred, and to inherit and adopt their enmities (17), we may easily conjecture, with what ardour of mind individuals then entered into connections of their own, and with what steadiness of conduct they pursued and maintained them. The ties of nature

(17) *Tacit. de M. G. c. 21.* Suscipere tam inimicitias seu patris seu propinqui, quam amicitias, necesse est.

were

were not stronger, or more sacred, than the attachments of prince and retainer. Shall we then imagine, that followers, renouncing all the objects of their first and warmest affection, and tarnishing all the lustre of their former glory, would ally themselves with families at variance with their princes? or shall we even fancy, that such families would accept of their alliances? Retainers listened to the counsels of their princes (18); who, uniting them to the more honourable and powerful, employed art to extend their greatness. Manners change not of a sudden: *superiors* continued this influence, and gave their *wards* in marriage. Delinquencies, in the one case, were punished by expulsion from the train of the prince, and by the infamy attending them; in the other, by the forfeiture of the fief.

(18) *Cæsar* says of *Dumnorix*, "Hujus potentia causa, matrem in Biturigibus, homini illic nobilissimo, ac potentissimo, conlocasse: ipsum ex Helvetiis uxorem habere: sororem ex matre et propinquas suas nuptum in alias civitates conlocasse." *lib. 1. c. 18.*

Among

Among a people who felt all their passions in extreme, and by whom every mark of favour was received with the highest gratitude, the admission into the train of a celebrated warrior was necessarily followed with some return. Among a people who delighted in presents (19), and performed not any act of civil life without exchanging them (20), a situation could not occur, where their propriety was greater. Led by passion, and prompted by an ambition to conciliate the affections of his prince, every retainer, when promoted to attend him, presented some gift to which the opinion of rude times had annexed a value. When land had become connected with individuals, and a *vassal* was about to receive a fief, he was exactly in a similar situation; and, guided

(19) "Gaudent muneribus," said *Tacitus* in general of the Germans, *c. 21.*

(20) See, in the same author, the ceremonial of marriage among this people, *c. 18.*

by

by the same principles (21), he offered a present to the *superior*. It is thus (22) that the right of *relief* was established.

The Germans, jealous of liberty, stooped not to taxes; but their genero-

(21) Before this present came to be paid in money, it consisted of *armour*; and it might be offered in this shape in Germany.

(22) This right, if known by the name of *relevium* in the earlier feudal times, must have acquired it from the consideration, that the present given was a kind of recompence to the superior for parting with his land: and this notion might easily prevail as times grew mercenary. It is, however, the common notion, that this word was not known till feuds came to be granted to a series of heirs: and, in this case, the word got a beginning, when the son of a feudatory offered a present to the superior to *relieve*, if one may speak so, the land which the death of his ancestor had rendered *caducuary*.

This leads me to remark a practice which is common to antiquaries. When they have found, with much industry, the age of a particular word, they invariably conclude, that the ceremony, or incident denoted by it, was not known till that period. They have no conception that the *thing* could prevail before the *name*. They act as philologers, while they should attend to the force of history, and the spirit of ages.

fity,

fity, and fondness of enterprise, furnished to their princes a more plentiful source to continue their splendour, and to assist their undertakings. The hearts and the arms of their followers offered them a supply more effectual than that half-granted tribute, that cold service, and those feeble efforts, which the power, or the wealth, of a despotic monarch, exacts, or buys from his slaves. But it was not solely to the glory of a prince that his retainers ministered (23): they relieved also his wants and necessities. Were his sons to be initiated in the trade of arms, were his daughters to be married, or was his captive family to be redeemed, their contributions furnished the feast, or made up the ransom. Hence the *aid* (24), or *benevolence*, which

(23) *Tacit. de M. G. c. 15.* Mos est civitatibus ultro ac viritim conferre principibus vel armentorum vel frugum, quod pro honore acceptum, etiam necessitatibus subvenit.

(24) *Spelman and Du Cange, voc. Auxilium.* "It has been observed by many writers," says an intelligent antiquary,

which a vassal rendered to his superior.

No people were more delicate in the point of honour than the Germans; and none had ever carried the military institutions to such a height. It is not therefore to be supposed, but the follower unworthy of the train of a prince, would immediately be expelled from it, and incur the punishment which was due to his cowardice or perfidy. When retainers got land for service, the same cases would occur, and the same rules be practised. The superior would ravish from a vassal the fief, which his crime or delinquency had made him incapable to enjoy. It is thus (25) that

quary, "that in England there were in ancient time three sorts of aid due to the king from his immediate tenants, (and likewise to inferior lords from their immediate tenants), of common right, or by reason of seignory; to wit, aid to make his eldest son a knight, to marry his eldest daughter, and to ransom his person when taken in war." *Madox. Hist. Excheq. p. 396.*

(25) See *Spelman and Du Cange, voc. Felonia et Escheata*, I have not mentioned the other appearance of *escheat*.

that the incident of *escheat* was produced.

Such was the origin of these ceremonies and incidents. They prevailed among the Germans; they were continued by that people when they had conquered, and followed in every period of the feudal progress. Antiquaries have been struck with the grants of land which a superior bestowed on his vassals; but have not attended to the history of property, or to the previous connection of those parties. They en-

escheat, which happened on the failure of heirs, as I have all along confined myself to times anterior to the perpetuity of the feud. Nor, for the same reason, have I mentioned the fine of alienation. To dismember a fief, was the invention of late times, when the advancement of arts had made every thing to be bought and sold. The feudal spirit locked up land from commerce; but the luxury and necessities of vassals induced them to alienate their lands. The consent of superiors was necessary to such alienations: a bribe softened them into compliance; and on this bribe the *fine of alienation* was erected. Time, no doubt, and accident, introduced innovations on ancient custom.

tered the labyrinth without the clue to direct their steps (26), and were lost in its windings.

But as these ceremonies and incidents arose, and grew with this connection of prince and retainer, so they attended, and were lost in its decline. When the life of a foldier, so exposed at different times to dissipation and hardship, had grown to be irksome, and industry and labour offered a more honourable subsistence than war and rapine; when the hand of the magistrate was armed with power to punish the offender, and government furnished protection and security to the persons and possessions of men; and when the spirit of com-

(26) It is remarkable, that very able writers are constantly committing errors in what they write concerning feuds. This proceeds from the little attention they pay to the way of thinking and history of the barbarians before their conquests. The short, but comprehensive and sentimental, work of Tacitus, on the manners of the Germans, is the key to the Institutions, the Capitularies, and the Codes of the barbarians: yet how seldom is it appealed to?

merce,

merce, and the allurements of luxury, had given birth to the arts of peace, and the love of wealth: in such a period, the use and necessity of all private associations were removed; princes forgot their retainers, retainers their princes; and those ceremonies and incidents which had attended their connection, and which were willingly performed while that connection was of advantage, were considered as grievances. Vassals yielded not the submission, in more peaceful times, which dangers and alarms made them give with cheerfulness; and the service enjoined by tenure, grown burdensome and severe, was made elusory or civil. The heirs or expectants of feuds found it more agreeable to remain at home: their relations thought it more expedient. The voice of war sounded not so loudly; and the talents for business and debate, and the soft accomplishments of peace, were but ill acquired, or improved, in the hall of the superior. The appetite of the sexes had

had refined, and was directed by more complicated views. Retainers trusted not to their lords the choice of the objects of their tenderest affection: nor did they lightly enter into contracts (27), which, unlike in their nature to all others, the consent of the parties dissolves not. More guided by sentiment than the savage and the barbarian, the member of a polished age finds a thousand charms, and a thousand obstacles, to incite and obstruct his passions: more guided also by interest, he often debases his affections to a sordid and ignoble traffick: and these motives joined their influence against the *incident of marriage*. The severity of the other *incidents* was no less felt in a cultivated and commercial age; and in kingdoms

(27) In rude times, before manners have acquired a delicacy, and before the passions are restrained by laws, the obligations of marriage are often temporary. The same consent which gave beginning to this union can dissolve it; and the parties, on every disgust, seek to unite themselves more agreeably.

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where the feudal law has been allowed to wear out by time, the decisions of judges, and the force of statutes, have reduced them to nothing. The enlarging experience of men is ever altering their manners: the present still improves on the past: and those customs and attachments which one age adopts, and pursues with pleasure, the next renounces, and avoids as oppressive and grievous. Constant alone in the changes they exhibit, men are ever furnishing the materials of those motley pictures which compose their history.

S E C T. III.

Of Allodial possessions.

WE are not, however, to imagine, that all the territory which the conquering nations acquired by their valour, was immediately converted into fiefs.

fiefs. The German nations only occupied in their own country, as much territory as was sufficient to maintain them. The princes who represented such nations did the like; and the lands which remained were partly claimed by the ancient inhabitants of the conquered provinces, and partly possessed by a free title. Warriors, who fought for themselves, and to whom liberty and splendour had the greatest charms, were not to be satisfied with the precarious possessions they received from their leaders. They seized also on estates, which, holding of no superior, were subjected to no service: and these they dissipated in expence, disposed of by sale, presented in donation, or transmitted to their heirs; exerting over them all the rights of the most absolute property. The codes of the barbarians perpetually allude to such estates, which they distinguish by the term *allodial* (1); but they offer

(1) *Allodium* — est prædium liberum nulli servituti obnoxium; ideoque *feudo* oppositum, quod hoc semper *allicui*

offer not any grounds by which to account for this enlarged notion of a private property over land. Would we find its origin, we must look for it in the customs of the Germans.

The inhabitant of Germany marked out a piece of ground around the cabin he had built (2); and having inclosed this

licui subiacet servituti. — Dicitur etiam allodium terra libera, quam quis a nemine tenet, nec recognoscit, licet sit in alieno districtu et jurisdictione: ita quod solum est sub domino districtus, quoad protectionem et jurisdictionem. Spelman, voc. Allodium. See also Glossaire du droit François, par Lauriere, Montesquieu, liv. 30. ch. 5. and Hume's hist. Append. 2.

(2) *Tacit. de M. G. c. 16.* Nullas Germanorum populis urbes habitari, satis notum est, ne pati quidem inter se junctas sedes. Colunt discreti ac diversi, ut fons, ut campus, ut nemus placuit. Vicos locant, non in nostrum morem, connexis et cohærentibus ædificiis: *suam quisque domum spatio circumdat*, sive aduersus casus ignis remedium, sive incitiam ædificandi.

Montesquieu has imagined, (*L'esprit des Loix, liv. 18. ch. 22.*), that the *Salick land* was within the inclosure of the *German house*; and that the Franks, when they had acquired new possessions, continued to call them *Salick lands*. The authority of this author is doubtless very great; but let us stop a moment to inquire into his opinion.

this ground, it became an object of his fondest attachment; and he possessed it in preference to all others. Nor did the public, though it annually cultivated a different territory, find it at any time expedient to call back to its stock those spaces which individuals had occupied, or to restrain their extent. Within these inclosures they fancied they had found

nion. If the Franks had been single in surrounding their houses with an inclosure, this opinion had been just and conclusive. The fact, however, applies equally to every German nation. It must therefore have followed, if this opinion was well founded, that the *Salick lands* were common to all the barbarous nations; for the *lands of the house* were common to them. But every body knows, that the *Salick lands* were particular to a certain people. The conclusion then is obvious, that the *Salick lands* were not the *lands of the house*. This opinion of Montesquieu appears likewise to be singular: for it is generally thought, that the *Salick lands*, and the *Salick law*, were so named from being peculiar to the *Salians* or Franks: and this notion is easy and natural. *Allodial lands* were common to all the Gothic nations: these then were the *lands of the house*. With regard to the succession to *Salick* and *Allodial* land, it is probable that the same principles directed it. But in the one, the women were entirely excluded; in the other, there was a distant possibility of their succeeding.

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an asylum; and should the rage of their enemies pursue and overtake them there (3), a double penalty atoned the delinquency.

The continued enjoyment of lands to which they were so firmly united, made men fancy them more peculiarly their own: and while they defended them against every invader, or shared them with their friends, the exertion of the privileges of property led to the conception of the right of it; and the abstract idea conveyed by that term, and so little known in the beginnings of society, became gradually evolved. It is indeed a fact no less curious than certain (4), that when the barbarians had conquered, the particular spaces surrounding the houses of the warriors were the first portions of territory which were redu-

(3) Compare the spirit of the following laws: *Wisigoth. lib. 8. tit. 1. l. 4. Burg. add. 1. tit. 5. Sal. tit. 6. § 3. Alm. tit. 10. 11. 31. 81. 82. ap. Lindenbr.*

(4) *Loccen. Antiq. Sueo-Goth. c. 19.*

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ced to commerce. From these the transition to others was obvious: and their minds growing in their powers, and enlarging by observation of the cultivated manners of the conquered provinces (5), no wonder (6) they every where took possession of lands which were free and allodial.

It occurs, next, to inquire concerning the principles which directed the succession to these lands: and for this end, we must again turn our eyes to the woods of Germany.

(5) Some of the conquering nations entered into formal agreements with the Romans, which induced them to observe the manners of that people: the moderation of others produced this effect without such agreements. And with regard to the Saxons, they could not but imitate, during their wars with the Britains, some part of the civility in which the Romans had instructed those islands.

(6) Persons who had received *crown-benefices* were sometimes in use to dispose of them in property, and to purchase them back again as allodial lands. This fraud shows the frequency of allodial possessions. See *Lindenbr. cap. 3. tit. 20.*

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Among the Germans, the sons of a warrior, sharing constantly in his pleasures and fatigues, felt strongly his attachments. His daughters, more reserved and distant, wanted opportunities to improve their sympathy. His connection with the former grew more and more ardent; his connection with the latter grew colder and more indifferent. The lands he had occupied, and the objects he valued, were fondly regarded by the former; and they continued to possess them. But (7) the latter

(7) *Leg. Rip. tit. 56. § 3. ap. Lindenbr.* — “Dum virilis sexus extiterit, foemina in hereditatem aviaticam non succedat.” See also *Leg. Angl. et Wer. tit. 6. &c.* It is worthy of remark, that if a woman who had the good fortune to inherit land should have a living child in marriage, and die in childbed, her estate went to her husband. This law is curious, and points out the origin of the incident, which lawyers have distinguished by the title of the *Courtesy of England*, tho' it was by no means peculiar to that kingdom. The reader will allow me to transcribe it. *Leg. Alam. tit. 92. ap. Lindenbr. p. 387.* “Si qua mulier quæ hereditatem paternam habet, post nuptum prægnans peperit puerum, et in ipsa hora mortua fuerit, et infans vivus remanserit aliquanto spatio, vel unius

latter thought not of appropriating subjects in which their hearts found not any claim.

It was agreeable to a warrior to transmit his liberty and greatness to his posterity; but his sons alone could support these advantages; and his lands furnished the means to continue them. The daughters were little interested; and inherited not possessions which they had not acquired, and could not defend.

Farther, in those times the husbands, by a singular custom, offered portions to the wives, not the wives to the husbands.

unius horæ, ut possit aperire oculos, et videre culmen domus, et quatuor parietes, et postea defunctus fuerit, hereditas materna ad patrem ejus pertineat. Et tamen si testes habet pater ejus, quod vidissent illum infantem oculos aperire, et potuisset culmen domus videre, et quatuor parietes, tunc pater ejus habeat licentiam cum lege ipsas res defendere." This law may be compared with Coke on Littleton, ch. 4. sect. 35. art. *Curtesie D'Engleterre*.

bands

bands (8); and these corresponded to their rank and merits. Enriched by the presents they received, and removed into other families, the women neither expected nor obtained possessions from their own. The males succeeded to the lands of their ancestors; and custom growing into law, the females were almost totally excluded from allodial possessions.

THESE were the different aspects which land every where assumed on the conquests of the barbarians; and they mutually communicated an influence to each other. The more enlarged notions of property implied in allodial possessions hastened the perpetuity of the feud; and the power and assistance which feudal lords derived from their vassals, the high compositions exacted for the injuries they received, and the

(8) *Tacit. de M. G. c. 18.* "Dotem non uxor marito, sed uxori maritus offert." The codes of the barbarians perpetually allude to this custom. See *Lindenbr. voc. Dos.*

other

other privileges to which they were intitled, rendering their authority and weight more considerable, and placing them in a higher point of view than allodial proprietors; these, allured by such advantages (9), resigned their lands, receiving them back again in the form of fiefs. And this practice coming to be general, the feudal plan was fully established.

S E C T. IV.

An application of the foregoing theory to the history of England.

IT is easy to apply these reflections to the German and Gothic kingdoms, and to ascertain in each the changes

(9) Marculf. lib. 1. form. 13. Montefq. liv. 31. ch. 8. Hume, Append. 2. Hurd on the Engl. constitution, and the Encyclopedie *mot Fief*.

and

and varieties which have distinguished the state of land. A detail, however, so minute and particular, would at present be tedious and irksome; and our subject confines us to the history of England.

The Saxons have been represented as the most warlike and uncultivated of all the German tribes (1); and they retained the longest their original rudeness. The phlegm of temper peculiar to this people, their confinement to an island, and that cruel policy which taught them to exterminate the Britains, retarded their refinement, but secured their independence. The steps by which they advanced were slow and cautious, but firm and certain. The different appearances exhibited in the feudal progress, and those *ceremonies* and *incidents*

(1) "Saxones omnium eas regiones incolentium barbarorum, et animis, et corporum viribus, et laborum in proeliis tolerantia, fortissimi habitui." *Zozimus hist. lib. 3.* And *Am. Marcellinus* has observed, *lib. 3.* "Præ ceteris hostibus Saxones timentur."

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which

which constantly attended them, were known, and had been unfolded in the Saxon period. The perpetuity, however, of the feud was not frequent; and a great share of territory was possessed by a free and allodial title. The foundations were laid, and the walls were erected; but the top was wanting to the fabrick. The event was about to establish itself, when it was hastened by the manners and way of thinking of a more cultivated people.

The Normans, to whom wars and foreign expeditions had communicated the improvements of Europe, brought along with them into this island the perpetuity of the feud; and to the invasion of William, on which so many historians have displayed their prejudices, and so few their candour, are we indebted for our first advances to art and civility. Lands, at this period precarious, and descending in limitation, were made hereditary and perpetual; allodial possessions were converted into fiefs;

fiefs; and the feudal law (2), in its more enlarged condition, spread itself over England.

But

(2) A similar progress of the state of land is observable in Scotland. Land in that kingdom was originally feudal and allodial. The feudal was arbitrary, or for life, or descended to a series of heirs, till the reign of Malcolm II.; and perhaps there might be some instances before that period of the perpetuity of the feud, and of the conversion of allodial lands into fiefs. After this period the feudal system was made general in Scotland. A writer of great name has represented it as altogether improbable, that the bulk of a people would resign their free lands to subject them to tenure. There is not a source of greater mistake than the judging of the notions of one age by those of another. This practice took place in every kingdom which the German and Gothic tribes had erected: and it was a long time before the incidents attending tenure were considered as grievous. It was not the views of exalting their sovereigns, which inclined individuals to resign their free possessions; nor was it the power or tyranny of sovereigns which brought about such resignations. It was the advantages enjoyed by the tenants *in capite*, which induced allodial proprietors to change their property into tenure.

I know that Spelman has conjectured on this occasion, that Malcolm II. has been mistaken by the Scottish historians for Malcolm III.; and that the laws which bear the name of the former are to be ascribed to the latter. But this antiquary perceived, that if the perpetuity of the feud was only known in the reign of Malcolm III.

But no sooner had the system attained its height, than the marks of its decline were at hand. William and Rufus ex-

the feudal customs could not have been unfolded with so much minuteness, as to have been reduced to a system in the time of his son David I.; and yet the *Regia Majestas*, the old Scottish institute, which contains a very perfect state of the feudal customs, appears to have been composed at the command of that monarch. This objection seemed to have weight; and he removes it by another conjecture, which supposes, that David I. was mistaken for David II. In this way, the hand of an antiquary may mould every thing to his opinions. The matter is doubtless important: for, to judge by their dates, the *Regia Majestas* preceded *Glanvil*; and the English must have borrowed from the Scots the model, or the expression, of their laws.

I enter not, however, into this dispute. In either case the principles I proceed on appear just; only it would follow, if the conjectures of Spelman are allowed, that Malcolm III. might have imitated the example of William the Norman, in extending the perpetuity of the feud. From these times the doctrines of the feudal law became burdensome; and continued to be so till their severities were taken away in the reign of George II. I shall conclude this note with observing, that the learned judge, to whom I have already referred, has paid Spelman the compliment to adopt and adorn those conjectures of his just now mentioned. The curious reader may compare Spelman on Feuds and Tenures, p. 28. and the first in order of the Essays on British Antiquities.

acted

acted its duties with too full a severity; and Henry I. though he granted a charter to remedy those oppressions, yet carried them to greater extremity than his predecessors. Succeeding princes imitated his example; and the rapacity of King John was insatiable. The barons asserted their liberties; the *Magna Charta* was granted; and some mitigation was applied to their rigours. But the feudal claims and pretensions were still considerable and oppressive, and seemed to be altogether incompatible with the growing softness and humanity of manners. They continued, however, till Charles II. mounted the throne of his ancestors; at which time the military tenures, with the fruits and incidents attending them, were abolished.

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HISTORICAL DISSERTATION

Concerning the ANTIQUITY of the
ENGLISH CONSTITUTION.

PART III.

Of the orders of men in Germany
and England.

SECTION I.

Of the distinction of Ranks.

WHEN society has increased in its numbers, and men, drawn by the prospects of advantage, have united their forces; when individuals have acknowledged an interest superior to their own,

Sect. 1. *Of the orders of men, &c.* 127

own, and consider themselves as the members of a great body; when communities, as well as the parties injured, conceive a resentment against criminals, and a public magistrate exacts satisfaction, and moderates the rigour of revenge; in a word, when the idea of a *public*, or a country, is suggested, it is then that the distinction of ranks takes place.

This idea, the first of any value that is formed by men, and the most enlarged, the most generous, and the most beneficial, which is at any time conceived, operates, with the fullest efficacy, in the ruder periods of society. The great passion of the German was the love of his country; and unsolicited by that variety of objects which employ the attention in a cultivated age, and undistracted by those divisions of labour which then prevail, he was at full leisure to indulge it. The society to which he belonged, was neither complicated in its form, nor were its possessions extensive; and he was able to attend, without

without embarrassment, to its interest. He was flattered by the part he sustained in the administration of affairs; he was flattered by the protection which was constantly afforded him amidst the violence of the times; and, unacquainted with a private property, he was chiefly supported by an annual allowance from his country. His tribe, therefore, was the important object which filled his thoughts; and he employed all his efforts to advance its glory. Every pursuit which contributed to this purpose was great and glorious: every pursuit which deviated from it was mean and ignoble. This great idea gave strength to his arm in the field: it gave firmness to his counsels in the senate. It was his country alone for which he lived; and when the vigour of his body, or the power of his mind, was wasted or impaired by the attacks of disease (1), or the decays of

(1) Cativolcus, one of the kings of the Eburones, finding himself infirm from age, and being deserted by his partner

age, he had recourse to the dagger, or to poison, and disdained to retain a life which was useless to his nation.

In proportion as they promoted the interest of the tribe, the character of individuals in such a period was estimated. In this view, their actions were examined, and their importance adjust-

partner Ambiorix, dispatched himself by poison. *Cæsar, lib. 6. c. 31.* *Silius Italicus* characterises the Spaniards in this manner:

“*Prodiga gens animæ, et properare facillima mortem,
Namque ubi transcendit florentes viribus annos,
Impatiens ævi spernit novisse senectam,
Et Fati modus in dextra est.*”

lib. 1. v. 225.

Other nations seem also to have thought in the same manner: “*Lex est apud Ceos,*” (says a judicious author), “*ut ii, qui senio plane confecti sunt, tanquam ad hospitalem mensam se invitantes, aut ad quoddam solenne sacrificium ascendentes, et coronati, cicutam bibant, quando sibi ipsis conscii sunt, se ad curanda patriæ commoda inutiles esse, animo jam ob ætatem aliquantulum delirante.*” *Ælian. lib. 3. c. 37.*

The same way of thinking was in part adopted by the Stoicks. See *Cic. de Finibus, lib. 3.*

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ed.

ed. This was the principle upon which the different orders of society arose; this was the principle from which they derived their value. Is not the soldier more esteemed than the slave? is not the noble more esteemed than the soldier? and the king than the noble? As the sphere in which he moved was more or less useful, and as his connection with the public was more or less intimate; so was the rank and value possessed by the citizen more or less honourable.

It will not be said, that the merits they possess are the source of that respect which is paid to the great; and nature, it will not be said, has distinguished, by certain and unerring marks, the monarch from the subject, and the noble from the slave. To their riches, however, many will be apt to ascribe their value. But the miser, with all his hoarded treasure, is treated with contempt. Is it then to the ease and convenience, to the luxury and splendour they enjoy, that we give our approbation? The private man, whom fortune has

has favoured, frequently possesses these advantages in a higher degree; yet was it ever known, that he obtained that regard which is bestowed on *nobility*? And what shows the entire weakness of this argument, the distinction of ranks is prior to the establishment of property. Kings and nobles appear in society before land devolves to individuals, and before laws are framed to give security to possessions. Filled and penetrated with the idea of a *public* men direct the distinctions of rank by the advantages which result to the community from the conduct of its members; and, according to the connection of ranks with the community, they determine the honour and attention conferred on them.

S E C T. II.

Of the German and Saxon Kings.

While they remained in their woods (1), the regal dignity was very rare among the Germans. It was not till they had settled in their conquests that it grew to be universal. Their states, when they meant to extend

(1) The Marcomani and Quadi had kings: "Juxta Hermunduros," says *Tacitus*, "Narifci, ac deinde Marcomani et Quadi agunt. — Marcomanis Quadisque usque ad nostram memoriam reges manserunt ex gente ipforum, nobile Marobodui et Tudri genus."—And he observes, in the same place, "Præcipua Marcomanorum gloria virefque, atque ipsa etiam sedes, pulsif olim Boiis, virtute parta. Nec Narifci Quadive degenerant." *de M. G. c. 42.* It likewise appears from the same author, that the Gothones, the Rugii, Lemovii, and Suiones, allowed of kings. *c. 43. 44.* The other states of Germany were in the form of republics; but it is difficult to fix their number.

their

their arms, or found it necessary to defend their territories, submitted, in general, to commanders, who renounced their power when peace was re-established. Generals only for a time, they sunk into their former characters, when the war or expedition, to the management of which they had been elected, was concluded; and every citizen was advanced, in his turn, to command the tribe. But having left their habitations, the continual wars in which they were engaged, gratitude for services performed, and the public interest, which might be hurt by the contentions of the great, but chiefly the investing in one person the bulk of the conquered territory (2), made them fond to continue their generals for life; and thus kings became necessary members in the governments they established.

In this manner Hengist came to be king over the Saxons. At first the leader of his people, it was not till some

(2) Part 2. sect. 1.

years

years after his entry into Britain (3), that he rose to the royal dignity. But neither in their own countries, nor in the provinces in which they settled, did the German or Gothic nations annex a supreme dominion to this rank. Kings they respected as the first magistrates of the state; but the authority possessed by them was narrow and limited. The public interest was superior to every other consideration, and animated the thoughts, and directed the pursuits, of every order of men.

When the suffrages of a German community had advanced a more distinguished citizen to the kingly rank, he divested himself of every attachment of nature, and of friendship, and studied to distribute justice with the utmost impartiality. He was solely attentive to the interest of his tribe; and the ap-

(3) *Heretogan* was the Saxon term for *general*; and Hengist, and his brother Horfa, were respectively distinguished by that appellation till the year 455. *Saxon annals*, p. 13.

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plause and approbation of his countrymen softened the toils and anxieties of his situation. But did he, at any time, relax his activity and martial ardour; did he employ his abilities to the prejudice of his nation, or fancy he was superior to the laws; the same power which raised him to honour, humbled and degraded him. The customs and councils of his country pointed out to him his duty; and if he infringed on the former, or disobeyed the latter, a fierce people set aside his authority.

The condition of the times neither allowed him to assume much grandeur, or to enjoy much ease. His long hair was the only ornament he affected (4); and to be foremost to attack an enemy was

(4) The *capillorum veneratio* was very great among the German and Gothic nations, and gave birth to many customs. Thus, when a people would deprive their sovereign of his throne, they cut off his hair. The same thing was done, when a nobleman was to be reduced from his rank. It also made a part in the punishment of an adulteress. *Tacit. de M. G. c. 19. Hottom. Fran. Gall. c. 9.*

was his chief distinction. Engaged in every hazardous expedition, he was a stranger to repose; and rivalled by half the heroes of his tribe, he could obtain little power. Anxious and watchful for the public interest, he felt every moment his dependence, and gave proofs of his submission.

He attended the general assembly of his nation, and was allowed the privilege to harangue it first; but the arts of persuasion (5), though known and respected by a rude people, were unequally opposed to the prejudices and passions of men.

Ignorant of the use of money, he knew not that source of corruption which is so fatal to the virtue of polished ages;

c. 9. *Wilkins, Leg. Angl. Sax.* p. 6. "— Les Rois des Francs," says Montefquieu, "des Bourguignons, et des Wisigoths, avoient pour diadème leur longue chevelure." *liv. 18. ch. 23.*

(5) — audiuntur, auctoritate suadendi magis quam jubendi potestate. *Tacit. de M. G. c. 11.*

and

and the annual allotments of his tribe, and the revenue arising to him from the divisions of booty (6), the contributions of

(6) The plunder they acquired was a source of considerable wealth to the Gauls and Germans, and was the occasion of perpetual contention. "Familiaris" (says Polybius) "est hæc Gallis infania, quoties aliena rapuerunt; ubi præsertim mero ciboque sese ingurgitarunt." *lib. 2.* The king, or general, though intitled to a division corresponding to his dignity, retained not what share he pleased of the booty. The story of Clovis, on this head, is famous, and discovers the limitation which the liberty of the people imposed on the greatest monarchs. A bishop was desirous to have a certain vase returned to him, which had been taken by the Franks in the plunder of his church; and for this purpose he applied to Clovis. "Episcopus autem ecclesiæ illius," to use the language of the historian, "missos ad regem dirigit, poscens, ut si aliud de sacris vasis recipere non mereretur, saltem vel urceum ecclesia sua reciperet. Hæc audiens rex, ait nuncio, Sequere nos usque Sueffionas, quia ibi cuncta quæ acquisita sunt dividenda erunt, cumque mihi vas illud fors dederit, quæ Papa poscit, adimpleam. Dehinc adveniens Sueffionas, cuncto onere prædæ in medium posito, ait rex, Rogo vos, ô fortissimi præliatores, ut saltem mihi vas istud extra partem concedere non abnuatis. Hoc rege dicente, illi quorum erat mens sanior aiunt, Omnia, gloriose rex, quæ cernimus tua sunt, sed et nos tuo sumus dominio subjugati; nunc quod tibi bene placitum videtur facito, nullus enim potestati tuæ resistere valet. Cum illi

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of individuals, and the fines of criminals, were scanty and precarious. They served, with difficulty, to support his hospitality and lustre: and though they had been greater, and more certain, he could not easily have employed them to extend his influence, while the metals (7) were not marked with a sign of value.

The authority of a Saxon monarch was not more considerable. The Saxons

hæc ita dixissent, unus levis invidus ac facilis cum voce magna elevatam bipennem, urceo impulit, dicens, Nihil hinc accipies, nisi quæ tibi fors vera largitur." Gregor. Turonen. lib. 2. c. 27.

(7) " Chez les peuples," says an author who saw deep into the history of mankind, " qui n'ont point de monnoie, chacun a peu de besoins, et les satisfait aisément et également. L'égalité est donc forcée: aussi leurs chefs ne font-ils point despotiques. — Les fruits de la chasse, de la pêche, ou des troupeaux, ne peuvent s'assembler en assez grande quantité, ni se garder assez, pour qu'un homme se trouve en état de corrompre tous les autres: au lieu que, lorsque l'on a des signes de richesses, on peut faire un amas de ces signes, et les distribuer à qui l'on veut." *Montesquieu, liv. 18. c. 17.*

submitted

submitted not to the arbitrary rule of princes. They administered an oath to their sovereigns, which bound them to acknowledge the laws, and to defend the rights of the church and people; and if they forgot this obligation (8), they forfeited their office. In both countries, a price was affixed on kings (9), a fine expiated their murder, as well as that of the meanest citizen; and

(8) *Tyrrel, Introd. p. 58.* The office of King is described in the following manner, in the laws of Edward the Confessor: " Rex autem, quia vicarius summi regis est, ad hoc est constitutus, ut regnum terrenum, et populum domini, et super omnia sanctam veneretur ecclesiam ejus, et regat, et ab injuriosis defendat, et maleficos ab ea evellat, et destruat, et penitus disperdat. Quod nisi fecerit, nec nomen regis in eo constabit, verum testante Papa Joanne nomen regis perdit:" — *Wilkins, p. 200.* See also *Lud. Imp. Capit. add. 2. c. 22. ap. Lindenbr.* I would likewise, on this head, refer the reader to the description which O. Rudbeck has given of the oath taken by the Swedish monarchs. *Atlant. tom. 1. p. 279. 640.*

(9) *Leg. Æthelst. et Jud. civ. Lund. ap. Wilkins, p. 64. 71.*

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the smallest violation of ancient usage (10), or the least step towards tyranny, was always dangerous, and often fatal, to them. But here, some one may urge, Did the feudal settlement produce then no alteration on the condition of royalty; and while kings were invested with all the territories of nations, were they able to acquire no dominion?

It is easy to reply to this question. We have already inquired into the origin and spirit of this system; and have seen how naturally a king or general was advanced to represent his tribe; and how the bulk of the territory was vested in him for the use of the people. We have seen, that his ambition was excited by these circumstances; and that he sought to employ them to his advan-

(10) Sigebryht, King of the West Saxons, was set aside for illegal and oppressive practices. *Saxon annals, an. 755.* The irregular life of King Edwy produced, in like manner, his dismissal. *Tyrrel, Introd. p. 69.* And Queen Seburgh was deposed because the people would not fight under a woman. *Bacon's discourse, p. 30.*

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tage. But we have also observed, that the jealousy of the people was thence awakened, that they lost not a moment to defend their rights, that they directed the progress of feudal possessions, and that they taught that system to assume those appearances (11) which were most favourable to liberty.

The head, then, of a feudal kingdom, it is answered, might possess some share of influence, when feuds were precarious or annual: but when these were granted for life, or for a term of years, this influence was diminished; and when they had advanced to be hereditary, it was totally destroyed. Every step in their progress lessened the authority of kings (12), and the last reduced it to nothing.

Princes,

(11) Part 2.

(12) It is observable, that the advocates for tyranny call in religion to their aid, when they find, that the testimony and informations of history are too strong for their arts and disguises. They trace back, with an impious

Princes, it is allowed, when they distributed to their subjects the conquered territory, retained a proportion for the expences of government, and the support of the royal dignity. But wars being as yet obnoxious to no charge (13), and the condition of royalty connected with no grandeur (14), the proportion

pious zeal, the rise of government to the Deity. They proudly call a sovereign his vicegerent and delegate; and affirm, that he possesses the marks of a divine commission: they dwell on his indefeasible right, which no act of his, however oppressive, can invalidate; and they found the doctrine of passive obedience. But in all this they talk not the language of reason; they discover their illiberal minds, and show that they were unworthy to enjoy the privileges of a free administration. Their arguments carry their refutation along with them; and few men can listen to them without indignation.

(13) The Saxon soldier supported himself on his own expence. It was not till manners had been refined very much, that troops received pay for service, that standing armies were introduced into Europe, and that many of its states lost their liberty.

(14) It is told of Henry II. who was a great and powerful monarch, that he had but three dishes at his table. The passage which records this fact is curious, and

portion required was inconsiderable; and the jealousy of the people did not allow them to exceed it. Nor could they supply their necessities by the allodial possessions which they seized. This privilege, which was given to the meanest

and discovers the genius of the age more than the paintings of the most masterly historians: "Referebat etiam quandoque Giraldus, quod et hic apponere præter rem non putavi, qualiter Monachi S. Swinthuni Wintoniæ cum Priore suo coram Anglorum Rege Henrico II. ad terram in luto prostrati cum lacrimis ac luctu conquesti sunt ei, quod eorum (Episcopus) Ricardus, quem et loco Abbatis habebant, tria eis fercula subtraxerat. Et cum rege inquirente quot eis remanserant, responderent decem, quoniam ab antiquo tredecim habere consueverant. Et ego, inquit rex, in curia mea tribus ferculis contentus sum. Pereat Episcopus vester, nisi ad hunc numerum ferculorum meorum redigat fercula vestra." *Girald. Cambren. c. 5. in tom. 2. Angl. Sacr. p. 480.* In the reign of Henry VII. John Baldwyn held the manor of Oterarsfee in Aylesbury, and other lands there, of the King (in chief) in focage, by the service of finding litter for the King's bed, to wit, in summer grass or herb, and two grey geese, and in winter straw, and three eels, thrice in a year, if the King should come thrice in a year to Aylesbury. *Madox, Bar. Angl. p. 247.* We may reason backward from these circumstances, and gather the condition of the Saxon monarchs.

warrior,

warrior, was refused to monarchs. And even the proportion of territory they received was unalienable. The people conceived an interest in the royal demesnes; and these they could not dispose of for pious uses (15), and far less for

(15) Baldred King of Kent had given the manor of Mailings, in Suffex, to Christ-church in Canterbury; but the people not having consented to this gift, it was revoked: and King Egbert afterwards made a new grant of the manor, with advice of the national council. *Bacon, p. 31. Spel. Concil. tom. 1. p. 340. Tyrrel, Introd. p. 68.* It was owing to this inability to alienate of themselves, that so many peers of the land always subscribe the charters of the ancient kings, not only as witnesses, but as consenting to them, by the words, *consensu, confirmavi, corroboravi, consolidavi, Amen dixi*, and such like, each commonly using a different term, and adding the sign of the cross X to his name. *Reliq. Spel. p. 235. Seld. tit. Hon. p. 503. 504.* We are indeed told of a magnificent donation given to the clergy by Ethelwulphus King of West Saxony, which seems to oppose this opinion. This king, say several of the Monkish writers, granted, not only the tithe of the goods, but the tenth part of the land through his kingdom, to God and the church, free from all secular service, taxations, and impositions whatsoever. But besides that this fact is in itself improbable, it is differently told by historians, and seems to rest solely on tradition. *Spelman*, who seems inclined

for any private advantage. Thus circumscribed, could the Saxon monarchs form or execute any project which might hurt the interest of the state, or render them despotic?

The emoluments they received from the feudal incidents were doubtful and unimportant (16); and the profits of justice (17) being divided between them and the lords of the kingdom, their share in these amounted not to any va-

clined to believe it, imagines, that the bishops and nobility consented to the grant. *de non temerand. eccles. p. 6.* But whence does this appear? and how was the confusion which would necessarily result to the possessions of the people, in following out this grant, to be obviated? If there be any truth at all in the matter, it must be understood, that this monarch granted to the church, with consent of the state, a tenth of his own demesnes; or that he granted to it, with the like consent, a tenth of the profits of the lands in the kingdom. *Bacon, p. 20.*

(16) The generality of the English antiquaries have imagined, that the feudal incidents were not known till the Norman period: an attempt was made to refute this opinion. See *part 2. sect. 2.*

(17) See the following section.

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lue. The advantage which, as heads of the church, they might derive from the vacancy of bishopricks (18), augmented little their revenue (19). Nor was it much increased by the impositions which they levied from the towns within their territories; and (20) they were not allowed to impose taxes on the kingdom.

If

(18) It has, however, been doubted, if a Saxon king could seize to his own use the profits of vacant bishopricks and monasteries. See *Madox, hist. excheq. p. 207*. It is needless to mention, that he had a casual revenue arising from treasure trove, waif, wreck, &c. See the same author, *p. 234*.

(19) It may be here observed, that the king's supremacy in matters ecclesiastical was acknowledged in the Saxon period. No man of rank could be excommunicated without his consent; and he disposed of all offices in the church, with the advice of the wittenagemot. *Spel. Conc. tom. 1. p. 386*. It was not till the time of Stephen that the Pope's supremacy took place in England, and that church-matters were entirely in the management of his legate, and of the bishops. *Tyrrel, Introd. p. 109*.

(20) Taxes were imposed by the wittenagemot. *Danegeld*, it may be remarked, and *Heregeld*, have been mentioned as making a part of the usual revenue of the Saxon

If their revenue was confined, their prerogatives were not extensive. Like the German monarchs, they deliberated in the general assembly of their nation; but their legislative authority was not much respected; and their assent was considered in no better light than as a form. This, however, was their chief prerogative; and they employed it to acquire an ascendant in the state. To art and insinuation they turned, as to their only resource, and flattered a peo-

Saxon kings. *Howel, hist. part 4*. But *danegeld* was a tribute in which the people bound themselves to oppose the Danes, and for payment of the sums exacted by them. And *heregeld*, if considered as of the nature of a *relief*, is comprehended among the feudal incidents. It had, however, a variety of meanings. It sometimes signified the feudal obligation to attend on wars; sometimes the penalty incurred by neglect of that obligation; and sometimes, as in Scotland, it expressed the voluntary donation given by an inferior to a superior. See *the Glossaries*. The contributions of certain towns have likewise been reckoned as a part of the usual revenue of the crown. *Hume, Append. 2*. But these doubtless were temporary or voluntary, and depended very much on the earls who governed those towns.

ple whom they could not awe; but address, and the abilities to persuade, were a weak compensation for the absence of real power.

They declared war, it is said, and made peace. In both cases, however, they acted as the instruments of the state, and put into execution the resolutions which its councils had decreed. If indeed an enemy had invaded the kingdom, and its glory and its safety were concerned, the great lords took the field at the call of their sovereign. But had a sovereign declared war against a neighbouring state, without requiring their advice, or if he meant to revenge by arms an insult offered to him by a subject, a haughty and independent nobility refused their assistance. These they considered as the quarrels of the king, not of the nation; and in all such emergencies (21), he could only be assisted by his retainers and dependents.

(21) *Usage des fiefs*, par Brussel, liv. 2. c. 6.

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The privilege of *coining* (22) has likewise been mentioned as a prerogative of the Saxon monarchs. But the money which they struck circulated only within the bounds of their demesnes (23); and they were not allowed to increase its value, or to detract from it. They gave pardon, it is added, to criminals. But the crimes, it is probable, must have been committed within their own lands; and in this case (24), and if the power was stretched at any time wider, the compositions to the parties injured were reserved.

The prejudice of authors has taught

(22) *Du Cange* has many observations on this subject; and remarks, in particular, that the king had the exclusive privilege of striking all the gold and silver coin. *Gloss. voc. Moneta*. The reader may see his notions examined and refuted by the author just now cited, *liv. 2. ch. 10*.

(23) Tyrrel, *Introd.* p. 67. Hale, *hist. placit. cor.* vol. 1. p. 194.

(24) Tyrrel, *Introd.* p. 68.

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them to ascribe to these monarchs (25) prerogatives which were not known till posterior ages. The favour which naturally attends on royalty, the connection of princes with great objects, the lustre and appearance of power which is given them by the execution of the laws, the titles of honour with which, in a cultivated age, they are loaded, and the guards that surround their persons; all these circumstances place them out to the observation, and draw to them the respect of mankind. Their joys and distresses are felt by nations; and no circumstance of their lives, however trivial, but inferior mortals consider as important. Struck with the glare of their condition, the bulk of men are deceived into the highest admiration; and,

(25) The powers acquired by kings in subsequent times may be seen in Hume, Append. 2.; in Staunford's exposition of the prerogative, Hale, hist. placit. cor. Noy's rights of the crown, Blackstone's comment.; and in other volumes.

forgetful

forgetful of their natural rights, and of the privileges of citizens, they would bind themselves over to slavery and oppression.

Nor must we imagine that the Saxon, any more than the German monarchs, succeeded each other in a lineal descent, or (26) that they disposed of the crown at their pleasure. In both countries, the free election of the people filled the

(26) Many writers, it may be here remarked, are fond of appealing to an *original contract* between the king and people. But history has preserved no memorial of this transaction; and it is absurd to suppose that it ever happened. The people, who in every general council or assembly could oppose and dethrone their sovereigns, were in little dread of incroachments on their liberties: and kings, who found sufficient employment in keeping possession of their crowns, would not likely attack the more important privileges of their subjects. What was the foundation, then, I would ask, of such a contract? The king made no attempts; and the people had no fears. But, reversing the case, and allowing that such a contract existed, what safety or advantage could result from it? The more powerful would be sure to infringe it.

throne;

throne; and (27) their choice was the only rule by which princes reigned. The succession, accordingly, of their kings, was often broken and interrupted, and (28) their depositions were frequent and groundless. The will of a

(27) *Boulayvilliers* says of Childeric, "Ce prince etoit fort jeune quand il fut élevé sur les boucliers des soldats François; c'etoit chez cette nation la seule cérémonie de l'auguration des rois:—" *Mem. histor. p. 6. fol.* See also *Les moeurs des François par le Gendre, p. 13.* *Tacitus* has mentioned the same custom: "Erat in Caninefatibus stolidæ audaciæ Brinno, claritate natalium insigni. Pater ejus multa hostilia ausus, Cajanarum expeditionum ludibrium impune spreverat. Igitur ipso rebellis familiæ nomine placuit, impositusque scuto more gentis, et sustinentium humeris vibratus dux diligitur." *hist. lib. 4. c. 15.* The same ceremony prevailed doubtless among the Anglo-Saxons, and proves beyond dispute the free election of their princes. It is probable, that this tumultuary proceeding was confirmed or authorized by the national assembly: "Legitime reges a sacerdotibus et senioribus populi eligantur,"—is a law of the great council which met at Calcuith. *Spel. Concil. tom. 1. p. 296.*

(28) *Tyrrel, Introd.* We are told by *Polybius, lib. 2.* that the Boii put to death their two kings, Ates and Galatus, in a fit of jealousy.

prince

prince whom they had long respected, and the favour they naturally transferred to his descendant, made them often advance him to the royal dignity; but the crown of his ancestor he considered as the gift of the people, and neither expected nor claimed it as a right.

The nobleness of their birth, joined to the great qualities they possessed, directed, in both countries, the election of sovereigns; and however much they neglected the order of succession (29), yet on every occasion was it requisite, that those who mounted the throne should be of royal blood. They even carried their respect to all the royal line: and the Saxons had proceeded so far as to distinguish them by parti-

(29) *Tacit. de M. G. c. 7.* "Reges ex nobilitate; duces ex virtute sumunt." An old author, cited by *Spelman*, has said the same thing of the Longobards: "Omnes reges fuerunt adelingi, id est, de nobiliori prosapia, quæ apud illos dicitur adelinga." *Gloss. p. 10.*

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cular appellations (30), and to punish (31), with a higher severity, all crimes committed in their presence.

But it was not till after the Norman invasion, when *feuds* had become *hereditary*, and the rights of *primogeniture*, and *representation in succession*, were fully understood, that the people allowed the kingly dignity to descend in a particular family. They recurred, however, to their free method of election when their liberties were invaded; and, breaking the line of their monarchs, they bestowed the crown where it was better merited. They reconciled the administration of a single person, and the li-

(30) "In the Saxon times," says *Selden*, "both the eldest and the rest of the king's sons were called often *clitones*, and *clitunculi*; that is, *illustrious*. *Ætheling*, *Atheling*, or *Adeling*, also were then used in the same sense in Saxon; and in the same sense also they continued till the time of Henry I." *tit. hon. part 2. ch. 5*. See likewise *Dodridge's Principality of Wales*, p. 143. and *Milles, Catalogue of Honour*, p. 26.

(31) L L. Inæ. c. 6. L L. Ælfr. c. 7. ap. Wilkins.

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berty of the subject. And to rude and ignorant men are we indebted for that excellent constitution, which the ancient world had never experienced (32), and could not conceive.

S E C T. III.

Of the German and Saxon nobility.

THE *princes* in the German communities were the next in rank to the king or general. They possessed the greatest weight in their nations, and were (1) adorned with

(32) "Res dissociabiles," says *Tacitus*, "principatum ac libertatem."—*Agr. c. 3*. Again, "Haud facile libertas et domini miscentur." *Hist. lib. 4. c. 64*. And *Polybius* makes the same remark,—"Regum et liberarum civitatum res inter se natura sua pugnant,—" *Excerpt. leg. 41*.

(1) Part 1. sect. 1.

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particular

particular distinctions. The single voice of a popular chieftain was often able to direct the deliberations of his state: his fame was frequently sufficient to put an end to wars (2); and his martial prowess, while it drew to him the admiration of his countrymen, excited the jealousy and fears of surrounding tribes. Orgetorix had even influence to persuade his nation to abandon its settlements, and attempt, in an entire body, the conquest of Gaul (3); and when brought to his trial (4), he appeared

(2) *Tacit. de M. G. c. 13.* — *Ipfa plerumque fama bella profligant.*

(3) *Cæsar de B. G. lib. 1. c. 2.* — *Orgetorix — civitati persuasit, ut de finibus suis cum omnibus copiis exirent: perfacile esse, quum virtute omnibus præstarent, totius Galliæ imperio potiri.*

(4) *Id. c. 4.* — *Orgetorix ad iudicium omnem suam familiam, ad hominum millia decem, undique cœgit; et omnes clientes, obæratosque suos, quorum magnum numerum habebat, eodem conduxit: per eos, ne causam diceret, se eripuit.*

with

with ten thousand retainers. It was the business of the great to command in war (5), and in peace they distributed justice. As yet the extended notions of property turned not the minds of men to the accumulation of wealth, and to the practice of fraud; and while an enlarged commerce and extent of dealing gave no intricacy to cases, and rendered not law a science, the authority and abilities of the princes, or more illustrious warriors, were equal to the task of maintaining order in society.

(5) *Cæsar de B. G. lib. 6. c. 15.* “*Hi,*” he had been speaking of the nobility, “*quum est usus, atque aliquod bellum incidit, (quod ante Cæsaris adventum fere quotannis accidere solebat, uti aut ipsi injurias inferrent, aut inlatas propulsarent), omnes in bello versantur: —*” “*Les mesmes Comtes,*” says *Mezeray*, “*et Ducs, qui jugeoient les François, les menoient a la guerre.*” *tom. 1. p. 118.* And *Muratori* has observed to the same purpose, — “*Duo — comitum munera fuere; unum videlicet justitiæ populis ministrandæ, alterum militiæ sibi subjectæ, quando in bellum eundum erat, educendæ atque regendæ.*” *Antiq. Ital. tom. 1. p. 399.*

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The German nobility (6) fell not in their dignity when their nations had conquered. They continued to enjoy their prerogatives; and the *fiefs*, or allotments of territory, they received, furnished to them a more certain and abundant source of wealth. The *Princes* in Germany were *Earls* (7) in England.

The

(6) Selden, and the authors who follow him, are of opinion, that the dignity denoted by the titles of *Dux* and *Comes*, was derived from the old Roman to the German empire. *tit. hon. part 2. ch. 22. Brady, hist. p. 81.* The reverse, without doubt, is the fact. These titles, I dispute not, are found in the constitutions of the Emperors before the German and Gothic nations had settled in their conquests. But, previous to that period, the Romans were acquainted with these nations; and were in the practice of imitating particular circumstances in their manners. See *part 2. sect. 1.* Besides, had these titles been borrowed from the Romans, they would not probably have been universal in the Gothic nations, but peculiar to some of them who were more intimately connected with that people.

(7) It is well known, that *Princeps* was the most frequent appellation for *Ealdorman*, or *Eorle*, both in the charters of the Saxon kings, and in the subscriptions to those charters, and to other instruments. *Subregulus*, and *Regulus*, *Patricius*, *Dux*, *Comes*, and *Consul*, were the

The great contended in both countries in the number of their retainers, and in that splendour and magnificence which are so alluring to a rude people; and though they joined to set bounds to regal power, they were often animated against each other with the fiercest hatred. To a proud and impatient nobility, it seemed little and unsuited, to give or to accept of compositions for the injuries they committed or received; and their vassals adopting their resentment and passions, war and bloodshed alone could terminate their quarrels. What necessarily resulted from their situation in society, was continued as a *privilege*; and the great, in both countries, made war (8), of their private authority, on their enemies. The Saxon

the other and less frequent names by which they were distinguished. It is observable, that *Duke* and *Earl* were synonymous, till the reign of Richard III. *Seld. tit. hon. p. 502. 621.*

(8) *Bruffel, liv. 2. ch. 2.*

Earls

Earls even carried their arms against their sovereigns (9); and, surrounded

(9) *Mezeray, Abr. Chronol. tom. 1. p. 400.* It is said of one Ailwin, that he was half king; so great was his authority. The same thing is said of Athelstane, who was Eoldorman of the East Angles, in the reign of the king of that name: "Ipsi regi" (to use the words of an old history) "adeo officiosa erat ejus sedulitas, ut ad arbitrium ipsius cuncta regni negotia tractarentur. Idcirco ab universis Athelstanus *Halfkoning*, quod est semi-*rex* dicebatur." *tit. hon. p. 505.* "The immeasurable power of Harold," says a great historian, "of Godwin, Leofric, Siward, Morcar, Edwin, Edric, and Alfric, controlled the authority of the kings, and made them necessary in the government." *Hume, Append. 1.* "Habet rex," says *Bracton*, "superiores in regno, i. e. Comites et Barones, — qui opponuntur regi, ut si rex sine freno regetur, frenum sibi imponentur." *lib. 2. c. 16.* Of so little consideration were monarchs, that they sometimes held lands of a subject, for which they did homage. *Bruffel, lib. 2. ch. 5.* When Henry III. called Leicester a traitor, that nobleman gave him the lie; and told him, that if he were not his sovereign, he would make him repent of that insult. *Hume, vol. 2. p. 26.* When Edward I. intended to send the Earl of Hereford with an army into Gascony, that Earl refused to comply with his order; and an altercation ensuing, the King exclaimed, *Sir Earl, by God, you shall either go or hang.* By God, *Sir King*, replied Hereford, *I will neither go nor hang.* *Hume, p. 101.*

with

with retainers, or secure in fortresses and castles, they despised their resentment, and defied their power.

The judges of the people, they presided in both countries (10) in the courts of law. The particular districts over which they exerted their authority were marked out in Germany by the council of the state; and in England their jurisdiction extended over the fiefs and other territories they possessed. All causes, both civil and criminal, were tried before them; and they judged (11), except in cases of the utmost importance, without appeal. They were even allowed to grant pardon to criminals (12), and to correct by their clemency the rigours of justice. Nor did the fove-

(10) *Lib. Constitut. c. de Comitibus, ap. Wilkins, p. 149.*

(11) *Bruffel, liv. 2. ch. 12.*

(12) *Id. liv. 2. ch. 11.*

X

reign

reign (13) exercise any authority in their lands. In these his officers formed no courts (14), and his writ was disregarded.

The alteration in the state of property, and the convenience of commerce, had impressed the metals; and the Saxon earls (15) struck all the money which passed in their territories. They could refuse the King's coin (16); and it was

(13) Bruffel, liv. 2. ch. 23. L'esprit des Loix, liv. 30. ch. 20.

(14) Dodridge, Principality of Wales, p. 38. Seld. tit. hon. part 2. ch. 5. sect. 8. The reader may consult farther the act which abrogated the power of the Earls. Stat. 27. Hen. VIII. c. 24. in Ruffhead, vol. 2. p. 237. and Mad. Bar. Angl. b. 2. ch. 1. tit. Comes Palatinus.

(15) Reliq. Spel. p. 249. Bird. mag. hon. p. 52.

(16) Seld. tit. hon. p. 529. Bruffel, liv. 2. ch. 10. It is added by some writers, that they gave to boroughs a right of representation in parliament, an exemption from other courts, and power to hold plea, pardon treasons, felonies, &c. See St Amand on the legislative power of England, p. 133.

solely

solely by their permission that it circulated in their lands. They levied impositions (17) on their vassals and tenants: they directed the customs and usages which prevailed within their jurisdiction (18); and they were enriched by the feudal incidents (19) of their retainers. They had officers, as well as the King, who collected their revenues (20), and

(17) Dodridge, pr. of Wales, p. 91. Madox, hist. excheq. p. 498.

(18) Bruffel, liv. 2. ch. 31.

(19) Dodridge, pr. of Wales, p. 90.

(20) They had their *Dapifers*, or *Seneschalls*, *Chamberlains*, and other officers. A writ by Earl Ranulf to his people has this preamble: "Ranulfus, Comes Cestriae, Episcopo Cestriae, Dapifero, Baronibus, Justiciariis, Castellanis, Vicecomitibus, Ministris, et Balivis, et omnibus hominibus suis, Francis et Anglis, Clericis et Laicis, salutem." *Madox, Bar. Angl. p. 133.* The same thing is partly to be gathered from the following law of Edward the Confessor: "Archiepiscopi, Episcopi, Comites, Barones, et omnes qui habuerint sacham et focam, thol, theam, et infangthefe, etiam milites suos, et proprios fervientes, scilicet Dapiferos, Pincernas, Camerarios, Pistor-

and added to their greatness: and the inhabitants of their lands (21) they distinguished by the name of *subjects*.

res, et Cocos, sub suo friborgo habeant. Et item isti suos armigeros, vel alios sibi fervientes sub suo friborgo. Quod si cui forisfacerent, et clamor vicinorum de eis assurgeret, ipsi tenerent eos rectitudini in curia sua: illi dico qui haberent sacham et focam, thol, et theam, et infangthefe." *Wilkins, p. 202.*

(21) Brussel, liv. 2. ch. 4. it may be judged from the great power of the princes or earls, that the Saxon earldoms were very early and very generally given for life. There occur also instances of some given in perpetuity in the Saxon period. Two of this kind are mentioned in the *Titles of Honour*: the one extended from the Humber to the Tyne, and was known by the name of *Deireland*, or *Deira*; the other extended from thence northward, and was named *Bernicia*. "These eoldordoms," says *Selden*, "began in Otho, brother to Hengist. King of Kent, and Ebusa his son; who, having conquered, by Hengist's commission, those northern parts, held them as eoldordoms, or earldoms, of the Kings of Kent; and by that name transmitted them to their heirs, who used no other title than *Eolderman*, or *Dux*, or *Comes*, until Ida, in 567, took on him the name of *King of all Northumberland*" *tit. hon. p. 511.* I know that *Spelman*, in his treatise of feuds and tenures, opposes this opinion of *Selden*, and objects against these examples which support it: but his reasons are of little weight.

But

But to attend the general assembly of their nation, was the chief prerogative of the German and Saxon princes: and as they consulted there the interest of their country, and deliberated concerning laws and matters of state (22); so, in the *king's court*, of which also they were members, they assisted to pronounce judgement in the complaints and appeals which were lodged in it.

It must not, however, be imagined, that every one in this order (23) of greatness possessed equally the same advantages. In both countries, the tur-

(22) "Ego Ina Dei gratia Occiduorum Saxonum Rex," says the preamble to his laws, — "cum omnibus meis fenatoribus — consultabam — de fundamento regni nostri, ut justæ leges, et justa statuta per ditionem nostram stabilita et constituta essent, —" *Wilkins, p. 14.*

(23) The Earls of greatest authority were *Earls Palatine*. The words, indeed, *Palatine* and *Palatinate*, were not known till the Norman times. But this need not occasion the smallest difficulty. In the course of human affairs, the *thing* or *custom* must invariably prevail, before the *name* be invented to distinguish it.

bulence

bulence of the times had furnished the more able and ambitious with opportunities to excel (24); and they arrogated superior powers as the reward of their merits and services. The most extensive privileges, and a jurisdiction full and unbounded, were possessed and exercised by some; while the dignity of others attracted less, and their authority was more subject to controul, more precarious and limited.

A smaller allotment in the annual distribution of the land was given by a German community to the inferior *princes* or *earls*; and they were less considered in the divisions of booty. In England they enjoyed only a portion of the territories they governed, while the superior and more noble *earls* retained all the land within their jurisdiction.

(24) Dumnorix, for example, Orgetorix, and Indutiomarus, were superior Princes or Earls in Gaul; Arminius and Civilis in Germany; and Harold, Godwin, Leofric, &c. in England.

And

And sometimes they received but a third or other customary part of the profits of justice (25), while the more dignified
princes

(25) Godwin, it is said, was Earl of all Westsex. But if he had possessed all the lands in Westsex, Hardiknute could not have been king of any thing there. This Earl then had only some particular possession in Westsex, tho' he presided as judge over the whole earldom. The like, says Selden, may be observed of others that occur in the stories of the Saxon times. This author gives also examples of earls who had only a particular revenue from the profits of justice in their territories. And he remarks, that it is to all such inferior ealdormen that Ingulphus alludes, when he observes, that Alfred appointed his *justiciarii* and *vicecomites* through his counties. For the government of other counties was sufficiently established by their being given to the superior princes or ealdormen. This antiquary speaks also of ealdormen who had their whole earldoms to their own use. *tit. hon. part 2. ch. 5. sect. 4. & 5.* See also *Leg. Longobard, lib. 1. tit. 2. c. 10. ap. Lindenbr. p. 517.* A curious question results from the consideration of these inferior Earls: In whom shall we suppose were the bodies of those shires and territories lodged which they governed? Selden, and his followers, affirm, that they were lodged in the crown. In lands which formed a part of the royal demesne, the king might doubtless constitute an inferior earl, and the body of the territory remain in the crown. But in whom were the bodies of those shires vested, over which inferior earls presided, and which constituted no part of the royal territory?

princes employed all such profits to their own advantage. They could not, like these, give pardon to criminals; nor was their civil authority so extensive.

But the king or general in Germany, and the chieftains or princes, had retainers who attended their persons, and constituted their courts. To these, when they had conquered, they dealt out many fair possessions, which, while they served to reward their valour (26), continued their attachment and services. A different rank of nobility thus arose among the Saxons; and those who were *Companions* in Germany were *Thanes* (27) in England.

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territory? Our antiquaries, so far as I remember, have not answered this question. The land of the kingdom, it was observed, was partly *feudal*, and partly *allodial*. A great share of territory had been seized by free adventurers, who exerted a full right over their acquisitions. In these, then, the bodies of those shires were vested.

(26) Part 2. sect. 1.

(27) The word *Thegne*, or *Thane*, signifies *Minister*, or *Servant*. "And so," says *Selden*, "are the translations most

It is not, however, to be supposed, that the *companions* of princes or earls were of equal dignity with those of the king. Hence then the distinction (28) of

most frequent, both out of the Saxon laws and annals, into the Latin of elder times, and out of Latin into Saxon." *tit. hon. p. 307.* *Ambacht* was the old German appellation for *thane* or *companion*. It occurs in *Cæsar*, *lib. 6. c. 15.*; and *Lindenbrogius*, and the other writers of glossaries, express it indifferently, by *cliens*, or *minister*. The service which thanes rendered to the king and princes was the reason of their name, but was by no means dishonourable. "Nec rubor," says *Tacitus*, "inter comites aspici." The Prince of Wales even used *Je dien*, or *thein*, "I serve," for his motto. See *Fortescue's notes on monarchy*, p. 41. or *Bird, mag. hon. p. 19.*

(28) The *thani majores* were the King's *thanes*. The *thani minores* were the *thanes* of princes or earls. The higher prelates of the church had likewise their *thanes*. "Non seulement nos Rois," says *Lauriere*, "et les Ducs, et les Comtes, qui relevoient d'eux, avoient leurs Barons, mais encore les Evêques: —" *Glossaire du droit François, mot Baron.* See also *Spelman on Feuds and Tenures*, p. 16. and *Bird, mag. hon. p. 55.* The Earl of Chester, for example, had eight *thanes*, or *barons*, who acknowledged him to be their superior lord. *Dodrige, pr. of Wales*, p. 124. Mr *Hume*, when talking in general of the nobility among the Anglo-Saxons, has the following remarkable

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able

of *greater* and *lesser* thanes. Nor must it be imagined, that the king and earls were equally attached to every individual in their trains, and bestowed on each the same quantity of territory. We know that the princes in Germany distinguished their companions according to their valour and military qualities (29); and a like distinction prevailing

able passage. "The nobles were called *thanes*; and were of two kinds, the King's thanes, and lesser thanes. The latter seem to have been dependent on the former." *Append.* 1. The thanes, I should imagine, were by no means the chief nobility of the Saxons; nor were the lesser thanes in the smallest degree dependent on or connected with the greater ones. In some cases, indeed, a thane might have a thane under him; but the thanes in this lowest class could not be of the order of nobility; and besides, they were not so numerous as to constitute a particular rank. Perhaps, too, the authority which Mr Hume has cited to confirm his opinion, overthrows it; and, at any rate, I should think it impossible to reconcile it to history. Hence the difficulty of these subjects may appear; and if so great a man has been mistaken, into how many errors must I have fallen?

(29) *Tacit. de M. G. c. 13.* "Gradus quinetiam et ipse comitatus habet, judicio ejus quem sectantur." It appears, as was just now hinted, that even a *thane* could, in

vailing in England, very unequal possessions (30) were given to retainers. The powers, therefore, and jurisdiction of thanes (31) were more or less extensive, in proportion to their territories.

Like

in certain circumstances, have a *thane* of his own under him: and this *lowest thane* might take an oath instead of his lord, and supply his place in cases of necessity and emergence. *Jud. Civ. Lund, ap. Wilkins, p. 71.* "Attamen, si thanus sit, qui serviat regi et iter equestre ipse faciat in provincia illius, si tunc thanum habeat, qui eum sequitur, qui ad regis egressum quinque hydas habeat, et in regis aula domino suo serviat, et ter cum epistola ejus proficiscatur ad regem, ille in posterum cum prajuramento suo domini vicario munere fungi debet circa varias necessitates, et causam ejus juste vindicare ubicunque debebat."

(30) Madox, Bar. Angl. p. 134.

(31) It is remarked by antiquaries, that five hides of land were the smallest portion of territory which could be possessed by a thane. "A hide of land," says *Selden*, "regularly is and was (as I think) as much land as might be well manured with one plough, together with pasture, meadow, and wood, competent for the maintenance of that plough, and the servants of the family. I know divers of the ancients make it an hundred acres. Others give otherwise a certainty to it. But doubtless it

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was

Like the barons (32), who succeeded them, they distributed justice, each in his particular *manor*.

The *companion* in Germany could rise to the dignity of a *prince*; and the *thane* in England (33) could attain the rank of an *earl*. But the attendance of the former was necessary and perpetual; that of the latter was less useful, and only

was uncertain; and justly is by others called only a plough-land, or so much as belongs to the tillage: whence it must of necessity be various, according to the nature of the soil and custom of husbandry in every country. Thence is it that in *Doomesday*, such a place *geldabat pro 10, 12, 20, &c. hidis*; that is, it paid after the rate of so many hides; for by hides the usual payments of subsidies and aids were in the elder times; and that which was always discharged was often called *terra non hidata*, as the other *hidata*. But the just value of a hide that might fit the whole kingdom never appears there." *tit. hon. p. 516.*

(32) After the time of William I. *baron* and *barony* were used for *thane* and *thaneland*. *Selden, p. 569.*

(33) *Jud. liv. Lund. ap. Wilkins, p. 71.* Attamen si thanus comes fiat, tunc jure comitis in posterum sit dignus.

given

given on particular occasions. To be at all times ready with his aid and service, was the chief ambition of the German retainer: but the lands which had been granted to the thane required his attention; and less necessitous, and more independent, by the property his virtues had purchased, he found every service disagreeable.

The varying situation of land, which produces so many changes in the sentiments and inclinations of men, had altered the condition of ranks. When the tribe alone was capable of property, and yearly dividing its members, alternately assigned to the one half of them the office of cultivating the ground, and to the other that of fighting its battles: all employments (34), both civil and military, were annual. Men rose and fell in their ranks; and the individuals who

(34) *Part 1. sect. 3.* It is observed of the Belgæ, by *Strabo, lib. 4.* "Antiquitus unum quotannis principem, itemque belli ducem multitudo deligebat: —"

composed

composed the community were advanced in their turn to its honours. But land, having lost all connection with the tribe, and individuals beginning to have property, employments and ranks were continued beyond the year. Riches and power had too many charms to be relinquished; and the altered condition of society allowed not the former changes to take place. Men wished to enjoy during life, or to a distant period, the lands and the offices which their merits had procured: and no sooner were their wishes indulged, but the sons intruded into the employments, and usurped the rank of their ancestors. Already in the Saxon period were land, offices, and honours, hastening to be hereditary; and, what may seem very singular (35), already were there some examples of *entails*.

S E C T.

(35) " Si quis terram hæreditariam habeat, quam parentes ejus ipsi reliquerunt, tunc statuimus, ut eam non vendat a cognatis hæredibus suis, si adsit scriptura vel testis, quod illi viro prohibitum sit, qui eam ab initio acquisivit, et illi qui eam vendidit, ut ita facere nequeat, et

S E C T. IV.

Of Allodial Proprietors, Ceorles, and Villeins.

I. **M**Any German warriors, unconnected with the king or princes, and led by their native valour, and the hope of plunder and acquisition, had engaged in the expeditions of their states; and many others, disgusted perhaps with the too lordly authority of their chiefs, had divested themselves of every attachment to them, and renounced their trains. These, fighting more immediately for themselves under a leader whom accident, or their choice,

et hoc tunc in Regis vel Episcopi testimonio recitetur coram cognatis suis." *L. L. Ælfr. c. 37. ap. Wilkins, p. 43.* The reader may consult farther the note of Wilkins on this law; and Spel. Conc. tom. 1. p. 370.

had

had raised to that honour, were disunited from the tribe, and could not be considered in the distributions of territory which followed on a conquest. They constituted, therefore, a particular rank (1); and, receiving no gift or feudal possession, they seized on lands which were *free* and *allodial*.

This order of men was more numerous in England (2) than in any other kingdom. The invitation to the Saxons was unexpected; their compliance, of consequence, was not the result of much deliberation or concert; and every warrior, fond of novelty, or tired of peace, ranged himself indifferently under the British banner. To assist a despairing and degenerate people, was too mean an

(1) It was formerly observed, that many warriors who had received *fiefs*, with which however they were unsatisfied, seized also on allodial possessions. But these, I should imagine, were always considered in their feudal capacity. See *part 2. sect. 3.*

(2) This fact, it is said, appears in a particular manner from the surveys of *Domesday*.

object

object to attract the attention of tribes; and the supplies which were given, consisting of the more tumultuous and disorderly, were little under the direction of authority, and little bound or guided by the ties of *prince* and *retainer*. They therefore conquered as individuals, rather than in a body; and though the general dealt out many feudal grants, yet was a considerable territory converted into property.

The possessors of allodial lands, breaking the natural subordination of the feudal arrangements, and being regarded with envy, or considered as the instruments of rebellion, were neither encouraged by the king, nor respected by the nobles. Mean and unequal compositions were affixed to the injuries they received; a small price or value was put upon their heads; and though their property procured to them some consideration with the vulgar, and repaid in part the insolence of the great; yet, exercising a very limited jurisdiction, and unsatisfied with their condition, they

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aspired to be equal in power and privileges to the nobility. Kings were fond to unite them to the state; and feuds growing to be perpetual, they resigned their free possessions, and received them back again in tenure. The feudal advantages were thus communicated to allodial proprietors; and their lands were secured by charters. This extension of the feudal polity (3) took place on the Norman invasion.

II. THE next in the range of subordination in Germany and England were the *Ceorles*. In the one country, they possessed those lands which individuals had abstracted from the tribe (4); in

(3) It is mentioned by *Madax*, that by or before the end of the reign of King Henry II. the feudal law was so fully settled, that all the lands in England were charged with some service or other; and there was no *allodium* left. This, he adds, is admitted by the Lord Chief Justice Coke. *Bar. Angl.* p. 30.

(4) Part 2. sect. 3.

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the other, they cultivated the property of the great; and in both, they rendered a proportion of corn (5), cattle, or cloth. The ignorance of leases subjected them, in some degree, to an arbitrary removal; but the rich exerted not this privilege, while they paid their

(5) *Tacit. de M. G. c. 25.* "Ceteris fervis non in nostrum morem, descriptis per familiam ministeriis, utuntur. Suam quisque sedem, suos penates regit. Frumenti modum dominus, aut pecoris, aut vestis, ut colono injungit: et servus hastenus paret." The rents of land were likewise paid in kind during the Saxon period. It was not till the time of Henry I. that they were converted into money. The furniture for foreign wars rendered money at that time necessary; and the farmers, complaining of the great trouble of carrying victuals to a distance from their houses, "the King directed commissions to certain discreet persons, which (having regard of the value of those victuals) should reduce them into reasonable sums of money; the levying of which sums they appointed to the sheriff, taking order withal, that he should pay them at the *scale* or *beam*; that is to say, that he should pay sixpence over and above every pound weight of money; because they thought, that in time the money would lose that much in the wearing." See *Gervase of Tilbury on the Excheq. Bird, Mag. hon.* p. 119. or *Lambard, Peramb. of Kent*, p. 172. The example of the king was followed by the nobility.

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retributions,

retributions, and fulfilled their engagements. And the laws guarded them from oppression (6), as they fixed the returns for every possession. Among the Saxons they were considered as members of the community (7), and could claim its protection. Free in their condition, they renounced at pleasure their possessions (8); a valuation was put upon their heads (9); they were capable of property; they could rise to command and

(6) *LL. Inæ, c. 70.* The reader may see on this head several curious particulars in *Spelman, voc. Firma.*

(7) *LL. Ælfr. c. 11. 31. 35. ap. Wilkins.*

(8) It is accordingly provided by the laws of King Ina, in what manner a *Georle* should leave his land on his departure. Thus it is said, "Qui viginti hydas terræ possidet, relinquere debet duodecim hydas terræ fatæ, cum abire velit." And, "Qui habuerit decem hydas, relinquere debet sex hydas terræ fatæ." And so in proportion of the rest. *Wilkins, p. 25.*

(9) "Coloni æstimatio capitis est cclxvi. thrymsarum, quæ faciunt cc solidos juxta legem Merciorum." *Jud. Civ. Lund. ap. Wilkins, p. 71. and L.L. Æthel. p. 64.*

offices;

offices; and did their wealth sufficiently increase, they were invested with the honours (10) and the dignity of a *thane*.

III. BUT in every rising community there are ever found some individuals who conceive not the duties of citizens, and compose an inferior order. The hewers of wood, and the drawers of water, they exercise the meanest occu-

(10) "Et si colonus tamen sit, qui habeat integras quinque hydas terræ, ecclesiam et culinam, turrinam, et atrii sedem ac officium distinctum in aula regis, ille tunc in posterum fit jure thani dignus." *Jud. Civ. Lund. ap. Wilkins, p. 70.* This law, it is observable, is also so far curious, as it shows the state and fashion of a Saxon thane. He had a church for his family and tenants; he had a court for them; and entertained them in his house. See farther, *Milles, Cat. bon. p. 72.* and *Seld. tit. bon. p. 516.* It comes likewise to be remarked in this place, that if a merchant had made three voyages, he was intitled to be a thane: "Et si mercator tamen sit, qui ter trans altum mare per facultates proprias abeat, ille postea jure thani fit dignus." *Wilkins, p. 71.* This law required considerable cultivation in the legislature, and shows that the Anglo-Saxons were refining in their manners,

pations,

pations, and sustain not the public interest or glory, by their voice in the senate, or their arm in the field. The property of masters, they acquire not by their labour, and are sold, and put to death with impunity. Such, in Germany and England, were the slaves, or *Villeins*.

To this wretched condition the chance of war and of gaming (11) reduced men in Germany: and these causes failed not to operate this effect among the Anglo-Saxons. Many also of the ancient Britains had become the slaves of their conquerors: and the wars in the heptarchy, and the incursions (12) of

(11) *Tacit. de M. G. c. 24.* Aleam (quod mirere) sobrii inter feria exercent, tanta lucrandi perdendive temeritate, ut cum omnia defecerunt, extremo ac novissimo jactu de libertate et de corpore contendant. Victus voluntariam servitutem adit. quamvis junior, quamvis robustior, alligari se ac venire patitur. ea est in re prava pervicacia: ipsi fidem vocant.

(12) Hume, App. 1.

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the Danes, had added to their number. Their crimes subjected some to slavery (13); misfortune and calamity induced others to traffick their liberty (14); and this state (15) received a constant increase from those who were born to it.

The magnanimity of the Germans did not allow them to treat their slaves

(13) LL. Inæ, c. 7. ap. Wilkins, p. 16. LL. Eadward. c. 9. p. 50. Capit. Kar. et Lud. lib. 4. tit. 14. ap. Lindenbr. p. 893.

(14) LL. Inæ, c. 11. 31. ap. Wilkins, p. 17. 19. An insolvent free man submitted to servitude till he had given satisfaction. Longob. leg. lib. 1. tit. 14. c. 10. 13. ap. Lindenbr. p. 539. "Plerique," says *Cæsar* of the Gaulic commonality, "quum aut ære alieno, aut magnitudine tributorum, aut injuria potentiorum premuntur, sese in servitutem dicant nobilibus." lib. 6. c. 13.

(15) Slaves were either *villani*, *bondi*, or *nativi*. The *villani* (to use the words of *Spelman*) were so called, because they belonged *ad villam domini*; that is, to the manor or town of their lord. The *bondi*, or bondmen, had sold themselves into bondage, or had been condemned to it by course of law. The *nativi* were the offspring of both these; and so called because they were *nati ad servitutem*. *Reliq. Spel. p. 250. 251.*

with

with inhumanity. They seldom punished their transgressions with torture or imprisonment; and if at any time they put them to death (16), it was not with discipline and severity, but in the rage of passion. Among the Saxons, however, to whom the connection with land, and the notions of private property had taught the more selfish and less noble passions, it was necessary that the community should furnish them protection. Laws accordingly were enacted (17), which punished the severity of masters, and on proofs of hard usage, allowed *villeins* their liberty. But they were never considered as members of the

(16) *Tacit. de M. G. c. 25.* Verberare servum, ac vinculis et opere coercere, rarum; occidere solent, non disciplina et severitate, sed impetu et ira, ut inimicum, nisi quod impune.

(17) *LL. Ælfr. c. 20.* Si quis servi sui vel ancillæ suæ oculum excusserit, et ille post factum hoc luscus sit, manumittat ipsum statim. Si dentem ei excusserit, faciat idem. See also *LL. Ælfr. c. 17.*

state,

state, and no price or value was put upon their heads.

The pride and ambition of patrons, which made them fond to add to their retinue and force, in times of foreign and domestic wars, induced them frequently to give liberty to their *villeins* (18); and their humanity made them sometimes present to them the arms of freedom, "the spear and the sword." Their interest or avarice made them often grant land to *villeins* under rent and services; which lifted them to the

(18) "— Si qui vero velit servum suum liberum facere, tradat eum vicecomiti per manum dextram in pleno comitatu, quietum illum clamare debet a jugo servitutis suæ per manumissionem, et ostendat ei liberam viam, et portas, et tradat illi libera arma, scilicet, lanceam et gladium; deinde liber homo efficitur." *Wilkins, p. 229.* "Si quis servum suum ad altare manumiserit, liber esto, et habilis sit ad gaudendum hæreditate et virgildo, et fas sit ei ubi volet sine limite versari." *Jud. Witr. c. 9. ap. Spel. Conc. tom. 1. p. 195.* Slaves could also be made free by will, by charter or deed, and in a great many other ways. See *Brady, hist. p. 82. Hiccsf. Dissert. Epist. p. 13. 14. 15.*

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condition of husbandmen (19): and if *villeins* had remained in a privileged town during a year and day (20), the laws gave them liberty.

A road was thus opened for the meanest in the community to attain to its honours; and while inferior orders were animated with the prospect of bettering their condition, the offices and purposes of society were performed with vigour. The activity and ardour with which different ranks prosecuted their different employments, communicated improvement to the community; and men advanced in civility, and the arts of life.

(19) In this way they rose to be *Copyholders*. *Brady*, p. 206.

(20) Si servi permanerint sine calumnia per annum et diem in civitatibus nostris, vel in burgis in muro vallatis, vel in castris nostris, a die illa liberi efficiuntur, et liberi a jugo servitutis suæ sint in perpetuum. *Wilkins*, p. 229. *Angl. Sac. tom. 1. p. 261.*

S E C T.

S E C T. V.

Of the German Priests or Druids (1).

IN the first periods of society, the conduct of men is more governed by accident than design; and many ages pass away before certain and determined habits of life point out a direction to their thoughts and pursuits. Events

come

(1) Several men of letters, misled by a passage in *Cæsar*, have concluded that the Germans had no druids. But the reasons they urge in support of their opinion are weak, and of little weight. If the Germans were of Celtic origin; and that they were, we have the testimony of *Arrian*, of *Strabo*, and of other ancient historians; they doubtless had druids, and followed in every particular the religion of their ancestors. Allowing, however, that they had no affinity to the Celtes, yet it may easily be supposed, that the persecutions which the Romans carried on against the druids in Gaul, obliged them to seek refuge in Germany; and that they there inculcated their

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doctrines,

come unforeseen and unexpected; and their fears and their hopes are perpetually agitated. They turn with timid and anxious minds to explore those invisible agents who dispose of their happiness or misery. They try to appease their resentment, or to conciliate their favour; and their gross conceptions assigning them particular places to inhabit, they pour out in these their thanks or lamentation. As yet, every individual leads, with his own hand, the victim to the altar, and performs himself the rites of devotion. But in the progress of society, the habitations of the gods requiring protectors; and ceremonies having multiplied to atone for

doctrines, and established their authority. It may likewise be imagined, that the German armies which had been hired into the service of Gaul, or which had passed into that country from the love of plunder, brought into Germany the druids, and their religion. The Celtic origin, however, of the Germans, is, I think, so clearly ascertained, that there seems to be little occasion for these suppositions.

the

the growing vices of men; and individuals being unable or unwilling to discharge them, while they sought to relieve their necessities, or to gratify their pleasures; it was necessary that a select number should be chosen from the crowd, to defend the former, and to celebrate the latter. Hence the origin of priests.

The care of religion in Gaul and Germany was intrusted to the druids; and no rite (2) of public or of private devotion was performed without them. The interpreters of the will of heaven, they were regarded as sacred, and were at all times necessary. They practised

(2) *Cæsar, lib. 6. c. 13.* "Illi rebus divinis intersunt, sacrificia publica ac privata procurant, religiones interpretantur:—" *Diodorus Siculus* observes to the same purpose, "Nec cuiquam sacrum facere absque philosopho, fas est. per eos enim, ut divinæ naturæ conscios, et quasi collocutores, gratiarum sacra diis offerenda, per hos internuncios bona ab illis expetenda esse, censent." *lib. 5. c. 31.*

their

their rites in dark groves (3); and their superstitions, though gross and unnatural, shocked not the understanding of an ignorant people. They employed in sacrifice every method of art and of cruelty (4); and surveyed the increase of their dominion

(3) Groves were the first places of religious worship. See *Pliny, lib. 12. c. 1.* and *Gen. c. 12. v. 6. 7.* "Si tibi occurrit," says *Seneca*, "vetustis arboribus et solitam altitudinem egressis frequens lucus, et conspectum cœli, densitate ramorum aliorum alios protegentium submovens: illa proceritas sylvæ, et secretum loci, et admiratio umbræ, in aperto tam densæ atque continuæ, fidem tibi numinis facit." *Ep. 41.* It is not till men have raised habitations for themselves, that they think of erecting temples to their deities.

(4) *Cæsar, lib. 6. c. 16.* "— Immani magnitudine simulacra habent; quorum contexta viminibus membra vivis hominibus complent; quibus succensis, circumventi flamma exanimantur homines. Supplicia eorum, qui in furto, aut in latrocinio, aut aliqua noxa sint comprehensi, gratiora diis immortalibus esse arbitrantur: sed, quum ejus generis copia defecit, etiam ad innocentium supplicia descendunt." *Diod. Sic. lib. 5. c. 32.* "Maleficos enim per quinquennium detentos, palis in honorem deum suffigunt, et super grandi pyrarum strue cum aliis primitiis immolant. nec aliter captivis, quam hostiis ad deum sacra abutuntur. Nonnulli ipsorum etiam animalia bello

capta

dominion (5) in the fears and admiration of their votaries.

Long observation, and the communicated reflection of so considerable an order, had instructed them in many branches of science. They were skilled in particular in astronomy and physic. By the former, they foretold the revolutions of the heavenly bodies; by the latter, they performed many cures; and the unthinking vulgar ascribed those effects to their free communication with the gods. Their knowledge they imparted solely to the initiated (6), while

capta una cum hominibus trucidant, aut comburunt, aliove supplicii genere tollunt." See also *Strab. Rer. geograph. lib. 4.*

(5) I stay not to examine into the belief and superstition of the druids; for I do not write their history. I speak only of their influence in society, and on manners.

(6) *Cæsar, lib. 6. c. 14.*— Annos nonnulli vicenos in disciplina permanent; neque fas esse existimant, ea literis mandare;—

an oath not to be violated bound them to silence.

The superstition of the people indulged them in the greatest immunities. No favour, it was thought, could repay their services. They neither contributed to the expences of government, nor served in wars (7); and it was a general ambition (8) to enter into their order. Kings, equally with the meanest of their subjects, submitted to those religious tyrants. Even the fiercest passions of the mind were obedient to their sway. They opposed the resentment of hostile and embattled armies, and the swords dropped, as by enchantment (9),
from

(7) *Caesar, lib. 6. c. 14.* Druides a bello abesse consue-
runt, neque tributa una cum reliquis pendunt; militiae
vacationem, omniumque rerum habent immunitatem.

(8) The same author observes in the same place,
“Tantis excitati praemiis, et sua sponte multi in disci-
plinam conveniunt, et a parentibus propinquisque mit-
tuntur.”

(9) *Diod. Sic. lib. 5. c. 31.* — Inter adversas saepe a-
cies, dum strictis ensibus et protentis hastis inter se exer-
citus

from the hands of the warriors. They devoted, on many occasions, the spoils of an enemy to their gods; and in their consecrated forests did the deluded soldier heap up the prizes of victory. No one dared to conceal or to abstract any part of the booty: the cruellest tortures and death punished the impiety (10); and the gold and silver, and other precious acquisitions of war, were untouched, and unguarded.

But it was not solely over matters of faith, and of religion, that they extend-

citus propinquant, in medium progressi, ac si bestias in-
cantamentis cicurarent, praelia dirimunt. Sic apud fero-
cissimos quoque barbaros, sapientiae ira cedit; et Mars re-
veretur Musas.

(10) *Caesar, lib. 6. c. 17.* — Quum proelio dimicare
constituerunt, ea, quae bello ceperint, plerumque devovent.
Quae superaverint, animalia capta immolant: reliquas
res in unum locum conferunt. Multis in civitatibus ha-
rum rerum extructos tumulos locis consecratis conspici
licet. Neque saepe accidit, ut neglecta quispiam religione,
aut capta apud se occultare, aut posita tollere auderet;
gravissimumque ei rei supplicium cum cruciatu constitutum
est.

ed their authority. They intruded into the public assemblies of their country; and, claiming a civil and criminal jurisdiction (11), they heard the complaints, and decided the disputes, of states and individuals. The most implicit obedience was paid to their judgments; and, what seems very singular, they inflicted themselves the punishments they decreed (12), nor allowed that

(11) *Cæsar, lib. 6. c. 13.* — fere de omnibus controversiis, publicis privatisque, constituunt; et, si quod est admissum facinus, si cædes facta, si de hereditate, si de finibus controversia est, iidem decernunt; præmia pœnasque constituunt: —

(12) *Tacit. de M. G. c. 7.* “ — neque animadvertere, neque vincire, neque verberare quidem nisi sacerdotibus permissum: — ”

In early ages the power of dooming to punishment, and the act of punishing, are closely united in the rude conceptions of mankind. Hence perhaps it proceeds, that judges are at first the executioners of their own sentences. This fact is evident, not only from the example of the German druids, but likewise from the practice of the Hebrews. See *1 Sam. c. 15. v. 33.* and *Exod. c. 32. v. 26. &c* At a time when the power of a public is beginning

that privilege to be communicated to others. The refractory and unyielding, they removed from all concern in religious duties: they denounced against them the sentence of *interdiction*. And this act was attended with the most terrible consequences: The unhappy persons incurring it were denied all access to the councils of their country, and to every exercise of public worship: they lost the protection of law: the arms of their countrymen were lifted against them: they were accounted wicked and impious: they were incapable of rank and of office: their presence and intercourse were avoided as contagious (13): and expelled

ginning to be conceived and acknowledged, it seemed too great an exertion over the liberties of the people, to allow the meanest of their number to punish them for offences. It is beautiful to observe how the minutest circumstances of ancient customs are corrected and softened by the light and humanity of modern manners.

(13) *Cæsar, lib. 6. c. 13.* “ — Si qui aut privatus aut publicus eorum decreto non stetit, sacrificiis interdunt. Hæc pœna apud eos est gravissima. Quibus ita est interdictum,

expelled from the societies of men, death alone could relieve their wretchedness. So great was the influence of druids!

S E C T. VI.

Of the Saxon clergy.

IT will be observed, if we attend to the history of mankind, that the change of religious principle has not

ii numero impiorum ac sceleratorum habentur; iis omnes decedunt, aditum eorum sermonemque defugiunt, ne quid ex contagione incommodi accipiant: neque iis penitentibus jus redditur, neque honos ullus communicatur."

It is not incurious to remark, that *outlawries* took probably their rise from this druidical interdiction. They agree in every particular. An outlaw forfeited his country and property: he was debarred from all intercourse with his friends, and could receive no assistance from them. To furnish him with food or lodging, or to perform to him any office, was to incur the penalties in which he was liable. See *Bracton, lib. 3. c. 13.*

always

always the greatest force on their conduct and affairs; and that in every period they are generally governed by the terrors of a mean superstition. The alteration in the mode of being to which Nature has subjected her offspring, and which, though in itself of small moment, appears so alarming to the weak and feeble; the uncertainty of their future destination; the dread of invisible powers, who mix, it is fancied, in human concerns; and the mysterious aspect of every system of belief, or of worship; these general causes, staggering the minds of men, have ever prepared them for priestly dominion.

The successors of the druids, though they taught a more enlarged doctrine, scrupled not to advance, with all their art and industry, the interest of their order; and they met not with opposition from the people. The ministers of the true God were no less ambitious than those of Odin; but, while they enjoyed many sources of influence which were
common

common to these, they possessed others equally powerful, by which they were able to secure and to extend their authority.

The court of Rome had gradually erected within the different kingdoms of Europe, a fabrick of policy to subject them to a foreign jurisdiction. The church became every where active to enlarge the Papal prerogative, and was every where supported by it. The Saxons, who owed their conversion to the see of Rome (1), were disposed on that account to submit more implicitly to its direction. No circumstance was omitted to heighten the veneration conceived for it; and their clergy derived thence a considerable power.

The law of celibacy, which was afterwards extended over England, was first known in the reign of Edgar (2), and

(1) Spel. Conc. tom. 1. p. 94. Goscel. de vit. St Aug. in tom. 2. Angl. Sacr.

(2) Spel. Conc. tom. 1. p. 476.

was

was well calculated to promote their glory. Unconscious of all those tender connections which please and agitate other men, and which bind them, with so firm a cement, to society and their country, they perceived no other object but their own advantage; and to this they applied all their skill and leisure. They were separated from the rest of mankind, to invent arts to destroy them.

The alteration which had happened in the state of land, having rendered them capable of property (3), all orders of men were ambitious to endow them with territory (4); and it may safely be affirmed,

(3) *Platina* has remarked, that Pope Urban first ordained that the church might receive land and possessions. Before that period, the faithful sold their estates, and gave the value of them to the church.

(4) "It was customary in the Saxon times," says *Spelman*, to make grants to persons intellectual and invisible, as to God himself, to the blessed Trinity, to the apostles, and to holy men." *Reliq. Spel.* p. 239. The clergy found their account in this usage: *Patrimonium Christi, Dos ecclesiae,*

affirmed, that the bulk of all the land in the kingdom has at different times been vested in them. The power accruing from their riches was infinite. Dependencies were raised without number; and their vassals and retainers formed a body, who felt and supported their interest.

The charters (5) they received allowed

clesiæ, Dos sponsæ Christi, Sacrata possessio, Prædium sanctum: these are a few of the expressions which denoted their possessions. The profuse length to which men carried their liberality to them, is thus remarked by *Mezeray*: "Les rois," says this historian, "et les grands seigneurs s'efforçoient à l'envy à qui feroit plus de donations, et de plus beaux presens aux eglises; ils mettoient dans leur sacré thresor jusqu' à leurs ceintures, leurs baudriers, leurs vases precieux, leurs habits quand ils estoient enrichis d'or et de pierreries, des meubles, et des raretez, qui estoient plus de curiosité que d'usage. C'estoit à qui bastiroit le plus d'eglises et d'hospitaux, et à qui fonderoit le plus de monasteres." *Abr. Chronol. tom. 1. p. 172.*

(5) The first charter or writing regarding lands and privileges, was made by Withredus King of Kent: it was kept in Christ-church at Canterbury for posterity to imitate; and was written in the Saxon tongue. Previous

ed them a royal jurisdiction (6) in their territories. All causes, whether civil or criminal, were tried by their judges; and they received the issues and the profits arising from them. They had the

to that period, the Saxons made conveyance of their lands, without deed or writing, by delivering a *turf*, or *spear*, a *staff*, an *arrow*, or some other symbol. This was done before a number of witnesses. And hence the reason why lands disposed of in this manner had the name of *folkland*; the assurance of them resting in the testimony of the *folk*, or people. It is farther observable, that before the time of Edward the Confessor, the Saxons used no seal to their charters but the sign of the cross; and what seems very singular, deeds were conceived in those ages in pretty much the same form in which they are written at present. So unrefining are men of business! *Reliq. Spel. p. 8. 233. 235. 236. Spel. Conc. tom. 1. p. 125. 319.*

(6) A charter, for example, from King Edgar to the monastery of Glaston, has this clause: "Eandem — libertatem et potestatem quam ego in curia mea habeo, tam in dimittendo quam in puniendo, et in quibuslibet omnino negotiis, abbas et monachi præfati monasterii in sua curia habeant." And we read, in a grant by King Athelbert to the monastery of Canterbury, "Monasterium — condidi, et cum ipsa terra, et cum omnibus quæ ad ipsum monasterium pertinent, perpetua libertate donavi, adeo ut nec mihi, nec alicui successorum meorum regum,

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nec

the custody of prisoners, and made delivery of them at their own will: and no bailiff, or other officer of the king, could exercise any duty in their lands. They had a market and gallows in their territories (7); and could condemn the chattles of fugitives and felons. They could make war of their private authority on their enemies (8); and while they published the doctrines of peace, they gave a different lesson by their practice. They had the privilege of stamping money (9); and though they

nec ulli unquam potestati, five ecclesiasticæ, five seculari, quicquam inde liceat usurpare, sed in ipsius abbatis sint omnia libera ditone." *Monast. Anglic. tom. 1. p. 16. & 24.*

(7) Madox, Bar. Angl. p. 152.

(8) *Brussel, liv. 2. ch. 3.* They also named champions, and often out of their own order, to fight in their causes.

(9) *LL. Æthelst. ap. Wilkins, p. 59.* "In Cantuaria sint vii monetarii; quatuor regis, duo episcopi, et unus abbatis.

In

they preached the disregard of temporal advantages, they yet courted and pursued them with a more unrelenting industry than other men. The greatest lords in the kingdom possessed not higher powers, or enjoyed more distinguished prerogatives.

They claimed, as well as the druids, an exemption from war and taxes; nor

In Roffensi civitate tres, duo regis, et unus episcopi." See also *Hale, Hist. placit. cor. tom. 1. p. 191.*

The abbot of Canterbury had *cuneum monetæ*, allowance of mintage and coinage, says *Somner*, in right of his abbacy. *Thorne* (he adds) writes thus of Silvester, the forty-fifth abbot, who died *anno 1161*, and was the last who enjoyed it: "Memorandum quod iste Silvester abbas, et multi prædecessores ejus abbates, habuerunt cuneum monetæ in civitate Cant. sicut per inquisitionem factam per Arnoldum Ferre, Wulfinum Mercere, et alios qui jurati dixerunt, quod quidem Abbas S. Aug. Silvester nomine habuit in civitate Cant. unum cuneum monetæ, et Elmundus Porre custodivit cuneum illud ex parte illius abbatis; et quando ille abbas obiit seifita fuit abbatia in manu domini regis una cum prædicto cuneo, nec unquam aliquis abbas qui ei successit, illius cunei recuperavit seifinam. Et fuit ista inquisitio facta temporibus Henrici Secundi Regis, et Regis Richardi filii ejusdem." *Antiq. of Canterb. p. 55.*

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were

were their lands burdened with services. They held in *Frank-Almoigne* (10), and furnished no secular aid, but a supply in times of invasion, and for the building and repairing of castles and bridges (11); an obligation (12) to which all the territory in the kingdom was alike subject.

It was not lawful, nor had they the

(10) The tenure of Frank-Almoigne was so called, because the lands given were said to be in free alms, *in liberam eleemosynam*. And those (says Littleton) who held in this manner were only bound to make orisons, prayers, masses, and other divine services, for the soul of their grantor, or feoffor. *lib. 2. sect. 135*. "Liberam sit ecclesia, fruaturque suis judiciis et redditibus, seu pensionibus. Pro rege preces fiant, mandatisque ejus, non cogente necessitate, sed ex sponte obediunt." *Jud. Withr. c. 1. in Spel. Conc. tom. 1. p. 194*.

(11) The charters to the church have generally a clause to this purpose: "— Sit autem prædicta terra libera ab omnibus secularibus negotiis præter expeditionem, et pontis arcive constructionem." *Monast. Angl. tom. 2. p. 858*. See likewise *Spelman's Glossary, voc. Burghbote*.

(12) *Spelman of Feuds and Tenures, p. 22. Spel. Conc. tom. 1. p. 256*.

power

power (13), to alienate their possessions. Their influence therefore and consideration were perpetually increasing, while new accessions of wealth were ever flowing into their order.

They called in to advance their cause, every art they possessed of invention, and every aid of learning. They affected the Roman language in their *deeds* (14); and these were, on that account, most frequently composed by themselves. Hence those tedious encomiums they contained, extolling the piety of donors; hence those bitter curses and maledictions they denounced against all persons who should invade or dispute the possessions of the church (15); and hence all that anxious care they

(13) *Mezeray, Abr. Chr. tom. 1. p. 280*.

(14) *Spel. Reliq. p. 234*.

(15) "Quisquis," says a charter of King Edmund, "— benevola mente meam donationem ampliare, et privilegii dignitatem servare fatagerit, in hoc præfenti seculo, vita illius prospera sit, et longiturnæ vitæ gaudia teneat.

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they expressed, that its property (16) might descend unimpaired, and in security, to the most distant ages.

But the free and extensive territory they enjoyed was insufficient to satisfy their rapacity. A fee was given to the

Si quis autem, propria temeritate, violenter invadere temptaverit, sciat se, procul dubio, ante tribunal districti iudicis titubantem, tremebundumque rationem redditurum, nisi prius digna satisfactione emandare maluerit." *M. A. tom. 1. p. 15.* A charter of Athelbert says more boldly, "Si quis vero de hac donatione nostra aliquid minuire, aut irritum facere temptaverit, auctoritate Beati Papæ Gregorii, nostrique apostoli Augustini, simul et nostra imprecatione, sit hic segregatus ab omni sanctæ ecclesiæ communione, et in die iudicii, ab omni electorum societate." *M. A. tom. 1. p. 24.* And a charter by King Edgar has these words: "Quam (sc. abbatiam) quicumque in aliquo violare præsumperit, ipsius Summi Præsidis Petri, et Romanæ Jerarchiæ, omniumque sacrorum ordinum animadversione, in infernum æternum damnetur. Qui vero provexerit, et defensaverit, in forte electorum Dei remuneretur." *M. A. tom. 1. p. 66.*

(16) Precor," says a charter of a Saxon king, "omnes successores meos, five filii, five fratres, five externi reges successerint, ut hoc nostrum partum ita servant inviolatum, sicuti volunt recipere reſtitutionis præmium, et evadere rapacitatis supplicium." *M. A. tom. 1. p. 64.*

church

church at the feast of St Martin (17): a tenth of all the fruits of the kingdom was claimed by the churchmen, a tenth of all domestic animals, and a tenth (18) of the labour of individuals. They exacted a tribute three times a-year for *luminaries* (19); a tribute was affixed to every plough (20); and no man could die, but his goods (21) were assessed by them to a certain amount. The blind zeal of the people even carried them to

(17) LL. Inæ ap. Wilkins, p. 15. Spel. Conc. tom. 1. p. 185. 402. 531. &c.

(18) *Spel. Conc. tom. 1. p. 100. 259. 298. 308. 454. 610. 620. &c.* "Some canonists" (says *Hume*) "went so far as to affirm, that the clergy were intitled to the tithe of the profits made by courtesans in the exercise of their profession." *vol. 1. p. 51.*

(19) Spel. Conc. tom. 1. p. 517. 545. 563. Wilkins, p. 130.

(20) Spel. Conc. tom. 1. p. 517. &c.

(21) Wilkins, p. 108. 113. 114. 121. 130. Ridley's view of civil and ecclesiastical law, ch. 2. sect. 1.

make

make payments to the see of Rome (22); and the severest penalties and fines punished the neglect of these tributes and taxes.

The place too (23) they obtained in the general council of the nation furnished to them a source of the greatest authority. This privilege they enjoyed in common with the druids; and when William had subjected their possessions to tenure (24), they claimed it as *barons*.

The

(22) Spel. Conc. tom. I. p. 230. 311. 343. 377. 392. &c.

(23) "Ego Æthelstanus Rex consilio Wulphelmi Archiepiscopi, et aliorum etiam Episcoporum meorum præcipio," &c. *Wilkins*, p. 54. "Ædmundus Rex congregavit magnam synodum in civitate Londini, sancto Paschali tempore, utriusque tam ecclesiastici ordinis quam politici. Ibi erat Oda et Wulsttan Archiepiscopus, et multi alii Episcopi contemplantes animæ suæ salutem, et eorum qui illis subjecti erant." *Wilkins*, p. 72.

(24) *Seld. tit. hon. part 2. ch. 5. sect. 19. Blackstone, Comment. b. I. p. 151.* This change, it must be remarked, was made with consent of the parliament, and not by William of his private authority. See the very learned and elegant history of Henry II. which is just now published.

The ardour with which they clung together, and the ascendancy they acquired, as possessing all the learning of the times, made them frequently able to direct and govern the acts and deliberations of that great assembly.

They sat also, like the German druids, in all inferior courts with the princes or earls (25); and their power being thus spread throughout the kingdom, they could turn their influence to every side,

blished. *vol. I. p. 43. 457.* "King William I." (says *Madox*) "found the archbishop, and bishops, and several of the abbots and priors of England, possessed of divers lands and rents. He commanded them to make proof that their possessions were rightful. This proof was called *dirationare*, to *dirationate*, or *deraigne*. When they made out their right to their lands and tenements, the King continued them in peaceable possession; but charged their lands with military service; that is to say, he enfeoffed them, to hold of him and his heirs, by the service of so many knights, to wit, in proportion to the quantity and value of their lands and tenements." *Bar. Angl. p. 25.* See also *Baron Gilbert's hist. of excheq. ch. 4. p. 55.*

(25) *LL. Eadgar, c. 5.* "Quæratu centuriæ conventus, sicut antea institutum erat; et habeatur ter in anno
D d conventus

fide, and to every object (26) of temporal government.

These are some of the principal causes which contributed to give power and weight

conventus oppidanus, et bis provincialis conventus: et interfit conventui provinciali episcopus et senator, et postea doceant tam divinum jus quam humanum." *LL. Cnut, c. 17.* "Et ter in anno habeantur comitia municipalia, et duo conventus provinciales, aut plures etiam: et illis interfit episcopus ac senator, et ibi ubique doceatur tam jus divinum quam humanum." *Capit. Kar. et Lud. lib. 4. tit. 71. ap. Lindenbr. p. 904.* "Ut omnis episcopus, abbas, et comes, excepta infirmitate, vel nostra iussione, nullam excusationem habeat, quin ad placitum missorum nostrorum veniat: aut talem vicarium suum mittat, qui in omni causa pro illo reddere rationem possit." See also *Seld. hist. of tithes, c. 14. sect. 1.* The Bishop, it may be observed, or spiritual judge, used to carry with him to court a *book of canons*, not only to direct him in his decrees, but as an ensign of his authority; and the Earl, who was the temporal judge, carried his *dome-book* with him, which was the body of the temporal law, for the same purposes. From hence also some conjecture comes the name of the famous book called *Doomsday-book*. See *Fortescue-Aland's notes on Fortescue on monarchy, p. 29.*

(26) The clergy sat no longer than the Saxon period in the county and inferior courts. The reader may see, in *Brady's Appendix, p. 15.* the charter of William, which separated the civil and ecclesiastical jurisdictions. Though
this

weight to the clergy (27); and when we consider the strength of them, we need not wonder that this order has been accounted as sacred, and adorned with the greatest immunities. We need not wonder that oaths given in their presence were of all others the most binding, that *deeds* acknowledged before them were the firmest security, and that

this act confined them to ecclesiastical pleas; yet under that name they included many civil causes. They claimed, for example, an exclusive privilege to judge in all matters matrimonial and testamentary. It also appears remarkable, that though the Saxon laws allowed the children and relations of *intestate persons* to succeed to their *moveables*; yet the clergy in posterior times consecrated all such goods to pious uses. See *Wilkins, p. 144.* and *Bacon's discourse, p. 89. 144.* So that this separation of courts, though intended to crush the clergy, was in some respects favourable to them.

(27) The observations in this section refer to the Saxon times. They will not apply, and I desire they may not be extended, to the present clergy of England. There is not perhaps in the world an order of priesthood more respectable.

churches (28) afforded an asylum and protection to the most hardened violators of human laws. To bestow a due reverence on princes, was to fully the dignity of this order; to give the way, to dismount from horseback, or to go too far in approaching them, were acts of unpardonable humility (29); and the composition or price of blood was higher for the archbishop (30) than for the king. To wound a churchman, to break the peace of the church, and to abstract any part of its riches (31), were the greatest crimes. To endow monasteries, to submit to penances, and to bend in a base servility to monks, were the greatest virtues.

(28) Spel. Conc. tom. 1. p. 182. 337. 365. Wilkins, p. 110.

(29) Bacon's discourse, p. 16.

(30) Wilkins, p. 110.

(31) Spel. Conc. tom. 1. p. 264. 265. 620. Mezeray, Abr. Chr. tom. 1. p. 279.

Even

Even the objects of proper and becoming worship were forgot amidst the adoration and respect which were paid to shrines and images (32), to copes, tabernacles, and vestments, to altar-cloths, crucifixes, reliques, and all the trumpery of a designing superstition. In the dejection and alarm which arose in the minds of men, the genius of war sunk, and the purposes of society were well-nigh neglected. Warriors laid aside their steel, and their armour: they put on the habit of monks, and fancied they were acceptable to the Deity, as they grew useless to mankind. Great nobles, and ladies of the first rank (33), renounced their figure in society, to distinguish themselves in penance, and

(32) Spel. Conc. tom. 1. p. 594.

(33) Mezeray, Abr. Chr. tom. 1. p. 176. "Le plus foible sexe n'avoit pas moins de force pour cette vie penitente, que les hommes. Les plus nobles filles cherchoient un espoux dans les cloistres, et les veuves y trouvoient leur consolation. Les princesses en bastilloient exprès pour s'y retirer.

the

the practices of an illiberal devotion; and kings (34) threw aside the purple and the diadem, to govern cloysters.

Do we turn over the ecclesiastical annals of almost every nation, and of every age? we shall still be presented with the same picture. The priests of almost every religion have been alike ambitious, and alike successful in their encroachments on the civil rights (35), and the

(34) See a discourse, *de prima institutione monachorum*, prefixed to the *Monasticon Anglicanum*.

(35) I can recollect but one exception in the ancient world to this observation. The Romans, if I am not mistaken, elected their priests from the nobility, and the civil magistrates; and connecting them with no great gain or emolument, this order was considered as a part of the civil power. It had no interest separate from the state, and the maxims which it followed were not opposite to those of the community. In no institution perhaps have that people shown greater wisdom; and among the causes of their grandeur we shall find few so powerful. It is seldom mentioned, however, by their historians; and, what is perhaps more singular, it seems to have escaped the penetration of *Montesquieu*, in that invaluable treatise, *Histoire Romaine, a l'usage des hommes d'état, et des philosophes*. *Eloge de M. Montesquieu, par M. d'Alembert*.

common

common understanding of men. Nor has the history of human affairs a cause to offer more subversive of the progress of refinement than the ghostly practices of priestly power. They poison and confine the mind of the barbarian, when, impelled by hope and ambition, he looks forward with a generous ardour, to better his condition, and enlarge his views; and in the most cultivated ages, they have erected their standard, and are able to support their dominion by the ignorance they establish.

A N

A N
 HISTORICAL DISSERTATION
 Concerning the ANTIQUITY of the
 ENGLISH CONSTITUTION.

P A R T IV.
 Of the judicial arrangements in
 Germany and England.

S E C T I O N I.
Of the origin of Justice.

IN the judgements pronounced concerning men, we are generally guided by the manners to which we have been accustomed. We forget, that the

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the human mind is conscious of a progress, and that mankind are ever exhibiting different manners, and a new way of thinking. The good-natured moralist may fancy, that in every age the mind of the individual is still sensible of right and of wrong, and feels remorse or approbation, as the acts of justice or injustice are committed. But no sentiment is more contradictory to the history of mankind.

These are the distinctions of refining manners, and are totally unknown in the first period of society. The savage goes forth into the woods, to procure his subsistence, and to employ his cunning and his force. He lays toils for the strong, and overpowers the weak. The animal he has caught, he robs of its fur, and uses for the purposes of life: his fellow-man, with whom he has contended, he robs of the booty he had gathered, or stabs to the heart, as a destroyer of the game he pursues. At the approach of night, he erects a temporary

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ry hut, which he forsakes with the sun, to renew his ravages and plunder. In the war he has declared against nature he knows no exceptions: every (1) object he meets with is hostile.

When pressed, however, by necessity, men have learned to provide for the future, and conceive a kind of property in the stores they have hoarded; and when instructed of their weakness in the savage and solitary state, they have united into bodies: it is in such a situation that the virtue of justice is discovered; it is then that the condition

(1) *Athenens, lib. 15.* has recorded the speech of a Scythian warrior, which, though he existed in a more cultivated age, may serve to illustrate and to prove these remarks: "Pro magnis mihi sunt divitiis, hasta, ensis, pulchrumque scutum munimentum corporis. Cum hoc aro, cum hoc meto, cum hoc vinum suave, quod præbet vitis, pedibus tero: cum hoc, supplices me dominum servi publici vocant: hastam qui non audent comparare, nec enses, nec pulchrum scutum corporis tegumentum, flexis ille genibus me adoret, dominumque salutet, ac magnum esse regem vociferetur." The Gauls told the Romans, "Se in armis jus ferre, et omnia fortium virorum esse, —" *Liv. lib. 5. c. 36.*

of

of individuals is made equal, that the powerful are taught to withhold their violence, and that laws give protection to the feeble. The relapse of the individual into his former predatory course is now considered as criminal; and though he beholds with desire the flocks of his neighbour, he must not appropriate them. The party he attacks in his goods, or in his person, conceives himself injured; he founds his complaints to the public; men observe, that the sacred bond of their union is infringed; and they lead out the delinquent to the frontier, and expel him from their society; or make him expiate by a fine, or by death, the guilt he has incurred.

The community meanwhile performs, without blame, those acts of robbery and oppression which it punishes in individuals. It authorises (2) its youthful

(2) *Tacit. de M. G. c. 46.* "Venedi — quidquid inter Peucinos Fennoſque ſilvarum ac montium erigitur, latrociniiſ pererrant." This author has also observed, that the Catti were addicted to the ſame practice. *Annal. lib. 12. c. 27.*

ful warriors to carry devastation to surrounding tribes; and seeks to enrich itself by giving poverty to its neighbours. Its example seems to encourage the vices of its members; but, from

c. 27. *Thucydides, lib. 1.* has mentioned this matter more fully: "Olim Græci, et barbari, quotquot in continente degebant, marique vicini erant, quique insulas incolebant, postquam navibus alii ad alios mare trajicere frequentius ceperunt, sese ad latrocinia converterunt, virorum potentissimorum ductu [quod faciebant] tum quæstus sui causa, tum etiam ut victum pauperibus quærent: atque adorti civitates nullis muris munitas, et quæ pagatim incolebantur, [eas] diripiebant, et maximam victus partem hinc [sibi] comparabant. Quod hoc facinus nondum ignominiam haberet, imo vero nonnihil etiam gloriæ potius afferret. Hoc autem nunc etiam cum alii nonnulli, qui in continente habitant, manifeste declarant, quibus decori est hoc egregie exercere, tum etiam antiqui poetæ, apud quos illi ultro citroque navigantes, ubique eodem modo interrogantur nunquid sint latrones: quod neque illi, quos interrogant, factum ut se indignum inficiantur, nec illi, quibus curæ est [rem ex illis] scire [hoc ipsis ut probrum, et crimen] exprobrant. In Mediterraneis etiam alii alios prædabantur. Et ad hoc usque tempus multi Græciæ [populi] prisco more vivunt, ut Loeri, qui Ozolæ [vocantur], et Ætolæ, et Acarnanes, et qui finitimam horum agro continentem incolunt. Quinetiam ipse armorum gestandorum mos apud hos continentis incolas ex veteri latrociniorum consuetudine permanfit." The reader may also consult *Homer's Odyssey, book 3.*

motives

motives of advantage, it corrects their enormities. The necessities and conventions of men induce them very early to regard justice in the one case, but a long experience is necessary before they acknowledge it, in the other.

The arrangements which, when joined into a body, they employ for the support of peace, and of order, though rude at first, and irregular, are well calculated for the preservation of liberty. The greatest equality prevails then among the members of the tribe; no invidious distinctions have place; the offices of honour, and of trust, are given indiscriminately to the brave and deserving; and justice knows no differences in the orders of men. No other rank, than that of the citizen, is distinguished in such a period: no other character is respected. Those establishments extend their influence to more cultivated times; and, while cherished by the people, they offer a bulwark to defend their rights against the power, the riches, and the factions, of the great.

The

The courts accordingly, or civil arrangements, which were modelled in Germany, preserved the independence of the people; and having followed the Saxons into England, and continuing their importance, they supported that envied liberty we boast of. It is to those courts, and to the forms of proceeding there, that we are now to turn our attention.

S E C T. II.

Of Courts.

Historians, judging of rude times by the standard of a cultivated age, have frequently concluded, that the establishments which arise in society are the result of intention and design. They seek for legislators before legislators could exist; and, while the greatest ignorance and inexperience have prevailed,

ed, they fancy, that the most difficult of the sciences had approached to perfection.

It is, however, by circumstance and accident that rules are discovered for the conduct of men; and society must have subsisted for ages, and its different appearances must have been often unfolded, before the wisdom of individuals could plan or project the arrangements of nations. The tumult and confusion which flow from intercourse and the social connections, suggest first the advantages of order. Regulations are then made, and forms of justice are invented. The actions and commerce of the species extend themselves, and new regulations are called for. Improvements follow on improvements; and schemes of government attain by degrees their utility and value.

Before the spirit of refinement has given birth to artificial manners, the highest respect and attention are produced by the exertion of superior qualities; and men willingly submit their disputes

disputes where they have placed their veneration. The talents of the mind, or the strength of the body, could alone give distinction among the ancient Germans. Had a warrior discovered superior prowess in danger, or superior wisdom in debate, he never failed to excite the approbation of his tribe; and while the notions of property and particular professions were yet unknown, many of his countrymen fought ambitiously to procure his patronage. They joined in his retinue, and added splendour to his appearance; they defended his character and person from insult and peril; and in the (1) rude abundance of his table, they found the pay which rewarded their service. Moved by the kindly commerce of affection, and by that fond admiration which his virtues had kindled in their minds, they

(1) *Tacit. de M. G. c. 14.* "Nam epulæ quamquam incompti, largi tamen apparatus, pro stipendio cedunt." See *part 1, sect. 1.* and *part 2, sect. 2.*

regarded

regarded him as the arbiter of all their differences. To him they appealed, as to a judge the most proper, whether they had fulfilled or neglected the duties to which they were bound by their combination and attachment.

As a chieftain led out his retainers to the field, and governed them during war; so in peace he summoned them together, and exerted a civil jurisdiction. He was at once their captain and their judge. They constituted his court; and having inquired with him into the guilt of those of their order whom justice had accused, they assisted him to enforce his decrees.

This court was imported into England (2); but the innovation which conquest introduced into the fashion of

(2) It had the name of *Halmot*. *Du Cange.* "*Halmotum*, curia dominica baronis seu alterius domini, in villis suis et dominiis, in qua lites vassallorum agitantur: seu curia tribuum, wardarum, et societatum in burgis et urbibus. Vox Saxon. formata ex *heal*, Angl. *hall*, domus, aula, et *mot*, conventus."

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the times, altered somewhat its appearance.

The distribution of the conquered territory had furnished the chieftain with land. He (3) retained a part of his acquisition to his own use, and gave out the remainder to his followers. An intimate connection still subsisted between them; they were still bound to attend him to war; and still submitted to his civil authority. But amidst the occupations of property, and the low concerns of private interest, they for-

(3) "The chieftains, or lords," (says a learned antiquary), "assigned a portion of their lands *ad victum et vestitum suum*, which they committed over to their *socmen* and husbandmen, to furnish them with corn, victuals, and provision for hospitality; and, briefly, all things necessary to their domestical and civil part of life. The residue they divided into as many shares or portions as might well maintain so many military men, whom then they called their *knights*; and thereupon the shares themselves *knights-fees*, i. e. *stipendia militaria*. And these fees they granted over to each of their principal followers, furnishing them with so many knights for the wars." *Reliq. Spel.* p. 58.

got

got the respect which they had formerly paid to his personal qualities; and he was no longer solicitous to preserve them. They considered it as his only merit, that he was possessed of a *manor*. Jurisdiction, therefore, which in Germany was the consequence of virtue and ability, was now annexed to the possession of land.

The head or lord of the *manor* called forth his attendants to his hall. He inquired, by their oaths, into the rents, the reliefs, the wardships, and other duties to which he was intitled; and impowered his *bailiff* to recover them. He inquired into the breaches of custom, and of justice, which were committed within the precincts of his territory; and (4), with his followers, who sat with

(4) *Greenwood of Courts-baron, ch. 3.* and *Scroggs of Courts-leet, and Courts-baron, p. 56.* It may be here remarked, that among the Saxons the baron-court had no cognifance in matters criminal, unless the baron had the king's charter for that purpose. *Reliq. Spel. p. 51.* This may seem to contradict what I observed concerning the

with him as judges, he determined in all matters of debt, and of trespass, to a certain amount. He possessed a similar jurisdiction with the chieftain in Germany; and his tenants enjoyed an equal authority with the German retainers.

But a mode of administration which intrusted so much power to the great, could not long be exercised without blame or injustice. The German, guided by the candour of his mind, and entering into all his engagements with the greatest ardour, perceived not at first, that the chieftain, to whom he submitted his disputes, might be swayed in the judgements he pronounced, by partiality, prejudice, or interest; and that the influence he maintained

the privileges of the higher earls. These privileges, however, were confined to those earls, and we are now discoursing of civil jurisdiction in general. The same objection may seem to lie against some other observations which will be presently made; and the same answer will apply to it.

with

with his followers, was too strong to be restrained by justice. Experience instructed him of his error; he acknowledged the necessity of appealing from his lord; and the (5) court of the *hundred* was erected.

This establishment was formed both in Germany and England, by the inhabitants of a certain division (6), who extended

(5) The hundred was known in Germany under the name of *pagus*. *Tacit. de M. G. c. 12.* "Pagus" (says *Du Cange*) "pars est regionis: atque ut regio in pagos, ita pagi in villas, oppida, et burgos, tributi erant." See likewise *Lindenbr. p. 1450.* and *Baluz. tom. 2. p. 915.* The following law of the Alemans proves strongly the antiquity of this court. "Conventus autem, secundum antiquam consuetudinem, fiat in omni centena coram comite, aut suo missio, et coram centenario." *Lindenbr. p. 372.*

(6) "The hundred," says *Gervase of Tilbury*, in his treatise on the exchequer, "consisted of an hundred hides of land; and an hide of land consisted of an hundred acres." Hence *Du Cange* and *Spelman* seem to think, that as a hide of land was the common possession of an ordinary family, this division might be constituted by an hundred families, and thereby receive its name. Other antiquaries have imagined, that this division was so termed, because "super decem decanos, et centum friburgos

extended their jurisdiction over the territory

burgos judicabat;" as it judged over *ten decennaries*, or an *hundred friboroughs*. Tyrrel, *Introd.* p. 80. There appears to be more difficulty in this matter than is generally imagined. The latter supposition falls entirely to the ground, when it is remembered, that the *hundred* preceded the erection of the *decennary*. And in relation to the former opinion, I would observe, that the division of the *hundred* has been known, in different places, to have consisted of an unequal number of towns or villages. This is proved even by *Du Gange* and *Spelman*. It contained sometimes thirty or forty villages, sometimes ten, and was often constituted by one village. A considerable inequality, therefore, must have been occasioned in the number of families which composed these divisions. If one village constituted a court of this kind, which consisted of an hundred families, forty villages constituting the same court, must doubtless have consisted of many more families. I should thence fancy it natural to conjecture, that the courts of the *hundred* were composed without much regard to the number of families, or of hides of land. And I am the more ready to rely on this conclusion, as these courts were known in Germany before individuals had connection with land, and before families could be distinguished by their possessions. It is also farther confirmed, when we consider the rudeness of the German manners, which will not allow us to imagine, that men should then study a very nice regularity in their civil institutions.

If the territory and number of families which constituted the *hundred* were uncertain, whence shall we fancy that

territory they occupied (7). They bound themselves under a penalty (8), to af-

that this court got its name? We must have recourse on this head to *Tacitus*, who has assisted us in former difficulties. The *pagus* in Germany, which, as has been just now observed, corresponded to the *hundred* in England, furnished, according to this author, an hundred warriors for the service of the community. In rude times, then, when the military virtues are much respected, and when wars are the great object of the care of nations, the court which was formed by the *pagus* might get its name from the chief circumstance which distinguished that division: it might be called the *hundred court* from the *hundred warriors*, who were supplied by the district over which it presided. "In universon æstimanti," says *Tacitus*, "plus penes peditum roboris: eoque mixti præliantur, apta et congruente ad equestrem pugnam velocitate peditum, quos ex omni juventute delectos ante aciem locant. Definitur et numerus: centeni ex singulis pagis sunt: idque ipsum inter suos vocantur, et quod primo numerus fuit, jam nomen et honor est." de *M. G.* c. 6.

(7) It was the freemen in Germany, and the possessors of land in England, who were *suitors* in the hundred court. These ranks of men were the same. The alteration which had happened in relation to property had invested the German freemen with land or territory.

(8) LL. Alaman. tit. 36. c. 4. ap. Lindenbr. p. 372. LL. Æthelst. c. 20. & LL. Hen. I. c. 29. ap. Wilkins, p. 60. & p. 248.

femle

femle at stated times (9); and having elected the wisest of their number (10) to preside over them, they judged, not only of all civil and criminal matters (11), but of those also which regarded religion (12) and the priesthood. The

(9) *Lindenbr. p. 372.* "Ipsum placitum fiat de sabbato in sabbatum, aut quali die comes aut centenarius voluerit, à septem in septem noctes, quando pax parva est in provincia: quando autem melior est, post XIIII noctes fiat conventus in omni centena, sicut superius diximus." "This court" (says *Spelman*) "was to be holden twelve times in the year, that is, once every month; but especially a full appearance was required twice in the year; in memory whereof the suitors are at this day called, at our *Lady* and *Michaelmas* courts, by the steward of the hundred." *Reliq. Spel. p. 51.* and *LL. Hen. 1. c. 8. & 9.*

(10) This judge was called the *hundreder*. It may be remarked in this place, that the greatest care was observed in the election of such officers. "Ut iudices, advocati, centenarii, præpositi, vicarii, scabini quales meliores inveniri possunt, constituentur ad ministeria sua exercenda." *Baluz. capit. reg. Franc. tom. 1. p. 472.* See also the same volume, p. 366. and *LL. Hen. 1. c. 8. ap. Wilkins, p. 241.*

(11) *Reliq. Spel. p. 52. Baluz. tom. 1. p. 19. 513.*

(12) *Bacon on the Eng. govern. p. 43. Dugdale, orig. jurid. c. 11.*

judicial

judicial power thus invested in the people was extensive; they were able to preserve their rights; and (13) attended this court in arms.

As the communication, however, and intercourse of the individuals of a German community began to be wider, and more general, as their dealings enlarged, and as disputes arose among the members of different hundreds, the insufficiency of these courts for the preservation of order was gradually perceived. The *shyre-mote*, therefore, or

(13) *LL. Edward. 6. 32. ap. Wilkins, p. 203.* "— Cum quis enim accipiebat præfecturam Wapentachii, [vel Hundredi], die statuto, in loco ubi consueverant congregari, omnes majores natu contra [versus] eum conveniebant, et descendente eo de equo suo, omnes assurgebant ei. Ipse vero erecta lancea sua ab omnibus secundum morem sædus accipiebat: omnes enim, quotquot venissent, cum lanceis suis ipsius hastam tangebant, et ita se confirmabant per contactum armorum, pace palam concessa. — Quamobrem potest cognosci quod hac de causa totus ille conventus dicitur *Wapentac*, eo quod per tactum armorum suorum ad invicem confœderati sunt." The same thing is hinted at by *Tacitus*: "— ad negotia, — procedunt armati." *de M. G. c. 22.*

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county-

county-court, was instituted; and it formed the chief source of justice both in Germany and England.

The powers, accordingly, which had been enjoyed by the court of the hundred, were considerably impaired. It decided no longer concerning capital offences; it decided not concerning matters of liberty, and (14) the property of estates, or of slaves; its judgments, in every case, became subject to review (15); and it lost entirely (16) the decision of causes, when it delayed too long to consider them.

(14) " Ut nullus homo in placito centenarii neque ad mortem, neque ad libertatem suam amittendam, aut ad res reddendas vel mancipia judicetur: sed ista aut in presentia comitis vel missorum nostrorum judicentur." *Capit. lib. 3. c. 79. ap. Lindenbr. p. 886.* " Omnis controversia coram centenariis diffiniri potest; excepta redhibitione terræ et mancipiorum, quæ non potest diffiniri nisi coram comite." *Baluz. tom. 1. p. 354.*

(15) *Lindenbr. p. 651. Baluz. tom. 2. p. 321.*

(16) *LL. Cnut. c. 18. ap. Wilkins.*

Every

Every subject of claim or contention was brought, in the first instance, or by appeal, to the *county-court* (17); and the *earl*, or *ealdorman* (18), who presided there, was active to put the laws in execution. He repressed the disorders which fell out within the circuit of his authority: and (19) the least remission in his duty, or the least fraud he committed, was complained of, and punish-

(17) *Lib. constitut. ap. Wilkins, p. 149. LL. Hen. I. c. 7. Baluz. tom. 1. p. 876. 971.*

(18) The reader will remember the distinction formerly made concerning the *superior* and *inferior* earls. See *part 3. sect. 3.* I refer here to the latter.

(19) " De advocatis, vicedominis, vicariis, et centenariis pravis, ut tollantur, et tales eligantur quales et sciant et velint juste causas discernere et terminare. Et si comes pravus inventus fuerit, nobis nuncietur." *Baluz. tom. 1. p. 426.* See also *p. 689. 756.* Earl Tosti, for example, was outlawed, in the time of the Confessor, for the severity and injustice which he exercised in his county. The people boldly declared, — " Se nullius ducis ferociam pati posse; a majoribus didicisse, aut libertatem, aut mortem." *Malmesb. lib. 2. p. 83. Ed. Franc. or Selden, tit. bon. p. 523.*

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ed. He was elected from among the number of the great, and was above the temptation of a bribe; but (20) to encourage his activity, he was presented with a share of the territory he governed, or was intitled to a proportion of the fines and profits of justice. Every man, in his district, was bound to inform him concerning criminals, and to assist him to bring them to trial (21); and, as in rude and violent times (22), the poor and helpless were ready to be oppressed by the strong, he was instructed particularly to defend them.

His court was ambulatory (23), and

(20) Spel. Gloss. p. 141. Baluz. tom. 1. p. 259. 538.

(21) Baluz. tom. 1. p. 19. 513.

(22) Murat. Antiq. Ital. tom. 1. p. 400. Baluz. tom. 1. p. 171. 243.

(23) Dalton, officium vicecomitum, p. 405. Bacon, p. 41. This court might be kept in any place within the county.

affembled

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affembled only twice a-year (24), unless the distribution of justice required that its meetings should be oftener. Every freeholder (25) in the county was obliged to attend it; and should he refuse this service (26), his possessions were seized, and he was forced to find surety for his appearance. The neigh-

(24) LL. Cnut. c. 17. ap. Wilkins. Capit. Kar. lib. 7. c. 96. ap. Lindenbr. Its meetings were proclaimed a fe'n-night before they took place. — "Summoneatur comitatus septem dies antea." LL. Hen. I. c. 51. But there is mention made of *county-courts*, both in Germany and England, which met monthly; and it has thence been imagined, that there were two county-courts in both countries. See LL. Baivar. tit. 2. c. 15. Baluz. tom. 1. p. 498. and Brady's history, p. 74. A distinction accordingly has been made between the *shyre-mote* and *folk-mote*. The more able antiquaries, however, are agreed, that these were expressions for the same court; and that the first denoted its more ordinary, and the latter its more extraordinary meetings. See Squire, p. 155.

(25) LL. Hen. I. c. 7. ap. Wilkins.

(26) Hicks, Dissert. epist. p. 4. LL. Æthelst. c. 20. et LL. Hen. I. c. 29. Dalton, offic. vic. p. 406.

bouring

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bouring earls (27) held not their courts on the same day; and (28) what seems very singular, no judge was allowed, after meals, to exercise his office.

The druids also, or priests, in Germany, as we had formerly occasion to

(27) Baluz. tom. 2. p. 190.

(28) "Ut iudices jejuni causas audiant et discernant." LL. Longobard. lib. 2. tit. 52. c. 4. ap. Lindenbr. — "Nec placitum comes habeat, nisi jejunus." Baluz. tom. 2. p. 329. "Addebatur" (says Muratori, in his dissertation concerning earls) "etiam singularis, eaque lepida conditio illorum iudicii, nempe ut nonnisi a jejunis celebrari possent, quo præcaverentur ventris pleni, five, ut rotunde loquar, ebrietatis malefana consilia in tractandis iustitiæ lancibus. Nimirum vel tunc populis, e Germania præcipue egressis, grandes cyathi in deliciis erant, et rara in potentibus temperantia." Antiq. Ital. tom. 1. p. 400. And Tacitus has remarked of the old Germans, "Diem noctemque continuare potando, nulli probrum. Crebræ ut inter vinolentos rixæ, raro conviciis, sæpius cæde et vulneribus transiguntur. — Si indulseris ebrietati, fuggerendo quantum concupiscunt, haud minus facile vitiis, quam armis, vincuntur." de Mor. Germ. c. 22. 23. I would observe, that from this propensity of our ancestors to an excess in diet, it has proceeded, that *jurors*, or *jurymen*, have not been allowed to have meat or drink, or even to leave the court, till they had settled their verdict.

remark,

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remark, and the clergy in England, exercised a jurisdiction in the *hundred* and *county* courts. They instructed the people in religious duties, and in matters regarding the priesthood (29); and the princes, earls, or *ealdormen*, related to them the laws and customs of the community. These judges were mutually a check to each other (30); but it was expected,

(29) "Ut episcopi cum comitibus stent, et comites cum episcopis, ut uterque pleniter suum ministerium peragere possit." Baluz. tom. 1. p. 871. Spelman remarks concerning the earl, "Præsidebat foro comitatus, non solus, sed adjunctus episcopo. Hic ut jus divinum, ille ut humanum diceret, alterque alteri auxilio esset et consilio: præsertim episcopus comiti, nam in hunc illi animadvertere sæpe licuit, et errantem cohibere. Idem igitur utrique territorium, et jurisdictionis terminus." Gloss. in verb. Comes. And the same author has observed, when talking of the *hundred court*, "Aderant hic thani, (quos barones vocant posteri), ut patet è LL. Ethelredi ca. 1. ipsique iudices ecclesiastici, cum partis illius clero. In *hundredo* enim non minus quam in comitatu, unà tunc agebantur quæ ad forum pertinent ecclesiasticum, et quæ ad seculare: donec Gulielmus Conquestor, divisis jurisdictionibus, hanc ab illa separavit." Gloss. p. 303.

(30) Add. Lud. 3. tit. 16. 54. 64. Add. Lud. 4. tit. 24. ap. Lindenbr. Baluz. tom. 1. p. 354. 450. 503. tom.

expected, that they should agree in their judgements, and should willingly unite their efforts for the public interest.

But the prince or earl performed not, at all times, in person, the obligations of his office. The enjoyment of ease, and of pleasure, to which in Germany he delivered himself over, when disengaged from war (31), and the mean idea he

tom. 2. p. 89. It appears, that even *abbesses* were sometimes present in these courts: "Ut episcopi, abbates, atque *abbatissæ*, comitesque, unanimiter invicem sint consentientes legem ad judicium justum terminandum," &c. *Baluz. tom. 1. p. 366.*

(31) "Quotiens bella non ineunt, non multum venatibus; plus per otium tranfigunt, dediti somno, ciboque. Fortissimus quisque ac bellicosissimus nihil agens, delegata domus et penatium et agrorum cura feminis senibusque, et infirmissimo cuique ex familia, ipsi habent: mira diversitate naturæ, cum iidem homines sic ament inertiam, et oderint quietem." *Tacit. de M. G. c. 15.* This propensity to idleness and sloth was owing to their limited ideas of property, and to the great liberty they enjoyed: "Socrates dicebat," says a judicious writer, "fororem libertatis esse otium; et argumentum hujus rei dicebat, fortissimos esse et libertatis studiosissimos Indos et Perfas;

he conceived of the drudgery of civil affairs (32), made him often delegate to an inferior person the distribution of justice in his district. The same sentiments were experienced by the Saxon nobility; and the service which they owed by their tenures, and the high employments they sustained, called them often from the management of their counties. The progress, too, of commerce, giving an intricacy to cases, and swelling the civil code, added to the difficulty of their office, and made them averse to discharge its duties. *Sheriffs*, therefore, or deputies, were frequently appointed to transact their business (33):
and

Perfas, qui utrique, si spectes exteriorem speciem, segnissimi essent: Phryges vero et Lydos ad opus faciendum aptissimos esse, sed fervire." *Ælian. lib. 10. c. 14.*

(32) LL. Long. lib. 2. tit. 30. c. 2. ap. Lindenbr. *Baluz. tom. 2. p. 187.*

(33) "*Vicecomes*," says *Du Cange*, "vicarius comitis, qui vices comitis exequitur,—" "The *scyre-gemot*," says *Selden*, (which was a court kept twice every year, as the sheriff's turn is at this day), "was held by the bi-

and though these were at first under some subordination to the earls, they grew at length to be entirely independent of them. The connection of jurisdiction and territory ceasing to prevail (34), and the civil being separated from the ecclesiastical power, they became the sole and proper officers for the direction of justice in the counties.

The *hundred*, however, and *county* courts, were not equal of themselves for the purposes of jurisdiction and order. It was necessary that a court should be erected, of supreme authority, where the disputes of the great

shop of the diocess, and the ealdorman, (in shires that had ealdormen), and by the bishops and *sheriffs* in such as were committed to *sheriffs*." *tit. hon. p. 520.*

(34) The sheriffs were perhaps originally elected by the earls; but the disunion of jurisdiction with land, and the interest of the people, which might be hurt by unskilful or improper sheriffs, brought about a popular election of these judges; which, however, seems to have been confirmed by the king. *Du Cange, voc. Comes. Dalton, offic. vic. p. 6. Blackstone, b. 1. p. 329.*

should

should be decided (35), where the disagreeing sentiments of judges (36) should be reconciled, and where protection (37) should be given to the people against their fraud and injustice.

The princes accordingly (38), or chief nobility, in the German communities, assembled together to judge of such matters. The Saxon nobles continued this prerogative; and the king (39), or, in

(35) *De causis vero magnatum, et potentiorum non cognovit comes, nam hæ ad aulam regiam deferendæ. Spel. Gloss. voc. Comes.*

(36) *Capit. 3. tit. 77. ap. Lindenbr. p. 885.*

(37) *Baluz. tom. 1. p. 198. 1222.*

(38) *Tacit. de M. G. c. 11. "De minoribus rebus principes consultant, de majoribus omnes."* The lesser matters, to which our author refers, were the rights of individuals, and the distribution of justice. The more important concerns, which the people decided in a body, or by their representatives, were those which regarded the community in general.

(39) *Spel. Gloss. voc. Justiciarius.* Hence this court was called the *king's court*. It was here that King Alfred, assisted by his nobles, is supposed to have condemned

in his absence, the chief *justiciary* (40), watched over their deliberations. But it was not on every trivial occasion that this court interested itself. In smaller concerns, justice (41) was refused du-

ed forty-four judges to be put to death for abuses in their office. See *Horn, Mirroir des Justices, c. 8.* But this author, I confess, is not entirely to be credited. Asser, who lived in the same age with Alfred, and wrote his life, says nothing to this purpose: and several of the names of the judges are evidently not Saxon. This court, however, is doubtless alluded to in that passage of the laws of the Confessor, where it is said in relation to the king, — “*Debet judicium rectum in regno facere, et justitiam per concilium procerum regni sui tenere.*” *Wilkins, p. 200.* Four courts arose from its ruins, and manage, at this day, the business it comprehended; the king’s bench, the chancery, the common pleas, and the exchequer. The house of Peers became also, on its abolition, the supreme court of appeal. *Dalrymple on feud. property, ch. 7. sect. 1.*

(40) This name, it may be alledged, is Norman; but the officer was known among the Saxons by the title of *Totius Angliæ Aldermannus.* *Dugdale, orig. jurid. c. 7. Selden, tit. hon. p. 505.*

(41) *Leg. Polit. Eadgar, c. 2. LL. Cnut. c. 16. 18. 2p. Wilkins.*

ring

ring three sessions of the *hundred*, and claimed, without effect, at four courts of the *county*, before there could lie an appeal to it.

So gradually were these arrangements established, and so naturally did the varying circumstances in the situation of the Germans and Anglo-Saxons direct those successive improvements, which the preservation of order, and the advantage of society, called them to adopt! The admission of the people into the courts of justice, preserved, among the former, that equality of ranks for which they were remarkable; and it helped to overturn, among the latter, those envious distinctions which the feudal system tended to introduce, and prevented that venality in judges, and those arbitrary proceedings, which the growing attachment to interest, and the influence of the crown, might otherwise have occasioned.

S E C T.

S E C T. III.

The same subject continued.

BEfore we leave this subject, it may be necessary to take notice, that some of our antiquaries, and many of our historians, have ascribed to King Alfred those maxims of police, and those methods for the regulation of justice, which we have just now attempted to describe; and which, trusting to the ancient monuments of Gothic story, we have ventured to trace in their progress from the forests of Germany.

The obscurity of the subject, and the want of curiosity, joined to the authority of a monkish writer (1), and the

(1) Rex Alfredus, totius Angliæ pagos et provincias, in comitatus primus omnium commutavit, comitatus in centurias et hundredas, et in decennas et tithingas divisit. *Ingulph. p. 870. ed. Francof.* See also *Malmesb. lib. 2. c. 4.*

high

high admiration of a monarch whom his historians have considered as the model of a perfect character (2), are the causes, undoubtedly, which have spread this opinion.

A propensity likewise in mankind, to consider the forms of policy as the consequence of political wisdom, has contributed its influence to the same purpose. It is the wants, however, as was observed, and the necessities of nations, which give birth to laws, and to civil establishments. The politician, who, attentive to these, endeavours to relieve them, and to insure the emolument of his state, is mistaken for its founder. To the designs of Lycurgus, and of Romulus, are ascribed the insti-

(2) "He seems indeed" (says a great historian of this prince) "to be the complete model of that perfect character, which, under the denomination of a *sage* or *wise man*, the philosophers have been fond of delineating, rather as a fiction of their imagination, than in hopes of ever seeing it reduced to practice: —" *Hume, vol. 1. p. 63.*

tutions

tutions of Sparta, and of Rome. But those illustrious statesmen only acted a more considerable part, in unfolding the modes of administration which were fitted for these. It is the memorable saying of *Solon* (3), "I have not given to my country the wisest laws, but those which were most suited to its genius and manners."

The distresses of his reign, and the dissolute manners which were thence occasioned, induced Alfred to attend more particularly to the government of his kingdom. He was scarcely fixed on his throne, when an invasion of the Danes called him out to defend it. Many battles were fought; and though Alfred was sometimes victorious, yet was he forced at length to retire, with a few nobles, to the isle of Athelney. The Danes mean-while carried every where destruction and ruin. Learning was

(3) Plutarch, vit. Sol. Dr Ferguson on civil society, part 3. sect. 2.

neglected

neglected (4); the execution of justice was suspended; and the English, unawed and unrestrained, and unable to attend to tillage, and to other occupations, gave themselves up to disorder, and subsisted by plunder. They even personated the Danes, and, landing sometimes in one place, and sometimes in another, committed spoil and devastation on their country.

When the arts and the valour of Alfred had brought matters to greater tranquillity, and he had resumed the ensigns of royalty, he began to repair the waste of the Danes, and to consult

(4) "Quemadmodum" (says *K. Alfred*, in the preface to Gregory's pastoral) extranei sapientiam et doctrinam hic in hac nostra terra quondam quaesierint; nosque jam (versa vice) peregrinari oportet ad eam adipiscendam, adeo funditus concidit apud gentem Anglicanam, ut paucissimi fuerint cis Humbrum qui vel preces suas communes, in sermone Anglico intelligere potuerant, vel scriptum aliquod e Latino in Anglicam transferre. Tam sane pauci fuerunt, ut ne unum quidem recordari possim ex australi parte Thamefis, tum cum ego regnare occiperam." To so low an ebb was learning reduced!

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the

the future preservation of his kingdom. He encouraged learning by his example, and invited many distinguished foreigners to take up their residence in England; he compiled a body of laws; he accustomed an undisciplined militia to regularity and order; he rebuilt the churches, the fortresses, and other public structures, which the Danes had demolished; and strengthened and adorned those cities which were no longer fit for habitation, or defence. But the arrangements, and execution, of justice, attracted his chief care.

Though the observations, however, which were formerly made, are sufficient to overthrow the opinion, that he was the sole author of the establishments of *counties* and *hundreds* (5); yet his wisdom

(5) Many facts might still be added to oppose this opinion. I shall here mention a very few with regard to the division of counties. To judge by the sentiment of Ingulphus above cited, there could have been no *earls* before the reign of Alfred, as there were no *counties*, till that time, from which they might have been denominated.

dom and vigilance introduced an order and dispatch, which had been unknown in these courts. He bestowed the greatest attention to have the nobility instructed in letters, and their country-customs: he was careful to elect sufficient magistrates; nor did his ability allow him to be biased by favour or prejudice: and he was active to discover and to punish their neglect, or their fraud.

But his care was not bounded by former establishments. He seems to have divided *hundreds* into *tythings*; and the

ted. We know, however, from Asserius, who was contemporary with this monarch, that *Osfic* was *Earl of Hampshire*, and *Ethelwolph* *Earl of Barshire*, under Ethelbert; and that *Eanwulf* was *Earl of Somersetshire*, under his father Ethelwolph. Several *earls*, before the time of Alfred, are also mentioned by Ethelwerd, a writer of the Saxon period. And even Ingulphus hath the charter of King Ethelbald's foundation of Crowland, which is subscribed by the *Comites of Leicester* and of *Lincoln*. Besides, it is said in the laws of Ina, that if an *earl* allowed a thief to escape, he forfeited his *county*. *Selden, tit. hon. p. 509. Wilkins, p. 20.*

disorderly manners of the lower orders of men, naturally suggested to him this improvement on the German institutions. A *tything*, or *free-borg*, consisted of ten free-born men, with their families, who, uniting into a company, were *pledges* or surety for one another; and should any of their number offend against the laws, they were bound to produce him, or to give satisfaction for his crime. Thirty-one days were allowed to bring him to justice (6); and if he could not be found during that period, the *tythingman*, or *borsholder*, with two of his own *free-borg*, and with the *tythingman*, and two of the more considerable *pledges* of each of the three neighbouring *free-borgs*, was called to purge himself, by oath, of the offence and flight of the criminal. The *borsholder* (7), or chief *pledge*, was the officer

(6) LL. Edw. c. 20. ap. Wilkins, p. 201. Spel. Gloss. voc. Friborga.

(7) LL. Edw. c. 32. ap. Wilkins, p. 203. "Præerat" (to use the words of Spelman) "novem sui sodalitiî comitibus

cer who presided over the business of the *tything*. Every householder was answerable for his own family, and (8) even for a guest, if he had staid above two nights in his house. To refuse to be inrolled in some *tything*, or *decennary*, was to incur the character of an *outlaw*; and no town daring to receive such person, he was thrown into prison, or put to death as a robber, and an enemy to society. No one could change the place of his residence, without a legal warrant to that purpose (9): and all the *pledges*, from twelve years of age, were annually assembled at a *court-leet*, as it was called, or *view* of *frank-pledge*; and having shewn in what

mitibus (quos friborgos, congildones, contubernales, &c. vocant) cognovitque inter hos de damno, pratis, pascuis, messibusque illato; etiam de litibus inter vicinos." Gloss. voc. Decanus Friborgi.

(8) LL. Edw. c. 27. ap. Wilkins. "Duabus noctibus hospes, tertia nocte familiaris habendus est.

(9) Lambard of Borsholders, and other lay officers, p. 7. 8.

free-

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free-borg they were entered, they took the oath of *fealty* to the king.

The institution likewise of *trithings* owed perhaps its original to this monarch. The *trithing* was constituted by the principal men of the different *hundreds* it comprehended (10); who meeting together, debated and determined all matters which had miscarried in the *hundred-courts*, or which had been found too difficult to be decided there (11); and the *trithingreve*, or *leidgreve*, was the officer who had chief authority in this court. But this division was not

(10) LL. Edw. c. 34. ap. Wilkins, p. 204. Erant etiam et alie potestates super Wapentachia, quas vocabant *Trithingas*, quod erat tertia pars provincie. Qui vero super eas dominabantur, vocabantur *Trithingerefas*. Ad hos deferebantur causae, quae non poterant definiri in Wapentachiis. Sicque, quod Angli vocabant *Hundredum*, isti Wapentachium; et quod Anglice vocabant III vel IV *hundreda*, isti vocabant *Trithingas*. — Quod autem in *trithinga* definiri non potuit, ferebatur ad Scyram.

(11) Du Cange, voc. *Trithinga*. LL. Cnut. c. 19. Lambard of Borholders, p. 8. Spel. vit. Alfr. p. 74.

generally

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generally extended over the kingdom (12); and where it did prevail (13), it does not appear to have subsisted long.

These, I am apt to think, were the only innovations which the wisdom of Alfred thought necessary (14). And with regard to *counties* and *hundreds*, he only

(12) The county of Kent was divided in this manner. The *rapes* too in *Suffex* seem to answer this division; and perhaps the *ridings* also of *Yorkshire*. Spel. Reliq. p. 52.

(13) "It seemeth," (says the same antiquary, p. 53.), "that our course now used for taking a jury out of many hundreds in the county, for trial of a cause arising in one hundred, took beginning from the trial in the *trithing*; and that thereupon the *trithing-court* grew out of use."

(14) After all, though I doubt not but Alfred introduced these divisions into England; yet I suspect, that he copied them from a German original. The *Trithingreve*, for example, who governed in the *trithing*, is the same officer, in the opinion of Spelman, with the Salic *Tungimus*: and it is certain, that *tythings* prevailed in many Gothic nations. — "Decani" (says Muratori, in his tenth dissertation concerning the antiquities of Italy) "per decanias, five decem familiis, jus dicebant: —" tom. 1. p. 519. But an impenetrable obscurity covers these subjects.

subjected

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subjected them to a form of greater method and rule. His success was equal to the pains he bestowed for the preservation of order, and the regular distribution of justice. Had a traveller lost a bag of money on the highway, he was sure to find it: and though golden bracelets, says Brompton (15), were hung up at the *parting* of several roads, yet no man durst presume to seize them.

S E C T. IV.

Of the Forms of procedure.

THE methods of trial which were in use among the Germans, are concealed in darkness, and in time.

(15) These circumstances are, no doubt, the exaggerations of historians; but they serve at least to show, that justice was administered with the greatest exactness.

Those

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Those of the Anglo-Saxons are not more certain: and *Selden* (1), the most learned of our antiquaries, has not scrupled to affirm, that he was no where able to discover them. Full of respect for so great a name, and sensible of the obscurity of this subject, I shall throw together my thoughts on it with doubt and hesitation.

Among the Germans, an *hundred companions*, as they were called, were chosen to assist the magistrates in the distribution of justice. It must not, however, be imagined, that these *companions* could be so well instructed in their country-customs, as to judge in relation to them. Occupied in the practice of arms, and selected from the body of the people (2), they

(1) *Præfat. in Auth. decem. p. 43. tit. hon. p. 521.*

(2) *Tacit. de M. G. c. 12.* "Ceteri singulis ex plebe comites, consilium simul et auctoritas adfunt." The English historians and antiquaries have confounded the *companions* mentioned in this passage, with those who had attached themselves to particular warriors. But no two orders of men could be more distinct. See *Tacit. de M. G.*

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they were *judges of fact*, and not of *law*. The democratical spirit of the Germans would not trust the great or more illustrious with the power of an arbitrary decision in matters of dispute, or of life. Every case was examined by the *hundred companions*; they pronounced their *verdict*; and the judges, princes, or earls, determined what was law. They were sworn, like other judges, to the performance of their duty, in conformity to the practice of the times; and in this establishment do we find the origin of a *jury*.

But to judge of evidence with precision and candour, is at all times difficult. In rude ages it is most so: hence those

c. 13. The former were judges; they were chosen for a certain purpose; and their number was definite. The latter had no connection with justice, but as citizens; they followed their minds in the attachments they formed; and their number was not limited. The wisdom of the former was respected, and the public was more immediately interested in their choice: the military qualities of the latter procured them esteem, and individuals were more immediately concerned in them.

judges

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judges amounted to an *hundred*. Though, perhaps, as the Germans lived dispersed, and distant from each other; as some might be indisposed by sickness, or taken up with other affairs; and as many might have entered into the service of nations which were then at war; it was necessary to elect or summon an *hundred*, that, at least, a competent number should assemble for the purposes of justice. In like manner, in posterior ages, the sheriff ordered *twenty-four jurors* to be called, though a smaller number was sufficient (3): and do not *juries* in Scotland consist, at this day, of a greater number than in England?

When the Germans had left their woods, and had begun to reside in towns; when intelligence, with regard to the inhabitants of districts and counties, was more certain; and when greater knowledge, and a higher degree of

(3) Smith's commonwealth of England, b. 2. c. 18.

K k 2 cultivation,

cultivation, had rendered the bulk of men more capable to judge in cases of intricacy, the number of *jurors* was diminished. In the Anglo-Saxon period accordingly *twelve* only were elected (4); and these, together with the judge, or presiding officer of the district, being sworn to regard justice (5), and the voice

(4) The *jurors* were annually elected in Germany, and served in that capacity for the year. The advancement of commerce and venality discovered the inconveniency of this method among the Saxons; and their number being reduced, as we observed, to twelve, they were chosen as occasion directed, from the neighbourhood of the delinquent.

(5) *LL. Ethelr. c. 4.* "Habeantur placita in singulis wapentachiis, ut exeant seniores xii thayni, et præpositus cum eis, et jurent super sanctuarium, quod eis dabitur in manus, quod neminem innocentem velint accusare, vel noxium concludere."

I know that Dr *Brady* in particular, (see his *Hist. p. 76.*), and *Hicks*, (*Dissert. Epist. p. 34.*) will not allow that the *thani* here mentioned were *jurors*; but contend, that they were *judges*, or *lawyers*. Not to mention, however, that *Hicks* is not consistent with himself, having advanced an opposite opinion in a former part of his *Dissertation*, I would observe, that my Lord *Coke*, and Sir *Hary*

voice of reason or conscience, all causes were submitted to them.

Before the orders of men were very nicely

Hary Spelman, who were doubtless more intelligent in antiquity and laws, were of a different opinion.

Hicks, it may be farther remarked, in quoting another law which establishes the practice of *juries* among the *Saxons*, has also endeavoured to take away its force by mistranslating it. See *Senat. consult. de Mont. Wal. c. 3.* He likewise supposes the *xii lahmen* mentioned there to be *duodeni jure consulti*. But *Bishop Nicolson* (*Præfat. ad LL. Anglo-Sax. p. 10.*) and *Spelman* (*Gloss. p. 328.*) have rendered these words more properly by *legales homines*, which is the proper expression for a *jury*, who, to this day, are proclaimed by the crier to be *xii good and lawful men*.

The same author has been equally inconsiderate or designing with regard to another Saxon law, which gives testimony to the same purpose. But I refer the reader to the before-named *Bishop*, who has examined his reasonings on this subject with equal learning and judgement.

The general idea which *Brady* and *Hicks*, with their followers, are fond to inculcate, to wit, that the different parts of our constitution are to be traced from the *Normans*, has led them into the greatest absurdities. They forget, that from the establishment of *juries* among the *Normans*, a very strong argument might be drawn, that they prevailed among the *Saxons*. They were known,

we

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nicely distinguished, the *jurors* were elected from the same rank. When, however, a regular subordination of orders was established, and when the knowledge of property had inspired the necessities with envy, and the rich with contempt (6), every man was tried by his equals. The same spirit of liberty, which gave rise to this regulation, attended its progress. Nor could monarchs assume a more arbitrary method

we are certain, to the *Danes* and other Gothic tribes. (See *Stiernhook de jure Sueonum et Gothorum vetusto, c. 4.*). And were not all those nations descended of the same original, and governed by the same customs? Even the ancient Britains had the *decemvirale judicium*. See *LL. Hoeli.*

(6) No one, says a law of the Longobards, "sine certa et convicta culpa suum beneficium perdat, nisi secundum consuetudinem antecessorum nostrorum, et judicium parium suorum." *Lindenbr. p. 679.* This law, by the way, proves the antiquity of *juries*. "En legis nostræ ideam," says *Spelman* in citing it, "quæ habetur in *Mag. Chart. c. 30. Nullus liber homo rapiatur, vel imprisonetur, aut dissestetur de libero tenemento suo,—nisi per legale judicium parium suorum, vel per legem terræ.*" *Gloss. p. 449.*

of

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of proceeding. "I will not" (said the Earl of Cornwall (7) to his sovereign) "render up my castles, nor depart the kingdom, but by judgement of my peers." Of this institution, so wisely calculated for the preservation of liberty, all our historians have pronounced the eulogium.

It was judged in general concerning evidence, both in Germany and England, by the testimony of witnesses (8): for the art of writing being altogether unknown to the Germans (9), and little used by the Saxons, no written proofs could be adduced among the former, and they were seldom appealed to among the latter. When no witnesses could be found, the party accused defended himself by his own oath, and by

(7) *M. Paris, an. 1227.*

(8) *Baluz. tom. 2. p. 330. 339. 348. 1187.*

(9) *Tacit. de M. G. c. 19. Litterarum secreta viri pariter ac feminae ignorant.*

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the oaths of a certain number of compurgators (10), who, without any knowledge of the cause, swore to his veracity. This practice took its rise in Germany at a time when individuals had entered into particular confederacies; and when their dealings being little extended, and their characters little known, no information was possessed concerning them beyond the circle of their companions; and it prevailed in England when those connections were broken, and when retainers were not kept together by continual alarm and habitual attendance on their chiefs. In the course of ages, the

(10) *Du Cange, voc. Juramentum, Spelman voc. Lada, LL. Hloth. et Eadr. c. 5. ap. Wilkins.* There is yet a remain of this custom in what is called the *wager of law*, which takes place in actions of debt without speciality. The *defendant*, when the proof is not clear on the *plaintiff's* side, is admitted to *wage his law*; that is, to give his oath, that that he owes nothing to the *plaintiff*; and to bring as many persons of good character as the court shall assign, to make oath that he swears true. *Brady, p. 65.*

causes

causes of customs are forgot, and yet those customs continue.

But when cases were extremely doubtful and intricate, or of much importance, the *jurors* or judges, considering the little respect which in those times was paid to an oath, trusted not to the testimony of parties, of compurgators, or of witnesses. They had recourse to other modes of trial, which were then fancied to be infallible, and which arose from the licentious notions entertained of the operations and providence of the Deity; subjects on which mankind have ever vainly employed their curiosity and research.

Of these the most considerable was the trial by *combat* (11): and to a people

(11) This trial was common to all the Celtic or Gothic tribes. *Paterculus* has observed concerning the Germans, "At illi — simulantes factas litium series, et nunc provocantes alter alterum injuria, nunc agentes gratias, *Quod eas Romana justitia finiret, feritasque sua, novitate incognita disciplina, mitesceret, et solita armis discerni jure terminarentur,*—" *lib. 2. c. 118.* To the same purpose is the following passage from *Nicolaus Damascenus*: "Umbrici,

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quum

ple who were inured to arms, and who imagined, that innocence was protected by the Deity, no institution appeared more natural, or carried with it a higher conviction. The victory of a party they considered as an award of the Divinity, who, concerning himself in human affairs, decided for the just. But as individuals (12) had submitted their differences to the laws of their country, it was not allowed to them to chuse this trial of their own accord. The judge (13) or magistrate examined the merits

quum controversias inter se habent, pugnant armati, ac si bello congregiendum esset; et videntur justiore habuisse causam, qui adversarium interemerint." *Gronov. antiq. Græc. tom. 6. p. 3850.* The reader may also consult *Livy, lib. 28. c. 21.* The Germans even judged in this manner of their national quarrels: "Ejus gentis, cum qua bellum est, captivum quoquo modo interceptum, cum electo popularium suorum, patriis quemque armis committunt. Victoria hujus vel illius, pro præjudicio accipitur." *Tacit. de M. G. c. 10.*

(12) Du Cange, voc. Duellum. LL. Hen. I. c. 59.

(13) Du Cange, *ibid.*

of

of the cause, and the propriety of deciding it in this form. He inquired if the parties were of proper age or condition (14); he received the *pledges* or security for their appearance, and submission to justice; he determined the day of the combat (15), and specified the place and the arms. The parties mean-while suspended their animosity and insult; and when brought to the field, they were sworn, that they possessed no herb, or spell, or incantation (16); and it was observed if they had armed themselves with the legal weapons. The charge (17) was then given;

and

(14) Those who were minors, or after sixty, and those who were blind, lame, or otherwise incapable of fighting, were permitted to have champions. See the *Glossaries.*

(15) Spel. Gloss. voc. Campus.

(16) Spel. *ibid.*

(17) It is not incurious to remark, that a *judicial combat* was proposed so late as the reign of Queen Elizabeth. The parties were Simon Low and John Kime,

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who

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and their success or miscarriage determined their innocence or guilt.

The trial of the *ordeal*, which prevailed also in Germany and England (18), was the next in dignity. It consisted of two branches; the *fire-ordeal*, by which the great and more noble were tried; and the *water-ordeal*, which was employed against peasants, and men of low extraction. By the first, the criminal was to carry a red-hot iron, in his naked hand, for a few steps (19), or

who sued Thomas Paramore for a manor and lands in the county of Kent. The story may be seen at large in *Speed*, or in *Spelman's Glossary*, *voc. Campus*.

(18) Baluz. tom. 2. p. 639. &c. Senat. conf. de Mont. Wall. c. 2. LL. Edw. et Gunth. c. 9. LL. Ethelst. c. 7. 14. 21. 23. Æthelr. c. 1. Cnut, c. 17. part 2. c. 20. 27. 29. 32. 34. LL. Edw. Conf. c. 9. ap. Wilkins.

(19) If the coulter or bar of iron was of one pound weight, the trial was called the *single ordeal*; if of three pound weight, the *triple ordeal*; and these methods were used in proportion to the supposed guilt of the criminal. *Du Cange*, *voc. Lada*.

to

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to walk blind-fold (20) and bare-foot over a certain number of red-hot ploughshares, which were placed a yard distant from each other: and he was pronounced to be innocent, if he escaped unhurt; but guilty, if he bore any mark or impression. By the last, the party was sometimes thrown into cold water (21): in which case, if he swam, he was condemned; and if he sunk, he was acquitted. At other times, his hand and arm were immersed, to a certain depth, into boiling water (22): and should

(20) *O. Worm. Mon. Dan. lib. 1. c. 11. Le Gendre*, p. 33. *Seld. analect. Anglo-Britan. c. 8.* It was in this manner, we are told, that Emma, the mother of Edward the Confessor, was tried for an illicit commerce with the Bishop of Winchester. *Spel. Gloss. p. 324.*

(21) *In aquam frigidam inculpatus, manibus pedibusque ligatus, ita ut dextra manus sinistro pedi, sinistra vero dextro pedi adligaretur, mittebatur: si supernataret, reus judicabatur; si submergeretur, innocens habebatur.* *Struv. hist. jur. criminal. sect. 9.*

(22) *Præfat. Episc. Derren. ad LL. Anglo-Sax. p. 13. Spel. voc. Judicium Dei. Selden's table-talk, article, Trial.*

should they receive any wound, his guilt was presumed; if not, his innocence.

It is not necessary to mention the other modes of trial. They were of a similar kind, and derived their original from

Trial. Verstegan, p. 66. It is remarkable, that among the Jews, women suspected of adultery were tried by the water of jealousy. See *Numbers, c. 5. v. 11.* and the commentary of Grotius. And several Roman historians mention the case of Tuccia, the vestal virgin; who, being accused of incontinence, cleared herself, by carrying water in a sieve out of the Tiber to the Temple. Sophocles alludes, in his *Antigone*, to the trial by hot iron. And on this head, we have the following very curious passage in Strabo: "Sub monte Soracte urbs est Feronia, cognominis indigenæ cuidam deæ, quam vicini studiose venerantur: atque est ibi lucus Feroniæ, in quo sacrificium perpetratur mirabile. correpti enim ejus numinis afflatu, homines nudis pedibus prunarum ardentium struem illæsi perambulant. et quotannis eo turba hominum cum solennis conventus, tum spectaculi ejus causa confluit." *lib. 5. p. 346.* The same customs appear also to have prevailed in several places of the East and West Indies. See Purchas, *Kempfer's hist. of Japan, vol. 1. p. 236.* and Churchill's *collect. of voyages, vol. 2.* The Germans even employed the trial by water, to prove the legitimacy of their children:

"Et quos nascentes explorat gurgite Rhenus."
Claud. in Rufin. lib. 2.

IF

from the same principle. These examples are sufficient; and the best lesson they give us is, to value those plans of justice to which we are accustomed. It may be observed, however, that the same enlarged reason which has long since abolished every appeal to the Divinity, has taught us to prize the institution of juries as the most precious gem of our constitution.

If the reader would inform himself of the exorcisms, conjurations, offices, and the different ceremonies which were used in the Gothic ordeals, he may consult *Spelman, voc. Ordalium. Baluz. tom. 2. or Murat. antiq. Ital. dissert. 38.*

AN

A N
HISTORICAL DISSERTATION
Concerning the ANTIQUITY of the
ENGLISH CONSTITUTION.

P A R T V.

Of the great council, or parliament,
in Germany and England.

S E C T I O N I.

Of the Commons in Germany.

WHEN we consider the tumult
and disorder with which man-
ners are frequently disfigured
in ruder ages, and compare them with
the peace and security which prevail in
cultivated

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cultivated times, we are apt to con-
clude, that in such periods the interest
and purposes of society are little under-
stood or valued. It is, however, among
nations whom we disgrace with the ap-
pellation of *barbarous*, that the duties of
the citizen are most generally known,
and that his character is most respected.
The novelty, and other qualities of ob-
jects, which wrought their effects with
a powerful energy in the mind of the
German, his inexperience in certain si-
tuations, and the heat and ardour with
which he prosecuted and followed his
resentments and his feelings, induced
him, on many occasions, to spill the
blood of his countrymen, and to in-
fringe the order of his tribe. But he
was ignorant of all the arts of life, and
of those various employments which fi-
gure in the ages of refinement, and
which, busying the minds of indivi-
duals, dull their sensations for a public
interest. He sought not, in the practice
of fraud and chicanery, the accumulation
of wealth, or the means of pleasure and
M m enjoyment.

enjoyment. For he had formed no idea of a private property; and the territory which his valour had purchased from an enemy, accrued to the state. His mind was unconscious of the meanness which the division of labour, and the variety of pursuits, occasion; and of all those selfish regards, which, following the progress of manners, rise up to the corruption of mankind. Maintained by his nation, he strengthened his natural magnanimity by an attention to so great an object. And as he was intitled to a larger allotment of territory (1), in proportion to his merits, he ambitiously contended to promote the glory and prosperity of his tribe. Instigated by the most generous reflections, he performed all the offices which he owed to his country, with a keenness of passion which is never experienced by the polished citizen.

He courted and procured an admission into the general assembly of his na-

(1) Part 1. sect. 3. & 4.

tion:

tion: and following the sentiments of his mind, unawed by a slavish fear or dejection, he painted them with that force, and glowing eloquence, which true passion always inspires; and communicated to his fellow-citizens those various movements with which his bosom was agitated. His tribe, often struck with the schemes he proposed, lifted him up to put them in execution. The low concerns (2) of a party yielded, in those times, to the public interest; and a grateful nation acknowledged the value of its members.

But though every man who had been adorned with a shield, and a *framea*, and was intitled to a proportion of territory, had a claim to attend the *parliament* or great council of his nation; yet was it impossible that the more populous tribes could, on such occasions, collect their individuals. It is natural, therefore, to imagine, that in smaller communities the people assembled in a

(2) Tacit. de M. G. c. 11. 13. and part 1. sect. 4.

M m 2

collective

collective body; but that in those which were richer, and more populous, they appeared by a *representative*.

At a time when the fatigue of too numerous a family, when luxury, and the love of pleasure, obstructed not the utility of the sexes (3), the greatest increase

(3) *Tacit. de M. G. c. 20.* "Quanto plus propinquorum, quo major affinium numerus, tanto gratiosior senectus, nec ulla orbitatis pretia." I shall here add a few facts with regard to population in several Celtic communities: "Magnam olim fuisse Arvernorum potentiam indiciri potest, quod multa adversus Romanos bella gesserunt, aliquando cc millium exercitu, atque etiam duplo ejus: nam duce Vercingetorige cccc millibus adversus D. Cæsarem decertaverunt: ante cc millibus contra Maximum Æmilianum, et Domitium item Ænobarbum." *Strabo, lib. 4.* "Helvetios aiunt," says the same author, in the same book, "quamquam essent auri divites, tamen latrociniiis se dedisse, cum viderent Cimbrorum opes: cumque essent in tres gentes divisi, duas earum in expeditionibus bellicis periisse. Quanta tamen ex reliquiis enata fuerit multitudo, bellum Helvetiorum contra D. Cæsarem gestum docuit, in quo hominum cccc millia deleta sunt: reliquos ad viii millia Cæsar superesse passus est, ne finitimis Germanis vacuum regionem relinqueret." It may be sufficient to subjoin another passage from the same writer: "Inter Belgas præstare aiunt Bellovacos, ac secundum hos Sueffiones. Quanta hominum

crease was unavoidable to the numbers of mankind. There were (4) four hundred nations in Gaul; the smallest containing 50,000, the largest 200,000 men; and Germany was populous in proportion. The nation, for example, of the *Suevi*, consisted of an hundred districts; and each district (5) comprehended two thousand warriors. Shall we imagine, then, that the whole body of this people assisted at the deliberations of its council?

As the Germans built no cities, but lived detached and separate from each other; as the one half of a com-

num copia apud eos fuerit, hinc colligi potest, quod olim trecenta millia hominum arma ferre valentium apud Belgas sunt censa."

(4) "Galliam multæ gentes, non æque tamen populosæ, incolunt. Maximæ inter has cc virorum millia, minimæ quinquaginta millia continent." *Diod. Sic. lib. 5.* See also *Plutarch, Appian, and Cæsar, lib. 1. c. 29. lib. 2. c. 4. 33.*

(5) Part 1. sect. 3.

munity

munity was employed against an enemy, and the other in cultivating the ground (6); it was even difficult for small communities to call together their members (7); but in large communities it must have been altogether impracticable. When Cæsar was erecting his bridge over the Rhine (8), the *Suevi*, it is said, were

(6) Part i. sect. 3.

(7) It gives me pleasure that I am able to confirm this opinion by the testimony of so great a man as *Grotius*. This author imagines, that it is unnatural to fancy that every individual in the German states was present at their councils. "Id enim" (to use his own words) "in gente magna, qualis præfertim Batavorum, in qua nationes septem Plinius (lib. 4.) numerat, Batavos proprie ita dictos, Caninesates, Frisios minores, Frisiabones, Cauchos minores, Tufios, Marfacios, fieri omnino non poterat. Sed omnes" (he alludes to this expression of Tacitus, de minoribus rebus principes consultant, de majoribus omnes) "dicuntur ipsum concilium, quo ex omni regione omnique ordine idonei homines mittebatur." *Lib. de Antiq. Reip. Batav. c. 2.* So when Civilis declared war against the Romans, "convocavit primores gentis et promptissimos vulgi." *Tacit. hist. lib. 4.*

(8) *Cæsar*,—Se in fines Ubiorum recepit, atque iis auxilium suum pollicitus, si ab Suevis premerentur, hæc ab

were alarmed, and summoning a great council, they dispatched orders through the community, directing the people to forsake their habitations, and concealing their children, their wives, and effects, in the woods, to repair to a stipulated rendezvous, and expect the Romans. If the individuals of this state had met in a collective body, it had been unnecessary to issue such orders.

Nor were the Gauls or Germans ignorant of a representation in other cases. When threatened by any general calamity, they formed great councils of their states to consult for their common preservation, and in these each community (9) appeared by its deputies. Kingdoms

ab iis cognovit: Suevos posteaquam per exploratores pontem fieri comperissent, *more suo, concilio habito, nuncios in omnes partes dimisisse, uti de oppidis demigrarent, liberos, uxores, suaque omnia, in silvas deponerent; atque omnes, qui arma ferre possent, unum in locum convenirent;* — de bell. Gall. lib. 4. c. 19.

(9) *Cæsar*, lib. 1. c. 30. lib. 6. c. 3. lib. 7. c. 12. 75. The states of Gaul, for example, held by their representatives

doms were represented by their sovereigns, and free states by chieftains whom the people had elected for that purpose. Another mode of representation was likewise known very generally over Germany. "*Vetustissimos se nobilissimosque,*" says the Roman historian (10), "*Suevorum Semnonis memorant. Fides antiquitatis religione firmatur. Stato tempore in silvam augurii patrum et prisca formidine sacram, omnes ejusdem sanguinis populi lega-*

tatives a great council or assembly in the reign of Vespasian. "*Respicere paulatim civitates, fasque et foedera respicere, principibus Remis: qui per Gallias edixere, Ut missis legatis in commune consultarent, libertas an pax placeret. — Igitur venientis exercitus fama, et suo ingenio ad mitiora inclinantes Galliarum civitates, in Remos convenire. — Tædio futurorum præsentia placere. Scribuntur ad Treveros epistolæ, nomine Galliarum, ut abstinerent armis, impetrabili venia, et paratis deprecatoribus si pœniteret.*" *Tacit. hist. lib. 4. c. 67. 68. 69.* The Anglo-Saxons, it may be observed in this place, had assemblies during the heptarchy of the seven kingdoms, and so could be no strangers to the idea of a representation.

(10) Tacit. de M. G. c. 39.

tionibus

tionibus coeunt, *cæsoque publice homine celebrant barbari ritus horrenda primordia.*" A representation which was used in the councils and superstitions of nations, could not be unknown in the councils of a community.

S E C T. II.

Of the Commons in England.

IF the commons were so considerable in Germany, they must also have constituted a part of the Anglo-Saxon parliament. But many authors decry the antiquity of our constitution, and deduce from Norman monarchs the existence of our liberty. Following the tenor of the sentiments (1) into which

(1) I may perhaps have occasion, if these papers are found to have any value, to exhibit, in another work, a
N n connected

I have been led, I shall deliver a few thoughts on this subject.

The Germans, it is natural to think, brought along with them into England the same spirit and manners by which they had been directed in their own country. They renounced not all at once the way of thinking to which they had been accustomed; the character of the citizen was still respected, and the power of the commons was still considerable. Would the freedom which the people had enjoyed in Germany be exchanged for servitude, and bands of independent heroes sink into slaves? Did they follow their leaders into another country; did they fight and conquer; and were chains and submission the reward of their valour and service? Haughty and free conquerors were not to be used in this manner. Such a

connected view of several direct arguments, which prove a representation of the commons before the 49th of Henry III. To enter upon these at present, would lead me beyond the design of this essay.

treatment

treatment might suit the condition of the vanquished; but could it ever be applied to men who had been born free, who had experienced liberty, and who had joined to their natural independence the fierceness of victory?

It is more consistent with history and reason to conclude, that they improved and secured their condition. They received an increase of consideration and power by the *fiefs* and territory they had acquired. The service they performed was honourable; and their influence constituting the grandeur and authority of the nobility with whom they were connected, their favour on that account was courted. Were they at any time treated with severity, or did they fancy that the expence and fatigues of war were but ill repaid by the lands they possessed (2), they returned them to their lords, and passing into the train of more

(2) *Bruffel. liv. 2. ch. 27.* I speak of times before the perpetuity of the feud had been fully established.

N n 2

liberal

liberal masters, they renounced the obligations they owed to them.

But a great part of the people in the Saxon period had seized on lands, which, holding of no superior, were considered as their property; and many of those, who, following the fortunes of leaders, had been presented with a feudal grant, possessed themselves likewise of territories which were free and *allodial*. Independent, therefore, from their riches, and the state of society, the people forgot not the privileges which they had enjoyed in Germany.

Guided, however, by ideas of the feudal law, the spirit of which they may not perhaps have understood, many authors have thought, that from the obligation of the king's vassals to attend his court, the origin of parliaments is derived. They confound the court of the king with that of the nation; and conjecture, that when the wants and necessities of the great barons had taught them to dismember their fiefs, and when cities had grown into estimation from the

the progress of commerce, the *knights of the shire*, and the *citizens or burghesses*, made their appearance in parliament; and these alterations they ascribe to the Norman times.

But parliaments were modelled upon a wider foundation. They prevailed in Germany; and it is only by an attention to the forms they assumed there, that we must judge of those establishments. They prevailed also in England before the great barons had parcelled out their possessions, and before commerce had flourished in towns, or wealth had become the chief object of value. Men talk of the oppression of the people, and of the poverty of the boroughs: but the people were rather flattered than oppressed. And allowing that the boroughs wanted wealth (3); yet they were

(3) This, however, can never be allowed. "We know from Bede," says a candid and manly investigator into the antiquities of our government, "that there were in England long before his time, twenty-eight famous cities, besides innumerable castles, and walled towns of
note;

were not poor from the severity of government, but because they despised (4), or were ignorant of the conveniencies of life :

note ; many of which, though now extremely decayed, or quite ruined, were then very considerable ; the greatest and richest part of the nation living in those times for the most part in cities, or great towns, for their greater benefit or security ; and the greater part of the lands of England in the Saxon times, and long after, lay uncultivated and over-run with forests and bogs ; so that the inhabitants of those cities and boroughs being then so considerable for estates in lands, as well as other riches, could not be excluded from having places both in the *British* or *Saxon* great councils. What man of sense can believe, that the ancient and potent cities of *London, York, Canterbury, Lincoln, &c.* should ever be excluded from having any hand in the great consultation about giving money, and making laws, and for the public defence of the kingdom, in the *Saxon* times, any more than they are now ? And therefore we find, that in all the kingdoms of the *German* or *Gothick* original, the chief cities and towns have still sent deputies to the diets or assemblies of estates." *Bibliotheca Politica*, p. 270. See also p. 272.

(4) " Il y a deux fortes" (says *Montesquieu*) " de peuples pauvres : ceux que la dureté du gouvernement a rendus tels ; et ces gens-là sont incapables de presque aucune vertu, parce que leur pauvreté fait une partie de leur servitude : les autres ne sont pauvres que parce qu'ils ont dédaigné, ou parce qu'ils n'ont pas connu les commodités

life : and thus their poverty was a part of their liberty.

We have seen, that the German nobility obtained a place in the councils of their nation ; and that they retained this prerogative in England : we have seen, that the German druids arrogated to themselves a seat in those councils ; and that the Saxon clergy were adorned with this privilege : we have also seen, that the commons in Germany assembled in a collective body, or by a representative : And shall we not conclude, with an equal propriety, that the commons in England exerted a legislative authority ?

Every free-man in Germany assembled in person at the councils of his nation, or voted for the representative of his district. The same conduct was observed in England. The possession of

modités de la vie ; et ceux-ci peuvent faire de grandes choses, parce que cet pauvreté fait une partie de leur liberté." *L'esprit des Loix*, liv. 20. ch. 3.

land

land was the mark of freedom among the Saxons; and in those states of the heptarchy where the people could appear in a body, every individual who had seized, or had been endowed with territory, had a title to attend its councils: but in those which were more populous, and where the individuals could not easily be collected, the holders of land gave their votes for representatives: and from the time that the Saxon kingdoms were united, the commons appeared generally in the way of representation.

In every inferior court, which had been formed in Germany and England, the free-men, or possessors of land in the territory over which it presided, assembled as the *suitors* there. Would we every where perceive the marks of a limited and free administration in the lowest establishments, and yet find them to be wanting in that which was highest, and most important? It is impossible. The whole land-holders among the Saxons were the *suitors* of the council of the nation. The boroughs, or towns,

towns, forming corporations, and being endowed with land, had a title to be present by their deputies; and the *wites* (5), or wise men, who are mentioned as a part of the Anglo-Saxon parliament, were the *knights of the shires*, and the *burgesses*.

THESE arguments in favour of a representation among the Saxons arise naturally from the reflections I had made. To enumerate the different opinions which have been formed concerning the establishment of our parliament, and to examine the reasonings which have been adduced to support them, belong not to the present undertaking.

(5) There can be no impropriety in supposing, that the term *wites* was applied to the representatives of counties and boroughs. A man whom the people could intrust to make laws for them, might very well be called a *wite*, "a discreet or wise man." It is obvious, at least, that this term could not mean *lawyers*, or *judges*, as Dr Brady imagines: for *law* was not then the object of a particular profession; and *judges* had no more voice in making laws than at present. See *Bibl. polit. dialogue 6*.

C O N C L U S I O N.

ON the whole, I pretend not to have exhausted the different subjects I have ventured to discourse of in this treatise. If I have made it appear, that the parts which compose our constitution arose more immediately from the forests of Germany, I have answered my intention. Those who have more learning and capacity may penetrate farther, and delineate, with a happier pencil, the plan of our government.

T H E E N D.

C O R R E C T I O N S.

Page 20. line 2. from the bottom, for *æque* read *æque*.

Page 90. line 18. from the top, for *To* read *Among*.

Page 185. line 2. from the bottom, for *Hikcef.* read *Hickes*.

Page 285. line 2. from the top, for *shire* read *shires*.

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[Faint, illegible text on a page, possibly bleed-through from the reverse side. The text is too light to transcribe accurately.]