A View Of Society In Europe, In Its Progress From Rudeness To Refinement: Or, Inquiries Concerning The History Of Law, Government, And Manners

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Section III.

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SECTION III.

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

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

It would lead to details improper in this place, if I ſhould attempt to explain the origin and growth of the different privileges

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

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

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

'Proditores

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

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

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my remarks, admit not of either. I can only hint at my idea, and muſt not wait to inſiſt upon it.

When the territorial juriſdictions of the nobles were to decay, they loſt the privilege of giving pardons, as well as the other advantages annexed to their fiefs. The judges who ſucceeded them, were not to poſſeſs their prerogatives. Other, and more cultivated maxims of law and equity, had grown familiar. Unconnected with the diſtributions and the offices of juſtice, but as peers, the nobles were to ceaſe to interfere with law and buſineſs in their eſtates or territories. In this condition, their prerogatives could paſs no where but to the crown. That of *mercy* was to be ſwallowed up with the reſt. When regular courts were erected, and when the barons neither levied troops, coined money, nor pardoned crimes, all theſe privileges were to be exerciſed, excluſively, by the ſovereign. All the members of the community were then under one head. The kingdom ſeemed as it were to be one great fief, and the people looked up to the ſovereign as the only ſuperior.

The act of parliament which had the effect to abridge, for ever, the high prerogatives of the nobles, declares, 'That no perſon 'or perſons, of what eſtate or degree ſoever they be, from the 'firſt day of July, which ſhall be in the year of our Lord God '1536, ſhall have any power or authority to pardon or remit 'any treaſons, murthers, manſlaughters, or any kind of felonies,

'whatſoever they be; nor any acceſſaries to any treaſons, mur-
'thers, manſlaughters, or felonies; or any outlawries, for any
'ſuch offences committed, perpetrated, done, or divulged, or
'hereafter to be committed, done, or divulged, by, or againſt
'any perſon or perſons, in any part of this realm, Wales, or to
'the marches of the ſame; but that the King's Highneſs, his
'heirs and ſucceſſors, Kings of this realm, ſhall have *the whole*
'*power and authority thereof*, united and knit to the imperial
'crown of this realm.' *Stat.* 27. *Henry* VIII. *c.* 24.

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

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

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

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

(5) 'In Gallia, non solum in omnibus civitatibus, atque pagis 'partibusque, sed pene etiam in singulis domibus, *factiones* sunt; 'earumque factionum sunt *principes*, qui summam auctoritatem 'eorum judicio habere existimantur; quorum ad arbitrium ju-'diciumque summa omnium rerum consiliorumque redeat.' *Caesar, de Bell. Gall. lib.* 6. *c.* 10.

After the Germanic conquests, the words *faida*, *feid*, *feeth*, and *feud*, came to express the hostilities of the combination of kindred, who revenged the death of any person of their blood, against the killer and his race. In the Anglo-Saxon period of our history, these factions and hostilities were prevalent to an uncommon degree. And, what is worthy of observation, when a person was outlawed, and could form no combination of this sort for his protection, but might be put to death by any individual who met him, the term *frendles-man*, expressed his condition. 'Talem,' says *Bracton*, 'vocant Anglici *Utlaughe*, et a-

'lio nomine *antiquitus* ſolet nominari, ſcilicet FRENDLES-'MAN.' *Lib.* 3. *p.* 129.

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

'Memet, et nos omnes taedet impiarum et quotidianarum 'pugnarum quae inter nos ipſos fiunt, et propterea in hunc mo-'dum ſtatuimus. Si quis alium poſthac interfecerit, ſolus cum 'interfecti cognatis faidam gerito, cujuſcunque conditionis fue-'rit, ni ope amicorum integram weram intra 12 menſes perſol-'verit. Sin deſtituerint eum cognati et noluerint: Volumus ut 'illi omnes [praeter reum] à faida ſint liberi, dum tamen, nec 'victum ei prebeant, nec refugium. Quod ſi quis hoc fecerit 'ſuis omnibus apud regem mulctator, et cum eo quem deſti-'tuit nuper, faidam jam ſuſtineat propinquorum interfecti. Qui 'vero ab alio cognatorum quam a reo ſumpſerit vindictam, ſit 'in faida ipſius regis et amicorum ſuorum omnium, omnibuſ-'que bonis ſuis plectitor.' *LL. Edmund. ap. Spelm. Gloſſ. p.* 209.

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

'Prudentium

'Prudentium eſt faidas compeſcere. Primo [de more genti-
'um] oratorem mittet interfector ad cognatos interfecti, nuncia-
'turum ſe velle eiſdem ſatisfacere. Deinde tradatur interfec-
'tor in manus oratoris, ut coram veniat pacaté, et de ſolvenda
'wera ipſemet ſpondeat. Sponſam ſolvi ſatiſdato. Hoc facto,
'indictetur mundium regis, ab illo die uſque in 21 noctes, et
'colliſtrigii mulctam dependito; poſt alias 21 noctes manbotam,
'et nocte 21 ſequenti primam were ſolutionem numerato.'
LL. Edmund. ap. Spelm. Gloſſ. p. 210. *et Wilkins, p.* 74. 75.

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

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The hoſtilities and factions of which I ſpeak, were ſupported among the Anglo-Saxons, as among the Gauls and the Germans, by the authority and countenance of the chiefs and the nobles. In the Norman times, the barons gave letters or mandates of protection to individuals, whom they were diſpoſed to ſerve. Even kings gave obligations to abbeys and monaſteries, by which they were bound to protect them againſt violence of every kind. On the conſideration of fines, they were even to remit their own animoſities, and to protect criminals from juſtice. See *Appendix*, No 3. The ſame things had place in the other kingdoms of Europe. Men, weak, and without ſtrength, bought the aſſiſtance and protection of the ſtrong and powerful. *Du Cange*, *voc. Salvamentum*, *Capitalicium*. *Form. Solen. ap. Baluz.*

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

Theſe fines or compoſitions, of which it was the object to ſatisfy the revenge of the relations of the perſon who had ſuffered, were originally ſettled by their agreement with the offender,

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

The exaction of fines to the injured, among the antient Germans, I consider as a proof that, in criminal matters, they had proceeded to appeal to a judge. I therefore differ from Dr Robertson, when he observes, that, 'among the antient Germans, 'as well as other nations in a similar state of society, the right 'of avenging injuries was a private and personal right, exercised by force of arms, without any reference to an umpire, or 'any appeal to a magistrate for decision.' *Hist. of Charles* V. *vol.* 1. *p.* 274.

In fact, it was not even solely the fine to individuals that was known among the Germans. They had advanced much farther in criminal jurisprudence. It was thought that the criminal, beside offending a particular family by the injury done to any

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of its number, had alſo offended the ſociety, by breaking its peace. A fine, likewiſe, was, on this account, exacted from him, and went to the public or fiſc. And thus Mr Hume, too, is miſtaken, when he will not allow that the Germans had made this ſtep towards a more cultivated life. *Hiſt. of England, vol.* 1. *p.* 154.

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

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

The biographer of Charles V. I am ſenſible, profeſſing to be guided by Baron Monteſquieu, denies that 'the *fredum* was a 'compenſation due to the community, on account of the public 'peace;' and conſiders it as 'the price paid to the magiſtrate 'for

'for the protection he afforded againſt the violence of reſent-
'ment.' *Vol.* 1. *p.* 300. This notion ſeems not to agree with his former opinion, as he conceives that the *fredum* was paid in the age of *Tacitus* *. And I obſerve he has alſo affirmed, that the fine to the injured family may, in like manner, be traced back to the antient Germans †, which appears to be another inconſiſtency with his former declaration. But, waving any conſideration of theſe inadvertencies, I think there is nothing more evident, than that the *fredum* was originally paid to the fiſc, or to the ſovereign, for the breach of the peace. The following arguments are ſtubborn, and perhaps concluſive.

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

'Hoc quoque jubemus, ut judices ſupra nominati, ſive fiſca-
'les, de quacunque libet cauſa freda non exigant, priuſquam fa-
'cinus componatur. Si quis autem per cupiditatem iſta tranſ-
'greſſus fuerit, legibus componatur. Fredum autem non illi ju-

* 'A certain ſum, called a *fredum*, was paid to the king or ſtate, as Tacitus ex-
'preſſes it, or the Fiſcus, in the language of the barbarous laws.' *vol.* 1. p. 300.

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

'dici tribuat, cui culpam commiſit, ſed illi qui ſolutionem recipit, 'tertiam partem FISCO tribuat, ut PAX perpetua ſtabilis perma-'neat.' *LL. Ripuar. tit.* 89.

'Si quis liber liberum infra januas eccleſiae occiderit, cognoſcat 'ſe contra Deum injuſte feciſſe, et eccleſiam Dei polluiſſe: Ad ip-'ſam eccleſiam quam polluit lx. ſol. componat. Ad FISCUM vero 'ſimiliter alios lx. ſol. pro FREDO ſolvat: Parentibus autem legi-'timum weregildum ſolvat.' *LL. Alaman. tit.* 4.

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

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

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

'ratione dignitatis illius haec conferenda decernit, quibuſdam *hae-*
'*reditarie* quibuſdam *perſonaliter*.' *Dial. de Scaccar. ap. Madox, p.* 402. The higher Earls, or the Earls palatine, it is obſervable, had all the profits to their own uſe. Of the Earls who poſſeſſed the *third penny*, there is mentioned the Earl of Kent, who had it under William I. And there is evidence, that it was antiently enjoyed by the Earls of Arundel, Oxford, Eſſex, Norfolk, and Devonſhire. *Selden, Tit. Hon. part* 2. *ch.* 5. *Madox, Baron. Anglica, book* 2. *ch.* 1.

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

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

* 'After the conqueſt, the mention of private wars among the nobility, occurs 'more rarely in the Engliſh hiſtory, than in that of any other European nation, and 'no laws concerning them are to be found in the body of their ſtatutes. Such 'a change in their own manners, and ſuch a variation from thoſe of their neigh-'bours, is remarkable. Is it to be aſcribed to the extraordinary power which 'William the Norman acquired by right of conqueſt, and tranſmitted to his ſuc-'ceſſors, which rendered the execution of juſtice more vigorous and deciſive, and 'the juriſdiction of the King's court more extenſive, than under the monarchs on 'the continent? Or, was it owing to the ſettlement of the Normans in England, 'who, having never adopted the practice of private war in their own country, a-'boliſhed it in the kingdom which they conquered? It is aſſerted, in an ordinance 'of John King of France, that in all times paſt, perſons of every rank in Nor-'mandy have been prohibited to wage war, and the practice has been deemed un-'lawful. *Ordon, tom.* 2. *p.* 407. If this fact were certain, it would go far towards 'explaining the peculiarity which I have mentioned. But, as there are ſome En-'gliſh acts of parliament, which, according to the remark of the learned author 'of the *obſervations on the ſtatutes, chiefly the more antient,* recite falſehoods, it 'may be added, that this is not peculiar to the laws of that country. Notwith-'ſtanding the poſitive aſſertion in this public law of France, there is good reaſon 'for conſidering it as a ſtatute which recites a falſehood.' *Charles* V. *vol.* 1. *p.* 286. 287.

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

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

In the appendix, I produce a very curious proof of the exerciſe of private war in England. It is a truce between two nobles, agreeing to ſtop hoſtilities. *Appendix*, No. 4. The following paſſage of *Glanville*, is alſo a ſtriking teſtimony of the exiſtence of the right of private war. 'Utrum vero ad *guerram* '*ſuam* maintenendam poſſint domini hujuſmodi auxilia exigere 'quaero.' *lib.* 9. *c.* 8. And the diſpute between Richard, Earl Marſhal, and Henry III. of which there is a ſingular relation in Matthew Paris, is certainly to be accounted for on the principle of this prerogative.

Nor is there wanting other evidence of its exiſtence. It was in a great meaſure, from the exerciſe of the right of private war, that in England, in the age of Stephen, there were above eleven hundred forts and caſtles. *Lord Lyttelton's Hiſtory of Henry* II. *vol.* 1. *p.* 418. The *feudum jurabile* et *reddibile* was likewiſe a conſequence of it, by which a ſovereign or a noble put a vaſſal into any of his caſtles, in order to defend it, and to guard his ſtores and his priſoners, and whom he bound by an oath, to re-

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ſtore it in a certain time, or to his call or mandate. This form of fief and tenure was not only known in England, but frequent there; and mention is made of it in the laws of Henry I. The right of private war was, therefore, often exerciſed in this country; and, what deſerves obſervation, without paying an attention to this right, it is impoſſible to explain thoſe ordinances of Henry which allude to this feudal peculiarity. Spelman, not attending to it, could not reach their meaning, and pronounces of them, that they are obſcure and corrupted. *Gloſſ. voc. Caſtellacium.* Their ſenſe, notwithſtanding, when tried by this ſtandard, is eaſy and natural.

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

Theſe powers were exerciſed by the higher nobles among the Anglo-Saxons. For, though *palatinates*, which are generally allowed to have poſſeſſed them, were not familiar by name in thoſe times; yet, I cannot but agree with Mr Selden, that the

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ſenſe and ſubſtance of them were then fully known. The Anglo-Saxon earls, who had their earldoms to their own uſe, had regal juriſdiction, and the king's writ of ordinary juſtice did not run in their dominions. Such, for example, was Etheldred Earl of Mercland, under King Alfred, and his ſon King Edward. *Selden, Tit. Hon. part.* 2. *ch.* 5. *ſect.* 8. *Diſſert. concerning the Antiq. of the Engl. Conſtitution, part* 3.

After the Norman invaſion, many of the higher nobility were expreſsly known as *Earls-Palatine.* Cheſhire was a palatinate, and poſſeſſed by its earls, *ad gladium, ſicut ipſe rex totam tenebat Angliam ad coronam ſuam.* The antient Earls of Pembroke were alſo palatines, being *domini totius comitatus de Pembroch,* and holding *totum regale infra praecinctum comitatus ſui de Pembroch.* This is the language of records. The like *regality* was claimed in the barony of Haverford. The biſhops of Durham had, antiently, *omnia jura regalia, et omnes libertates regales infra libertatem ſuam Dunelmenſem.* The archbiſhop of York had a regality in Hexham, which, antiently, was ſtyled a *county-palatine.* The biſhoprick of Ely was a palatinate, or a royal franchiſe. The earldom of Lancaſter was created *palatine* in the reign of Edward III. Hugo de Beleſme Earl of Shrewſbury, under William II. had the title *palatine.* The ſame thing is mentioned of John Earl of Warren and Surrey, under Edward III. And Humfrey de Bohun, Earl of Hereford and Eſſex, had a *regality* within the honour of Breknou. *Spelman Gloſſ.*

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de Comite Palatino, Selden, tit. Hon. part. 2. *ch.* 5. *ſect.* 8. *Madox, Bar. Angl. p.* 150. *Camden, Britan. p.* 661. 935.

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

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

It is contended for, indeed, ſtrenuouſly, and at great length, by Monſr. Bouquet, that the greater and leſſer juriſdictions were inherent in allodiality. *Le droit Public de France.* Dr Smith, in his moſt ingenious Inquiries concerning the Wealth of Nations, gives his ſuffrage for the ſame opinion. And Dr Ro-

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bertſon, notwithſtanding what he has ſaid concerning fiefs, is, in ſome meaſure, diſpoſed to it. *Hiſt. of Charles* V. *vol.* 1. *p.* 303.

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

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

this privilege was originally of so little account, that it was enjoyed indifferently by every feudal lord.

(10) Du Cange, voc. Gruarium, Pedagium, Rotaticum, Feudum Nummorum, Feudum Soldatae. Brussel, Usage-general des fiefs, liv. 1. ch. 1. sect. 11. Assises de Jerusalem, avec des notes, par Thaumassiere, *p.* 171. 268.