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

Stuart, Gilbert

Edinburgh, 1778

Chapter I.

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Visual Library

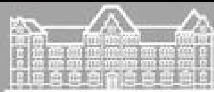
Authorities, Controverſy, and Remarks.

B O O K II.

C H A P T E R I.

S E C T I O N I.

(1) THE ordinary form of homage and fealty varied in ſome little particulars in different nations, and in the ſame nations, at different times; and fidelity, while the fief was precarious, could only be promiſed during the connection of the lord and the vaſſal. The oldeſt example of theſe ceremonies which is preſerved, and perhaps the moſt ſimple, is that of



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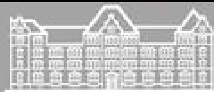
Taſſilon Duke of Bavaria, to King Pepin, in the year 757. It is thus deſcribed. 'Taſſilo Dux Bajoariarum cum primoribus 'gentis ſuae venit, et more Francorum, in manus regis in *vaſſa-*'*ticum* manibus ſuis ſemetipſum *commendavit; fidelitatemque,* 'tam ipſi regi Pipino, quam filiis ejus Carolo et Carlomanno, 'jure jurando ſupra corpus Sancti Dionyſii promiſit.' *Adelmus, Annal. Franc. ap. Bruſſel, liv.* 1. *ch.* 1. *ſect.* 7.

From the words *more Francorum* it is to be inferred, that theſe uſages were of a ſtill higher antiquity; and, indeed, there can be little doubt, that they prevailed from the earlieſt times. We find them, accordingly, in the Anglo-Saxon period of our hiſtory. *Nichol. Praefat. ad LL. Anglo-Saxon. p.* 6. 7. It is true, notwithſtanding, that ſome eminent authors contend, that they were conſequences of the perpetuity of the fief. But the homage of Taſſilon, and the Anglo-Saxon fealty, were prior to the general eſtabliſhment of this perpetuity. And there does not appear any ſolid reaſon to think, that theſe ceremonies were a reſult of it.

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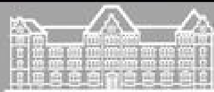
tion to the prevalence of private war, and difcovered an advancement in the ideas of civilization and government. Saint Louis eftablifhed it in France; and it appears in England, in what is called 'The Statute of Homage,' in the feventeenth year of Edward II. By this form or ordinance, the vaffal, after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

Out of thefe ufages, in this ftate of their reftriction, there grew, as fiefs died away, the ligeance, or allegiance, which every fubject, whether a proprietor of land or not, was fuppofed to owe to his fovereign. Thus, the oath of ligeance or fealty was to produce the oath of allegiance.

(2) I have endeavoured to inveftigate, in another work, the high antiquity of the feudal incidents. *Differt. on the Antiq. of the Eng. Conftitut. part* 2. It is a common miftake, that the feudal fruits or incidents were not known in England till the Norman times. This opinion is to be afcribed to the want of curiofity in fome inquirers of great name, who have given a fanction to it without deliberation; and to the narrow prejudices of others, who affect to confider the Norman invafion as the proper aera of our political conftitution, from the view of paying a compliment to the prerogative of our kings, by holding out Duke William as a conqueror, and by infulting the confequence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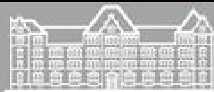
of the people. It is in this manner that errors have been engrafted upon errors.

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

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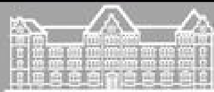
not require to be informed, that his verſion of the Anglo-Saxon laws is often defective and unfaithful.

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

The fact is, that theſe fruits and this law extended themſelves over Europe, from no principle of adoption, but from the peculiarity of manners and ſituation of the barbaric nations who made conqueſts. There is no poſition in hiſtory which is clearer than this. And Du Cange, in particular, when we conſider the amazing extent of his information, is very much to blame, while he fondly holds out the tenet, that the uſages and inſtitutions of the European ſtates proceeded chiefly from the manners and cuſtoms of France.

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

ᶜ Nihil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'Nihil facere poteſt tenens propter obligationem homagii, 'quod vertatur domino ad exhaeredationem vel aliam atrocem 'injuriam; nec dominus tenenti, e converſo. Quod ſi fecerint, 'diſſolvitur et extinguitur homagium omnino, et homagii connec-'tio et obligatio, et erit inde juſtum judicium cum venerit con-'tra homagium et fidelitatis ſacramentum, quod in eo in quo de-'linquunt puniantur, ſc. in perſona domini, quod amittat domi-'nium, et in perſona tenentis, quod amittat tenementum.' *De leg. et Conſuetud. Angl. p.* 81.

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

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

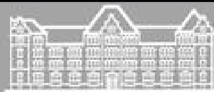
and ſpirit. The decay, indeed, of this cordiality, was to create confuſions and oppreſſion; and, what confirms my remark, it was in this ſituation, that the power of the nobles was to be humbled.

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

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

In every feudal kingdom, notwithſtanding this ſtrong affirmation, the *comes* was known, and the *comitatus*. The *comitatus*, or county, was the territory or eſtate of the *comes*; and the court he held, and in which he preſided, was the *county-court*,

to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to which the freeholders and feudators were called, and acted as assessors or judges. *Du Cange, and Spelman, voc. Comites.*

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

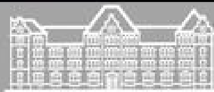
It is said by Mr Hume, That the great authority of the conqueror retained the county-courts from the Saxon customs. He thus infers, that these courts were favourable to the royal authority. The fact, however, is exactly the reverse. The greater jurisdiction there is in the nobles and the people, the more limited is the prerogative of princes. The county-courts were eminent and formidable supports of the liberty of the subject. And, instead of giving them encouragement, it was the interest of the conqueror to employ his great authority in their suppression.

Mr Hume adds, in the spirit of a writer who had made a discovery, 'Perhaps this institution of county-courts *in England*, 'has

'has had greater effect on the government, than has yet been di-
'stinctly pointed out by historians, or traced by antiquaries.'
Ibid.

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

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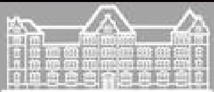
all the European ſtates, every perſon who wore a ſword had a title to go to the national aſſembly. The ſovereign could enact no new laws, and could repeal no old ones, without the conſent of the people.

But, in antient Germany, a repreſentation of the people was even practiſed on particular occaſions; and we are told by *Tacitus*, that, when Civilis declared war againſt the Romans, 'convocavit primores gentis, et *promptiſſimos vulgi*.' *Tacit. Hiſt. lib.* 4. See farther *A Diſſertation concerning the Antiquity of the Engliſh Conſtitution, part* 5. After the erection of the European ſtates, the inconveniencies ariſing from great multitudes of armed men in councils of buſineſs, diſcovered fully the advantages of *repreſentation*. And deputies made their appearance in theſe to conſult and defend the privileges and rights of the people. The exact aera of this eſtabliſhment is not known in any country of Europe. Its antiquity, however, is beyond all doubt. And the *commons* made a figure in the aſſemblies of France, termed, les champs de mars, et les champs de mai, in the cortes of Spain, and in the wittenagemots of England.

It is probable, that in France, the people were repreſented before the age of Charlemagne. That they were important in the reign of this politic and powerful prince, there are proofs, poſitive and certain. The inſtructive work of Archbiſhop Hincmar, de ordine Palatii, places this matter in a ſtrong light; and Abbé Mably, who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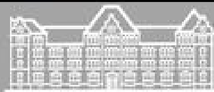
who copies and comments upon it, acknowledges the ſupreme power of the aſſemblies of thoſe days, ſelects examples of it, and of the interference and conſideration of the people. In fact, nothing of any moment or value, in peace or in war, or in any ſubject whatever, could be done without their approbation. 'Lex 'conſenſu populi fit, et conſtitutione regis.' *Capit. Kar. Calv. an.* 864. *ap. Baluz. tom.* 2. *p.* 177. This concluſion is ſupported by expreſs, numerous, and concurring teſtimonies of antient laws, hiſtories, and ordinances. See *Hotoman, Franco-Gallia, ch.* 10. 11. *Mably Obſervat. ſur l'Hiſt. de France, lib.* 2. *ch.* 2. *Rymer on the antiquity of parliaments*, &c.*. Theſe aſſemblies were very different from the Etats Generaux of after times, when the rights of the people were inſulted, and the legiſlative power came to reſide in the ſovereign. Yet, it is not uncommon to confound them; and, on the foundation of this error, improper concluſions have been inferred againſt the *commons* of England.

At what period the deputies of the people appeared in the

 cortes

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



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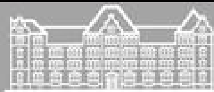
cortes of Spain, is uncertain. But the liberty of the Wiſigoths, who founded that kingdom, was ferocious; their love of independence was foſtered by the ills of the Mooriſh domination; and their ſovereigns, during a long tract of time, were kept in a ſurpriſing degree of ſubjection. Like all the other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

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

While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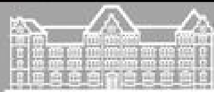
While liberty and the deputies of the people made a figure, and while the prerogative of the ſovereign was reſtrained and directed by national councils and aſſemblies in the other countries of Europe, it ſeems the height of wildneſs to conclude, as many have done, that, in England, the inhabitants were in a ſtate of ſlavery, and that the mandate of the Prince was the law. His condition, ſo far from being deſpotic, was every moment expoſed to danger and inſult. He might be depoſed for a ſlight offence. He was elected to his office. And, his coronation-oath expreſſed his ſubjection to the community, and bound him to protect the rights of his ſubjects.

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

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

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

In fact, the expreſſions which denote the Anglo-Saxon aſſemblies, allude to their nationality. 'Commune concilium, conventus omnium, concilium cleri et populi, omnium principum et omnium ſapientum conventus,' &c. are appellations which mark forcibly the interference and aſſiſtance of the *commons* *.

In

* Mr Hume has obſerved, indeed, that 'None of the expreſſions of the antient hiſtorians, though ſeveral hundred paſſages might be produced, can, *without the utmoſt violence*, be *tortured* to a meaning which will admit the *Commons* to be conſtituent members of the great council.' Append. 11. It is painful to remark a want of candour ſo glaring in ſo great a man.

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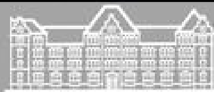
In the annals of Winchelcomb, an. 811. there is to be feen the term *procuratores*, as expreffive of a branch of the wittenagemot. It alfo occurs in a charter of King Athelftane. And, that the perfons denoted by it were the deputies of the people, feems paft all doubt, when it is recollected, that, in the Spanifh writers, this order of men is expreffed by *procuradores de las cividades y villas*. Nay, in Polydore Virgil, we meet the expreffion *procuratores civium populique. p.* 478. *ap. Whitelocke, vol.* 1. *p.* 378.

To thefe notices I might add a multitude of authorities, refpectable and pofitive. But I mean not now to enter fully into the difpute concerning the importance of the people. To give completenefs to the fpirit of my prefent volume, it is fufficient for me to affert the antiquity of the commons, in oppofition to an opinion of their late rife, which a modern hiftorian, of great reputation, has inculcated, with that hardinefs which he difplays in all his writings, but with little of that power of thought and of reafoning which does honour to his philofophical works.

Mr Hume, ftruck with the talents of Dr Brady, deceived by his ability, difpofed to pay adulation to government, or willing to profit by a fyftem, formed with art, and ready for adoption, has executed his hiftory upon the tenets of this writer. Yet, of Dr Brady it ought to be remembered, that he was the flave of a faction, and that he meanly proftituted an excellent underftan-

ding,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ding, and admirable quicknefs, to vindicate tyranny, and to deftroy the rights of his nation. With no lefs pertinacity, but with an air of greater candour, and with the marks of a more liberal mind, Mr Hume has employed himfelf to the fame purpofes; and his hiftory, from its beginning to its conclufion, is chiefly to be regarded as a plaufible defence of prerogative. As an elegant and a fpirited compofition, it merits every commendation. But no friend to humanity, and to the freedom of this kingdom, will confider his conftitutional inquiries, with their effect on his narrative, and compare them with the antient and venerable monuments of our ftory, without feeling a lively furprife, and a patriot indignation.

(7) The general doctrines concerning wardfhips may be feen in *Craig, lib.* 2. *Du Cange, voc. Cuftos, Warda. La Coutume reformée de Normandie, par Bafnage, Art. des Gardes.*

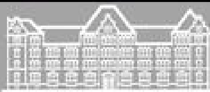
In that inftructive collection of records, *The hiftory and antiquities of the exchequer of the Kings of England, by Mr Madox*, there are the following examples of the fale of wardfhips by the crown, in the times which paffed from Duke William to King John.

Godfrey de Cramavill gave xxv l. x s. for the cuftody of the land of Aketon, which was Ralf de Heldebouill's, and of Ralf's heir during his nonage. Hugh de Flammavill profered x l. for

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

In remarking theſe ſales, the value of money in its variations, is to be attended to. From *Mr Madox*, it appears, that, 'in 'the reign of Henry III. Simon de Montfort gave ten thouſand 'marks to have the cuſtody of the lands and heir of Gilbert de 'Unfranville, until the heir's full age, with the heir's marriage, 'and with advouſons of churches, knight-fees, and other 'pertinencies and eſcheats;' and my *Lord Lyttleton* has calculated the amount of this payment, according to the preſent value of money. 'Ten thouſand marks,' he obſerves, 'containing 'then as much ſilver in weight as twenty thouſand pounds now; 'and the value of ſilver in thoſe days, being unqueſtionably 'more than five times the preſent value, this ſum was equivalent to a payment of above a hundred thouſand pounds made 'to the exchequer at this time.' *Hiſt. of Henry* II. *vol.* 2. *p.* 297. *Madox*, *vol.* 1. *p.* 326.

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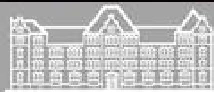
(8) Of reliefs in England, it is ſufficient to give the following examples, as they will fully illuſtrate the oppreſſions which muſt have reſulted from the exaction of this feudal incident.

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

The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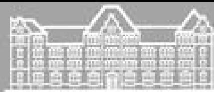
The minute ſteps in the hiſtory of reliefs, and of the other feudal perquiſites, are no part of this work. The reader who would inveſtigate Engliſh reliefs ſtill farther, may conſult *LL. Guliel. LL. Hen. I. Chart. Johan. &c.* and, for their ſtate in foreign countries, he may conſider what is ſaid in *Bruſſel, uſage-general des fiefs, liv. 2. Aſſiſes de Jeruſalem, and the Gloſſaries.*

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

(10) Celeſtia, wife of Richard ſon of Colbern, gave xl s. that ſhe might have her children in wardſhip with their land, and that *ſhe might not be married, except to her own good-liking.* William Biſhop of Ely gave CCXX marks, that he might have the cuſtody of Stephen de Beauchamp, *and might marry him to whom he pleaſed.* William de St Marie-church gave D marks, to have the wardſhip of Robert, ſon of Robert Fitzharding, with his whole inheritance, with the knight's-fees, donations of churches, *and marriages of women thereto belonging*; and that he might marry him to one of his [William's] kinſwomen; provided, that Robert's land ſhould revert to him, when he came to full age. Bartholomew de Muleton gave C marks, to have the cuſtody of the land and heir of Lambert de Ybetoft, *and that he might marry Lambert's wife to whom he pleaſed*, but without diſparagement. Geoffrey Croſs gave XL marks, for the wardſhip of the lands and heirs of *Sampſon De Mules*, who held of

 the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the King *in capite*, by ſerjeanty, with the *marriage* of the heirs. John Earl of Lincoln, conſtable of Cheſter, fined MMM marks, to have the marriage of Richard de Clare, for the behoof of Maud, eldeſt daughter to the ſaid Earl. Gilbert de Maiſnil gave X marks of ſilver, that the King would give him leave to take a wife. Lucia, Counteſs of Cheſter, gave D marks of ſilver, that ſhe might not be married within five years. Cecilie, wife of Hugh Pevere, gave xii l. x s. that ſhe might marry to whom ſhe pleaſed. Ralf Fitz William gave C marks fine, that he might marry Margery, late wife of Nicholas Corbet, who held of the King in chief, and that Margery might be married to him. And Alice Bertram gave XX marks, that ſhe might not be compelled to marry. *Madox, hiſt. of the Exchequer, vol.* 1. *p.* 322—326. 463—466.

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

(11) Henry II. levied an *aid* of one mark *per fee*, for the *marriage* of his daughter Maud to the Duke of Saxony. Of this aid, the proportion of the Earl of Clare for his own knight-fees, and for thoſe of his lady the Counteſs, of the old feofment, was 'fourſcore and fourteen pounds and odd;' and for his fees of the new feofment, it was ciii s. iiii d. The feofments which had been made either to barons or knights, before the death of Henry I. were called *vetus feſſamentum.* Fees of the new feofment

ment were from the acceſſion of Henry II. This appears from the Black Book of the Exchequer.

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

In all caſes of aids, the inferior vaſſals might be called to aſſiſt the crown vaſſals. They were even to contribute to extinguiſh their debts.

(12) Du Cange, voc. Auxilium. Bruſſel, Uſage-general des Fiefs en France. Couſt. Norman. Madox, hiſt. of the Excheq. vol. 1. p. 614—618.

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

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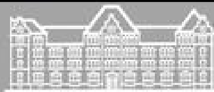
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SECTION II.

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

I begin with a diftinction which has efcaped many inquirers; who have thence wandered in contradiction and obfcurity. The duel was, in one view, a precaution of civil polity; in another, an inftitution of honour. Thefe diftinctive characters it bore in its origin. *Book* I. *Chap.* 2. *Sect.* 4. And, in thefe different refpects, it was governed by different forms. The common law, and the ordinary judges, directed it in the one condition; the *court of chivalry*, or the conftitutions which gave a foundation to this court, governed it in the other. In reading what many authors have amaffed on the duel, it is difficult to know what refers to

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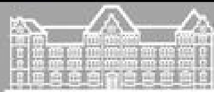
the former ſtate of the matter, and what to the latter. They either knew not the diſtinction, or poſſeſſed an imperfect notion of it. Even in the reſearches of Monteſquieu, concerning the judicial combat, there is thence, perhaps, a faintneſs and embarraſſment; and, in the obſervations of Dr Robertſon, on the ſame ſubject, the confuſion is evident and palpable. See *Note* 22. *to Charles* V.

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

The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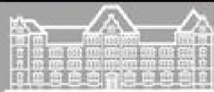
The determination of a doubt, for which no compleat evidence could be produced, was the end of the duél as a civil precaution. The decision of points of honour, and disputes of arms, or the satisfaction of a proud and a wounded spirit, was the end of the duel, as an institution of chivalry. While the common judges of the land managed the duel in the former instance, as an object of common law; it was governed in the latter by the judges in the court of chivalry, that is, by the constable and the marshal; and the forms of procedure in these cases were essentially different.

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

Yet, from these officers, there lay an appeal to the sovereign, as the head of arms, and he might stop, by his power, their proceedings. It is thence that we find the Kings of England superseding combats of chivalry. It was as the head of the civil state that they could supersede the combats of right, or at common law. Instances of their jurisdiction, in both cases, are not unusual. An exertion of it, in the duel of chivalry, took place in the intended combat between the Lord Rea and Mr Ramsay.

The



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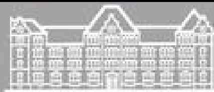
The Lord Rae, a Scots baron, impeached Ramſay and Meldrum for moving him beyond the ſeas, to join in the treaſons of the Marquis of Hamilton. Ramſay denied the fact, and offered to clear himſelf by combat. A court of chivalry was conſtituted, by commiſſion under the great ſeal; and the parties were on the point of engaging, when Charles I. interpoſing to prevent the duel, ſent them priſoners to the Tower. *Kennet, complete hiſtory of England, vol.* 3. *p.* 64. An interpoſition in the duel at common law, was exerciſed in an intended combat in a writ of right between the champions of Simon Low and Jo. Kine, petitioners, and of Thomas Paramore, defendant. The battle was diſcharged by Queen Elizabeth. *Spelm. Gloſſ. p.* 103.

In the duel by chivalry, champions were not uſual; becauſe queſtions of honour required the engagement of the parties. In the duels of right, the parties might have champions, becauſe the trial was merely an appeal to the Divinity, who was to decide the truth by aſſiſting, miraculouſly, the cauſe of the innocent perſon; and this aſſiſtance might be manifeſted either to himſelf or to his repreſentative. The faſhion, however, of martial times, was an inducement to the parties themſelves to engage: And, in general, champions were only proper for the old and infirm, for prieſts, minors, and women. *Du Cange, voce Campiones.*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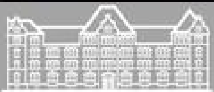
Antiently, in the duel of right, there was a discretionary power in the judges to determine in what cases it was necessary; and this was a proper restraint on the violence with which the duel was courted, in preference to other modes of trial. *Brussel, Usage general des Fiefs, liv.* 3. *ch.* 13. Express laws were even made to describe the occasions in which alone it was to be expedient. There is, on this head, the following regulation of Henry I. 'Non fiat bellum sine capitali, ad minus x sol. nisi de furto vel 'hujusmodi nequitia compellatio sit, vel de pace regis infracta, 'vel in illis in quibus est capitale mortis, vel diffamationis.' *LL. Hen.* I. *c.* 59.

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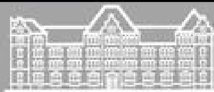
one only is in practice. Abſurdities of this kind, for they ſurely deſerve this name, muſt be frequent in the progreſſion of juriſprudence in all nations.

The duel of chivalry loſt its legality with the fall of the court of chivalry. It left behind it, however, the modern challenge or duel, which it is diſhonourable to refuſe, and illegal to accept. The jury, which ſwallowed up the duel at common law, could here afford no remedy.

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

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

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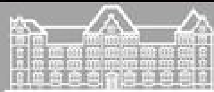
quity. *Du Cange, voc. Major Domus.* After the age of Hugh Capet, this dignity was ſuppreſſed; and out of its ruins four courts aroſe. One of theſe was the court of chivalry, or the offices of the high conſtable and marſhal. The other courts were thoſe of the high chancellor, the high treaſurer, and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

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

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

Carta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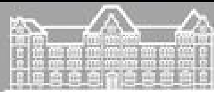
Carta Willelmi, filii Roberti.

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

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

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

Carta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Carta Guidonis Extranei.*

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

Carta Roberti, filii Albrici.

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

Carta Willelmi Martel.

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

It was chiefly the polity or the natural beneficence of princes and nobles that varied the condition of fees. At times, the fee was ſcarcely ſufficient for the ſervice required; and, on other occaſions, it was infinitely plentiful, and beyond all proportion to the

* Guy Strange.

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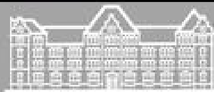
the military purpofe of the grant. Its value, on an average, is, however, to be calculated from records and acts of parliament. From William the Norman till King John, it was in progreffion, a five, a ten, a fifteen, and a twenty pound land †. In King John's times, it grew to be a forty pound land; and, before the aera of the act of parliament which took away and abolifhed the military part of the feudal fyftem, the knight's fee was computed at *L.* 200 *per annum.* Thefe things are very curious, and might lead to political reafonings of importance. *Spelman, voc. Miles, Afhmole on the Order of the Garter.*

(3) Baronies and earldoms could be created or made to confift of any number of fees whatever. Thus, the barony of William de Albeney Brito confifted of thirty-three knight's fees, the barony of Earl Reginald, of two hundred and fifteen knight's fees, and a third part of a fee; and William de Mefchines had a barony of eleven knight's fees. *Madox, Baronia Anglica, p.* 91. Thus the earldom of Geofrey Fitzpeter Earl of Effex confifted of fixty knight's fees; and that of Aubry Earl of Oxford, of thirty knight's fees. *Selden, Tit. hon. part.* 2. *ch.* 5. *fect.* 26. Inftances to the fame purpofe might be collected in the greateft profufion.

From

† Sir William Blackftone feems to think, that the knight's fee, in the reign of the Conqueror, was ftated at L. 20 *per annum,* which is certainly a miftake. *Book* 2. *ch.* 5.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From facts ſo particular, it is, I conceive, to be concluded, that Sir Edward Coke is miſtaken, when he lays it down, that a barony conſiſted, in antient times, of thirteen knight's fees and a third part, and that an earldom conſiſted of twenty knight's fees. 1. *Inſtitut. p.* 69. 70. According to this way of thinking, ſome of the barons and earls whoſe names are now recited, muſt have poſſeſſed many baronies, and many earldoms; an idea which is ſurely not only ſtrange, but abſurd. The ſuppoſition that nobility is inherent in a certain and determined number of fees, which this opinion implies, is a notion, that does not correſpond with feudal principles. The nobility was given, not by the mere poſſeſſion of the fees, but by their erection into an honour by the ſovereign. Yet Sir Edward Coke had an authority for what he ſaid. It is the old treatiſe, termed the *Modus tenendi parliamentum.* This treatiſe, however, is not of ſo high a date as the Saxon times, to which it pretends; and the circumſtance of its aſſumed antiquity, with the intrinſic proofs it bears of being a fabrication in the times of Edward III. detract very much from its weight. And, in the preſent caſe, it is in oppoſition to indubitable monuments of hiſtory.

I am ſenſible, that Sir William Blackſtone has ſaid expreſsly, 'That a *certain* number of knight-fees were requiſite to make 'up a barony.' *Book.* 2. *ch.* 5. He has not, however, entered into any detail concerning this poſition. I ſhould, therefore, imagine, that he has relied implicitly on the authority of Sir

Edward

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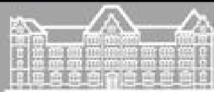
Edward Coke, which ought not, perhaps, to be efteemed too highly in queftions which have a connection with the feudal inftitutions *.

Nor is it in England only that examples can be produced to refute this notion about the conftitution of baronies and earldoms. In Normandy, five knight's fees might form a barony; and of this the following teftimonies are an authentic proof. 1.

* That Lord Coke had neglected too much the feudal cuftoms, was a matter of lamentation to Sir Henry Spelman. It is with a reference to them, that Sir Henry thus fpeaks. 'I do marvel many times, that my Lord Coke, adorn-'ing our law with fo many flowers of antiquity and foreign learning, hath not, '(as I fuppofe), turned afide into this field, from whence fo many roots of our 'law have, of old, been taken and tranfplanted. I wifh fome worthy lawyer 'would read them diligently, and fhow the feveral heads from whence thofe of 'ours are taken. They beyond the feas are not only diligent, but very curi-'ous in this kind; but we are all for profit and *lucrando pane*, taking what 'we find at market, without inquiring whence it came.' *Reliq. Spelman, p.* 99.

The neglect which produced this complaint, and drew this wifh from this learned knight, is ftill prevalent. The law in Great Britain is no where ftudied in its hiftory, and as a fcience. The ftudent is folicitous only to ftore his memory with cafes and reports; and courts of juftice pay more regard to authorities than to reafonings. From the moment that the Dictionary of Decifions was publifhed in Scotland, the knowledge of the Scottifh law has declined. Yet the refpectable author of that compilation did not furely imagine that he was about to do a prejudice to his nation.



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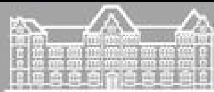
'Ricardus de Harcourt tenet honorem S. Salvatoris de domino 'rege per fervitium 4 militum: Sed debebat quinque, quando 'baronia erat integra.' 2. 'Guillelmus de Hommet conftabula-'rius Normanniae tenet de domino rege honorem de Hommetto 'per fervitium 5 militum, et habet in eadem baronia 22 feoda 'militum ad fervitium fuum proprium.' *Regeftrum Philip. Aug. Herouvallianum, ap. Du Cange, voc. Baronia.*

(4) The terms *knight* and *chivaler* denoted both the knight of *honour* and the knight of *tenure*; and *chivalry* was ufed to exprefs both *knighthood* and *knight-fervice*. Hence, it has proceeded, that thefe perfons and thefe ftates have been confounded. Yet the marks of their difference are fo ftrong and pointed, that one muft wonder that writers fhould miftake them. It is not, however, mean and common compilers only who have been deceived. Sir Edward Coke, notwithftanding his diftinguifhing head, is of this number. When eftimating the value of the knight's fee at L. 20 *per annum*, he appeals to the ftatute *de militibus, an.* 1. *Ed.* II. and, by the fenfe of his illuftration, he conceives, that the knights alluded to there, were the fame with the poffeffors of knight's fees; and they, no doubt, had knight's fees; but a knight's fee might be enjoyed not only by the tenants *in capite* of the crown, but by the tenants of a vaffal, or by the tenants of a fub-vaffal. Now, to thefe the ftatute makes no allufion. It did not mean to annex knighthood to every land-holder in the kingdom who had a knight's fee; but to encourage

courage arms, by requiring the tenants *in capite* of the crown to take to them the dignity. He thus confounds *knighthood* and the *knight's fee*. *Coke on Littleton, p.* 69.

If I am not deceived, Sir William Blackſtone has fallen into the ſame miſtake, and has added to it. Speaking of *the knights of honour*, or the *equites aurati*, from the gilt ſpurs they wore, he thus expreſſes himſelf. 'They are alſo called, in our law, '*milites*, becauſe they formed a part, or, indeed, *the whole of* '*the royal army*, in virtue of their feodal tenures; one condition 'of which was, that *every one who held a knight's fee* (which, 'in Henry the Second's time, amounted to L. 20 *per annum*), 'was obliged to be knighted, and attend the king in his wars, 'or fine for his non-compliance. The exertion of this prero-'gative, as an expedient to raiſe money, in the reign of 'Charles I. gave great offence, though warranted by law and 'the recent example of Queen Elizabeth: But it was, at the 'Reſtoration, together with all other military branches of the 'feodal law, aboliſhed; and this kind of knighthood has, ſince 'that time, fallen into great diſrepute.' *Book.* 1. *ch.* 12.

After what I have juſt ſaid, and what is laid down in the text, I need hardly obſerve, that this learned and able writer has confounded the knight of *honour* and the knight of *tenure*. And, that the requiſition to take knighthood, was not made to *every*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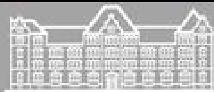
poffeffor of a knight's fee, but to the tenants of knight's fees held *in capite* of the crown, who had merely a fufficiency to maintain the dignity, and were thence difpofed not to take it. See farther *the notes to chapter* IV. The idea that the whole force of the royal army confifted of *knights of honour*, or *dubbed knights*, is fo extraordinary a circumftance, that it might have fhown, of itfelf, to this eminent writer, the fource of his error. Had every foldier in the feudal army received the inveftiture of arms? Could he wear a feal, furpafs in filk and drefs, ufe enfigns-armorial, and enjoy all the other privileges of knighthood? But, while I hazard thefe remarks, my reader will obferve, that, it is with the greateft deference I diffent from Sir William Black-ftone, whofe abilities are the object of a moft general and defer-ved admiration.

In this note, and, perhaps, in other places of this volume, I ufe the expreffion 'tenant *in capite* of the crown,' which may feem a tautology to many. The phrafe, 'a tenant *in capite*,' may, indeed, exprefs fufficiently the royal vaffal. It may, how-ever, exprefs a tenant *in capite* of a fubject. And this diftinction was not unknown in the law of England. *Madox, Bar. Angl. p.* 166. *Spelm. Gloff. voc. Caput.*

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

Carta Albani de Hairun.

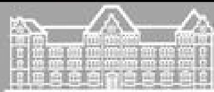
Domino suo excellentissimo H. Regi Anglorum, Albanus de Hairun. Vestrae excellentiae notifico, quod ego in Hertford-scire feodum. 1. militis de veteri fesamento de vobis principaliter teneo, et quod de novo fesamento nichil habeo, nec militem feo-fatum aliquem habeo. Valete.

Carta Mathaei de Gerardi Villa.

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

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

CHAP-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