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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

Section I.

urn:nbn:de:gbv:45:1-1563

Authorities, Controversy, and Remarks.



B O O K II.

C H A P T E R I.

S E C T I O N I.

(1) **T**HE ordinary form of homage and fealty varied in some little particulars in different nations, and in the same nations, at different times; and fidelity, while the fief was precarious, could only be promised during the 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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Taffilon



Taffilon Duke of Bavaria, to King Pepin, in the year 757. It is thus described. ‘*Taffilo Dux Bajoariarum cum primoribus gentis suae venit, et more Francorum, in manus regis in vassaticum 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 *Taffilon*, and the Anglo-Saxon fealty, were prior to the general establishment of this perpetuity. And there does not appear any solid reason to think, that these ceremonies were a result of it.

When the exercise of the prerogative of private war among the nobles had spread its disorders and calamity, it became common, both in France and England, to insert a reservation in the form of homage, which limited the fidelity of the vassals of a lord or a chief, to the acts which were not derogatory to the faith they owed to the king. This was intended as an obstruction

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tion to the prevalence of private war, and discovered an advancement in the ideas of civilization and government. Saint Louis established it in France; and it appears in England, in what is called 'The Statute of Homage,' in the seventeenth year of Edward II. By this form or ordinance, the vassal, after expressing the fidelity he is to bear to his lord for the lands he holds, is made to add, *saving the faith I owe unto our Lord the King.*

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

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

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of



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. Feloniâ.* 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



not require to be informed, that his version of the Anglo-Saxon laws is often defective and unfaithful.

What is worthy of notice, while many writers of England look to Normandy and Duke William for the introduction of the feudal law, and its incidents, into their nation, an author of France, William Rophile of 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.

• Nihil



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



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 distinctly pointed out by historians, or traced by antiquaries.’
Ibid.

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

(6) The distinguishing freedom of the Germanic tribes was carried with them into their conquests. *Tacitus* said of them, while they were in their woods, ‘ De minoribus rebus principes consultant, de majoribus omnes.’ *De Mor. Germ. c. 11.* This peculiarity of government, and this importance of the people, appear not only in the history of these nations, but in their laws. The prologue to the laws of the Franks has these words. ‘ Hoc decretum est apud regem, et principes ejus, et apud cunctum *populum* Christianum, qui infra regnum Merwungorum consistunt.’ *Lindenbr. p. 399.* The *lex Alamannorum* begins thus. ‘ Incipit *lex Alamannorum*, quae temporibus Chlotarii regis una cum principibus suis, id sunt, xxxiii. episcopis, 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



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, ‘*vocavit 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



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
 S f 2 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-dis-
 ‘putes, have allowed, that the *commons* were very late in being admitted to a
 ‘share in the legislative power.’ *Append. 11.*

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



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,



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 prelates, 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* *.

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* 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.

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

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

Mr Hume, struck with the talents of Dr Brady, deceived by his ability, disposed to pay adulation to government, or willing to profit by a system, formed with art, and ready for adoption, has executed his history upon the tenets of this writer. Yet, of Dr Brady it ought to be remembered, that he was the slave of a faction, and that he meanly prostituted an excellent understanding,



ding, and admirable quickness, to vindicate tyranny, and to destroy the rights of his nation. With no less pertinacity, but with an air of greater candour, and with the marks of a more liberal mind, Mr Hume has employed himself to the same purposes; and his history, from its beginning to its conclusion, is chiefly to be regarded as a plausible defence of prerogative. As an elegant and a spirited composition, it merits every commendation. But no friend to humanity, and to the freedom of this kingdom, will consider his constitutional inquiries, with their effect on his narrative, and compare them with the antient and venerable monuments of our story, without feeling a lively surprise, and a patriot indignation.

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

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

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

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(8) Of



(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 iiiii 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.*

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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-generel 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 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 Maifnil 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 feffamentum*. 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. Etablissements de S. Louis, liv. 1. Craig, Jus Feudale, lib. 3.

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