

THE
Original, Growth, Propagation and Condition
OF
FEUDS and TENURES
BY
KNIGHT-SERVICE,
In ENGLAND.

CHAP. I.

*The Occasion of this Discourse, and what a
Feud is.*



IN the great Case of Tenures, upon the *Commission of Defective Titles*, argued by all the Judges of *Ireland*, and published after their resolution by the commandment of the Lord Deputy, this year 1639. it fell out upon the fourth point of the Case to be affirmed, *That Tenures had their original in England before the Norman Conquest*: And in pursuit of this assertion, it was concluded, That *Feuds* were then and there in use. In proof hereof divers Laws and Charters of the *Saxon* Kings, and some other Authorities be there alledged, which being conceived to have clear'd that point, it thus followeth in the Report, p. 35.

And therefore it was said that Sir Henry Spelman was mistaken, who in his Glossary (verbo Feodum) refers the original of Feuds in England to the Norman Conquest. And for a Corollary (p. 38.) addeth these words:

Neither is the bare conjecture of Sir Henry Spelman sufficient to take away the force of these Laws. Vide Spelman in Glossar. verbo Feodum.

Being thus by way of voucher made a chief Antagonist to the Reverend Opinion of these learned, grave, and honour'd Judges, I humbly desire of them, that writing what I did so long ago, and in a transitory passage among a thousand other obscure words (not thinking them to be provok'd to this account) they will be pleas'd to pardon my mistakings where they fall, and to hear without offence, what motives led me to my conjectures which they speak of. It is necessary therefore, that first of all we make the Question certain, which (in my understanding) is not done in the *Report*. For it is not declared whether there were divers kinds of *Feuds* or no; nor what kind they were that were in use among the *Saxons*: nor what kind those were that I conjectured to be brought in by the *Norman Conquerour*. I will therefore follow the direction of the Orator, and fix the Question upon the definition.

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The general definition of a Feud.

A Feud is said to be *Usus fructus quidam rei immobilis sub conditione fidei*. But this definition is of too large extent for such kind of Feuds as our Question must consist upon: for it includeth two members or species greatly differing one from the other, the one *temporary and revocable*, (as those at Will or for Years, Life or Lives;) the other *hereditary and perpetual*. As for *temporary Feuds*, which (like wild fig-trees) could yield none of the feudal fruits of *Wardship, Marriage, Relief, &c.* unto their Lords, they belong nothing unto our argument, nor shall I make other use in setting of them forth, than to assure the Reader they are not those that our Laws take notice of.

To come therefore to our proper Scheme, let us see what that *hereditary Feud* is, whereupon our Question must be fixed: For none but this can bear the feudal fruits we speak of, *Wardship, Marriage, &c.*

The particular definition of a Feud.

A Feud is a right which the Vassal hath in Land, or some immoveable thing of his Lord's, to use the same and take the profits thereof hereditarily: rendering unto his Lord such feudal duties and services as belong to military tenure: the mere propriety of the soil always remaining unto the Lord. I call it as the Feudists do, *Jus utendi prædio alieno*; a right to use another man's Land, not a property in it; for in true feudal speech the Tenant or Vassal hath nothing in the propriety of the soil it self, but it remaineth intirely unto the Lord, and is comprehended under the usual name which we now give it of the *Seignory*. So that the *Seignory* and the *Feud* being joined together, seem to make that absolute and compleat estate of Inheritance, which the Feudists in time of old called *Allodium*. But this kind of Feud (we speak of) and no other, is that only whereof our Law taketh notice, though time hath somewhat varied it from the first institution, by drawing the propriety of the soil from the Lord unto the Tenant. And I both conceive and affirm under correction, That this our kind of Feuds being perpetual and hereditary, and subject to *Wardship, Marriage, and Relief, with other feudal services, were not in use among our Saxons; nor our Law of Tenures (whereon they depend) once known unto them.* As shall appear by that which hereafter followeth.

CHAP. II.

The Original, Growth, and Propagation of Feuds: first in general, then in England.

BEFORE I enter into the Question in hand, it will be necessary for better understanding that which followeth, to set forth the Original, Growth, Propagation, and Condition of Feuds in general: Which I conceive to be thus.

There were no doubt from the beginning of *Jus Gentium*, Lords and Servants; and those Servants of two sorts. Some to attend and guard the person of their Lord upon all occasions in War and Peace. Some to manure his Lands for the sustenance of him and his Family. When private Families were drawn into a Kingdom, the Kings themselves held this distribution. Examples hereof are in all Nations. King David well observ'd it in the Institution of the Kingdom of Israel: Where, if such services have any shew of Feuds or Tenures, we have a pattern for them all: viz. For that of *Frankalmoine* in the Levites: For *Knight-service, Tenure in Capite, and Grand Sergeanty* in the Military men, which serv'd the King personally by monthly

Instances of Feuds among the Jews.

^a Cujac, in præfat. ad lib. 1. feud. p. 10. et seq. ^b Cujac. ad lib. 3. feud. tit. 1. p. 178. ^c 1 Chron. chap. 23, et 27. ^d Ibid. Cap. 23. ^e Cap. 27

courses

courses: for *Socage*, in those whom David appointed to manure the Fields, dress the Vineyards, the Olive-trees, the Mulberry-trees, and that had the care of the Oyl, of the Oxen, of the Camels, Asses, Sheep, &c. For the Lands and portion of the Levites was given to do the service of the Tabernacle; ^a the Lands of the other Tribes, to fight the battels of the Lord against his idolatrous enemies, and to root them out. Thus may fancy couple the remotest things. To come lower down and nearer home, ^b Pausanias tells us, that when Brennus (who they say was a Britain) invaded Greece with an Army of Gauls; every horseman of the better sort, had two other horsemen to attend and second him (as his Vassals) and they three together were called *Τετραπρωστιαν* *Trimarcesiam*, i. e. a society of three horsemen. ^c But Caesar saith, that the nobler Gauls in his time, had (according to their abilities) many horsemen attending them in war, whom by a German word he calleth *Ambactos*, which properly signifies Servants, Vassals, Workmen, and Labourers; yet he by a fairer name expoundeth it there ^d in Latin *Clientes*, and in another place ^e calleth them among the Germans, *Comites & familiares*, as accounting them (like Abraham's ^f 318. Souldiers) to be all their Lord's Followers and of his Family. Tacitus ^g likewise nameth them *Comites*, as Companions and Followers; *quod bello sequi Dominum coguntur*, saith ^h Cujacius. But Tacitus further saith, *Gradus quinetiam ipse comitatus habet judicio ejus quem sectantur*; that there were degrees in those companies, as he whom they followed did appoint. Like them, perhaps, in after-ages of Earls, Barons, Knights, &c. But how the *Comites* or *Ambacti* were maintained, neither Caesar nor yet Tacitus have related. As for such portions of Land, as we call *Knights-Fees*, they could not then have any; for Caesar ⁱ speaking of the Germans saith, (and so it appears by Tacitus) ^j *neque quisque agri modum certum, aut fines proprios habet, &c.* "That no man hath any certain estate or peculiar bounds of Lands; but the Magistrate and Lords (of the place) assign from year to year to kindreds and such as live together, what quantity of Land, and in what place they think good; and the next year force them to remove. The reason you may see in Caesar, who ^k also sheweth, that they had no common Magistrate; but the Lord of the Town or Territory set what Laws he would among his followers or *Ambactos*.

These Laws, the Goths, the Swedes, the Danes, and Saxons, called *Bilagines*; of *By*, which in all these Languages signifieth a Town, and *Lagh* or *Laghe* which signifies Laws, as *Gravins* ^l *Succus*, and our Saxon Authors testifie. And tho' *Jornandes* a Spanish Goth writeth it after the Spanish corruption *Bellagines*, yet we in England keep the very *radix* and word it self *By-laws* even unto this day, tho' diverted somewhat from the sense that Caesar speaks of. For we call them *Town-laws* or *By-laws* which the Townsmen make among themselves; but Caesar sheweth that the Lords imposed them. Here-with agreeth, that of Tacitus, or some other Ancient, who speaking of the Germans saith, *Agricolis suis jus dicunt*, They give Laws to them which dwell upon their Lands. For I take *Agricolis* here in the larger sense, to extend to all that dwell upon the Lord's Lands (as well his military followers as his husbandmen) in the same manner as *Solicolæ* containeth all that live upon the Soil, *Ruricolæ* all that live in the Country, and *Cælicolæ* all that live in Heaven.

These Lordships of Towns, which Caesar speaketh of, were after by the Normans called *Maneria*. The *Ambacti* or *Comites*, and these which he saith *sectabantur Dominos suos*, were called *Vassalli*, and *Señtatores Manerii sive Curie Domini*, Vassals and Suiters of Court. The *Bilagines* or *Town-laws* were called *Consuetudines* and Customs of the Mannor. The jurisdiction, which the Lord had

^a Num. 21. 14. 1 Kings 13. 17. ^b Lib. de Phocid. p. 118. ^c Bell. Gall. lib. 6. p. 118. ^d Bell. Gall. p. 184. ^e Ibid. p. 124. ^f Genes. 14. 14. ^g Germ. Mor. p. 129. ^h Cujac. ad Constit. Lotharii feud. lib. 5. p. 284. ⁱ Bell. Gall. lib. 6. p. 120. ^j Germ. Mor. ^k Bell. Gall. p. 121. ^l In Epist. ad Bon. Vulcan. Vid. Bellagines in Glossario nostro.

over his Followers and Suiters, was called *the Court Baron*, and the portions of Land, &c. assigned to his Followers for their stipend or maintenance, were at first called *Munera*, after *Beneficia*; and lastly *Feuda* or *Tenant-lands*: which were of two sorts, one for military men called *Feudum militare* and *Feudum nobile*, tenure by *Knights-service*; the other for husbandmen call'd therefore *Feudum rusticum* & *ignobile*, tenure in *Socage*, or by the Plough.

Thus it appeareth that *Feuds* and *Tenures* and the Feudal-law it self, took their original from the *Germans* and Northern Nations. In such condition therefore (how obscure soever) as *Cæsar* and *Tacitus* left them to us, ^a *Gerardus Niger* the Consul of *Milan* (who flourished about *A. D.* 1176. and first composed them into a book) taketh them up as he there findeth them; and speaking of the times of *Cæsar* and *Tacitus* (as having the forementioned passages under his eye) saith *Antiquissimo tempore sic erat in Dominorum potestate connexum, ut quando vellent, possent auferre rem in feudum à se datam.* And this agreeth with *Cæsar*, by whom it seemeth in the places before mentioned, that the *Ambacti* or Followers of the *Germans* had in those times either no Land at all, or no Estate at all in their Land, or first but at the will of the Lord, and then but for one single year. Which *Gerardus* also confesseth to have been the condition of the eldest sort of *Feudataries*; for he saith presently after his former words, *Postea vero eo ventum est, ut per annum tantum stabilitatem haberent (res in feudum datae).* Thus for another while their Feudal Vassals (whom here he calleth *Fideles*, and we now Tenants by *Knights-service*) enjoyed their Feuds no otherwise than from year to year at the pleasure of their Lords, either by grant or sufferance, till further grace confirmed them to them for divers years, and at length for term of life, which *Gerardus* also presently there declareth, saying, *Deinde statutum est ut usque ad vitam fidelis producerentur (Feuda.)* In this manner stood the principal Feuds themselves, even those of Earldoms and Dukedoms (which they call *Feuda majora* and *Feuda regalia*) in the latter time of the Saxons, till the coming of the Conquerour. But as touching the lesser Feuds which we call *Knights-Fees*, I find nothing in Abby-books, otherwise than a numerous multitude of Leafes and Grants made by Bishops and Abbats to their Followers for term of life, without mention of Tenure or Feudal-service. Yet I must confess that there is a notable precedent left us by *Oswald* Bishop of *Worcester* in the time of King *Edgar*, who in granting out the Lands of his Bishoprick unto his Followers, for life or three lives, imposed upon them by a solemn Instrument, ratified by the King himself, a multitude of Services and Charges, as well military as civil: which after you shall here see, and then consider how and whether they conduce to our *Feuds* or not.

Tenures
for Life.

If we understand them to be *Feuds* among the *Saxons*, or of that nature, then are we sure they were no more than for life, and not inheritable, nor stretching further, without further grace obtained from the Lord. For which purpose *Conradus Salicus* (a French Emperour, but of German descent) going to *Rome* about forty five years before the time of our King *Edgar* (*viz. sub An. Dom. 915.*) to fetch his Crown from Pope *John X.* made a Constitution upon the petition of his Souldiers: That *filii* or *aviatici*, the sons, or if no Sons were living the Nephews or Grandsons (as they call them) of some of them, should succeed in the *Feud* of their Father. (See the Constitution in the beginning of the fifth book of *Feuds*.) But *Gerardus* noteth that this Law settled not the *Feud* upon the eldest Son, or any other Son of the *Feudatary* particularly; but left it in the Lord's election to please himself with which of them he would. After this, *Feuds* were continued in divers places by several increments to the third, fourth, fifth, sixth and seventh generation, and sometime (for want of lineal issue) collaterally to the Brother, as *Gerardus*

^a *Cujac. in pref. ad lib. p. 1.* ^r *Cujac. at lib. 1. feud. p. 21.* ^s *Vid. infra Cap. 26.*

ardus testifieth; but whether by some positive Law, or by the munificence of the Lords, he doth not tell us; nor when or by whom they were made perpetual and hereditary; tho' he confesseth, that at last they grew to be extended in *infinitum*, and then they began to be settled upon the eldest Son, who formerly had no preheminance above a younger Brother. But while they stood sometimes produced in this manner by the indulgence of Princes, to the third, fourth, or fifth generation, &c. some men of learning have concluded them to be hereditary, as tho' there were no medium between a limitation (how far soever extended) and *infinitum*.

To pass by that; let us now go on in examination, when and how *Feuds* became hereditary. Some suggest a shew of such a matter under the two *Othones*, German Emperours (who succeeded one the other about the year 973.) But to rest upon the common and received opinion (which we shall hereafter more at large declare,) the truth is, that when *Hugh Capet* usurped the Kingdom of *France* against the *Carolingies* he, to fortifie himself and to draw all the Nobility of *France* to support his Faction about the year 987. granted to them in the year 988. that whereas till then they enjoyed their *Feuds* and Honours but for life or at pleasure of their Princes; they should from thenceforth for ever hold them to them, and their heirs, in Feudal manner by the Ceremony of Homage, and Oath of Fealty: And that he would accordingly maintain them therein, as they supported him and his heirs in the Crown of *France*; which they joyfully accepted.

This was a fair direction for *William of Normandy* (whom we call the Conquerour) how to secure himself of this his new acquired Kingdom of *England*; and he pretermitted not to take the advantage of it. For with as great diligence as providence, he presently transfer'd his Country-customs into *England* (as the *Black Book* of the Chequer witnesseth) and amongst them (as after shall be made perspicuous) this new French custom of making *Feuds* hereditary, not regarding the former use of our Saxon Ancestors; who, like all other Nations, save the French, continued till that time their *Feuds* and *Tenures*, either arbitrary or in some definite limitation, according to the ancient manner of the *Germans*, receiv'd generally throughout *Europe*. For by the multitude of their Colonies and transigrations into all the chiefest parts thereof, they carried with them such Feodal Rites, as were then in use amongst them; and planting those Rites and Customs in those several Countries where they settled themselves, did by that means make all those several Countries to hold a general conformity in their Feuds and Military customs. So by the *Longobards* they were carried into *Italy*, by the *Saliques* into the Eastern parts of *France*, by the *Franks* into the West part thereof, by the *Saxons* into this our *Britain*, by their neighbours the *Western Goths* (who communicated with the *Germans* in Manners, Laws, and Customs,) into *Spain*; and by the Eastern *Goths* into *Greece* it self, and the Eastern parts of *Europe*, &c. These (I say) carried with them into the parts of *Europe*, where they settled, such ancient Feudal Customs, as at the time of their transmigration were in use among them. But the more prevalent and more generally receiv'd Customs, were those that were in use or taken up in the time of *Conradus* the Emperour, and when *Feuds* became hereditary; for on them especially is the Feudal Law grounded and composed, tho' enlarg'd oftentimes by Constitutions of the Emperours, and spread abroad into divers Nations by their example, countenance, or authority. Wherein the Court of *Milan* was chiefly followed in *rebus judicatis* (as appeareth by *Duraneus* and *Merula*;) but reserving unto every Nation their peculiar Rites and Customs. ^h For it was generally received into every Kingdom, and then conceived to be the most absolute Law for supporting the

How
Feuds be-
came he-
reditary

Feuds he-
reditary
in Eng-
land.

ⁱ *Comment. in consuet. Fe. d. Cap. 1.* ^s *Ren. A. ed. lib. 3.* ^h *Gunt. p. 409.*

Royal estate, preserving union, confirming peace, and suppressing robberies, incendiaries, and rebellions. I conclude with *Cujacius*, who upon the above-cited passages of *Gerardus Niger*, saith, *Quam aliam Feudorum originem querimus? His veluti incrementis paulatim feuda constituta sunt; quæ & post Conradum usus recepit, ut transirent ad liberos mares in infinitum, &c.*

The great growth of Feuds as to Title.

The Military and Lay-Feuds being thus advanced from an arbitrary condition to become perpetual and hereditary, did now in ordinary account leave their former name of *Beneficia* (which were only temporary for years, or life) unto the Livings of the Clergy; and retained to themselves the proper name of *Feuds*, whereby they were produced to be perpetual and hereditary. *Cujacius* therefore speaking of them both, saith, *Feudum differt à beneficio, quodd hoc temporaneum fuit, illud perpetuum.* And treating in another place of these *beneficiarii* and *temporarii possessores*, he saith further, *Isdem postea capit concedi Feudum in perpetuum, quod est verum, & proprium Feudum.* Concluding in a third place, "that *Propria Feudi natura hæc est, ut sit perpetua.* So that *Cassineus* in the Feuds of *Burgundy* saith, "that *omne Feudum quocunque modo acquisitum sit hereditarium, cum successione sit redactum ad instar Allodialium*: That all Feuds by what means soever they be acquired, are made hereditary; in so much as by the continual succession of the Children into the Feuds of their Fathers, the Feuds are now brought to be like *Allodial* or patrimonial inheritances. Thus *Feudum* (which at first was but a tottering possession, *ad voluntatem Domini*) growing at length to be an irrevocable Estate, descending by many successions from Son to Son, became at last to be an absolute inheritance, and thereupon the words themselves *Feudum* and *Hereditas* in common use of speech

(*Quem penes arbitrium est & jus & norma loquendi*)

to be *voces convertibiles*, and by a fair *metonymia* each to signify other. For as *Horace* further saith,

—*Verborum vetus interit ætas,*

Et juvenum ritu florent modo nata vigentque.

Aply therefore and truly is it said by the ever honoured Justice *Littleton*, that *Feudum idem est quod hereditas*; and the captious criticism of Sir *Thomas Smith* (Dr. of the Civil Law) in denying it, is to his own reproach: For his great Master *Cujacius* (as before appeareth) supporteth *Littleton*; and his fellow Civilians do tell him, *quod in feudis particularis & localis consuetudo attendenda est.* And *Littleton* received it as used in this signification from the eldest writers of our Law. Of the like indiscretion is that of Dr. *Cowell* who carpeth at this ancient phrase used in the *formulis* of our pleading, where it is ordinarily said, *Rex seistus fuit in dominico suo ut de Feodo*, as tho' *de Feodo* was there to be understood according to the Court of *Milan*, for *prædium militare superiori Domino & servitiis obnoxium* not by the Laws of *England*, *pro directo Dominio vel hereditate pura & absoluta.*

No proper Feuds before the Conquest.

To conclude therefore, It appeareth by this passage of Justice *Littleton's*, joined to that we have formerly delivered, that our Law took no notice of Feuds till they were become hereditary with us; which being since the Conquest (as we have already shewed, and shall prove abundantly hereafter) overthroweth all the arguments in the Report produced for proving our Feodal Rites of *Tenure*, *Wardship*, *Marriage*, *Relief*, &c. to have been in use among the Saxons; for till they were hereditary, these appendances could not belong to them. It is also very improbable that Feuds were made hereditary here in *England* before other Countries; or that the more civil Nations of *Europe*, should take example herein from our rude (if not illiterate) Saxons.

¹ *Ad lib. 1. Feud. Tit. 1. p. 21.* ² *Cujac. Feud. lib. 3. p. 180.* ³ *Ibid.* ⁴ *Lib. 1. p. 7.*
⁵ *Feud. lib. 1. p. 5.* ⁶ *Rub. 3. §. 5. col. 437.*

CHAP. III.

That none of our Feodal Words, nor Words of Tenure, are found in any Law or ancient Charter of the Saxons.

IT appeareth by that which hath been said, that our modern kind of Feuds could not be in use among our English Saxons. And it will now be a Question, whether any of our modern Tenures (or which of them) were then in use, or not? The Report saith, "It is most manifest that Capite-Tenures, Tenures by Knight-service, Tenure in Socage, Frank-Almoign, &c. were frequent in the time of the Saxons." I desire that without offence, I may examine this that is so manifest, and so frequent. I confess there be many specious shews of *Knight-service* and *Socage* among our Saxon Ancestors; but whether by way of *Tenure*, *Contract*, or *De more Gentium*, must be well examined. For the Romans and other Nations had formerly as great command over their followers, and such as dwelt upon their Lands, as our Saxons had, yet was it without any rule or speech of *Tenure*.

The word *Tenura* is neither known nor found in any Latin Author of antiquity, nor any conjugate thereof (as *tenentes*, *tenementa*, *tenere*, or *tenendum*) in a feodal sense. The first place where I meet with *tenere* in that manner, is amongst the *Saliques* and *Germans*, in the Constitution before mentioned of *Conradus* the Emperour, about the year 915, when *Beneficia* (which we now call Feuds) were first continued to some of the sons and grand-children of the male line of them that then enjoyed them. But I find not one of those words or any consignificant or equivalent to them, in all our Saxon Laws. The word *Feodum*, *Feud* or *Fee* it self, is never mentioned in them, nor is there any found of *Tenure in Capite*, *Tenure by Knight-service*, *Tenure in Socage*, *Frank-Almoign*, &c. either in our Saxon Laws or in the Laws of any other Nation (that I can find) till the time that Feuds began to be perpetual or hereditary (as before is mentioned.) It is true that in some Latin Charters of the Saxon time, we now and then find the words *tenere*, *tenementum*, and *tenendum*: and in a Charter of *Beorredus* King of the *Mercians* dated Anno 868. the words *de eodem feodo*, (as tho' Lordships at that time had been distributed into Feuds;) which being reported by *Ingulfus* a Saxon, giveth great probability that Feuds were then in use. But it is to be noted, that these Charters are (as I said) in Latin and not in Saxon; and therefore not likely to be the very originals, but translations of them made after the Conquest for the instruction of the Normans, either by *Ingulf* himself, or some other expert in the Norman Language, Laws, and Customs. Who applying himself to the understanding of the Normans, used Norman words, and such interpretation as they were best acquainted with, tho' differing from the propriety of the Saxon Tongue; and so perhaps translated *de eodem feodo* for *de eodem territorio* or *patrimonio*; and *tenentes*, *tenementa* and *tenendum*, for *possidentes*, *possessiones*, and *possidendum*. Not unlike our translators of the holy Scriptures, who tell us of the Arms of Families, Chancellors, Sheriffs, Records, Townclerks, Doctors of Law, Homage done to *Solomon*, and of the arraignment of our blessed Saviour; as tho' the Jewish and Asiatick Nations had in those days of old, their College of Heralds, the same Magistrates, Officers, Degrees in School, Customs of Law, Pleas of the Crown and form of Government, which we in *England* have at this day.

By such allusions I suppose (or illusions rather) came out later Feodal words into ancient Latin Charters. I desire to see but one Charter in the Saxon Tongue

What Tenures were in use among the Saxons.

Tenures when first used.

Translation of Saxon Charters.

No Feodal words among the Saxons.

tongue before the Conquest, wherein any *feodal Word* is apparently expressed. A Saxon Chronicle telleth us, that King *Alfred* in the year 896. gave *London* to *Ethelred* (an Earl or Alderman that married his daughter *Ethelfled*) to healþon, that is *ad tenendum*, which some understand feodally as to hold it of him; but *Wigorniensis* reports the matter plainly *ad servandum*, that is, to keep and defend it. So among the Customs of *Kent*, the word healþen (*i. e.* holder) is used for a Tenant in the Saxon distich there cited. But it is to be noted, that those Customs were collected long after the Conquest, and therefore written in the Norman Tongue, not in the Saxon; and that the distich it self is not of the ancient Saxon, but of a puiſne dialect used vulgarly ſince the Conquest.

The charter of *Beorredus* examined.

But because the Charter of *Beorredus* (produced by my self against myself) is more material for proof of Feuds among the *Saxons*, than all that is alledged to that purpose in the Report; First, in respect of the Antiquity thereof; then for that it nameth the word *Feodo*, expressly; and thirdly, for that it declareth certain Lands to be *de eodem Feodo*, as if there were many other Feods then in use: Give me leave (I beseech you) to examine this Charter yet more largely and particularly. It is therefore to be understood, that the elder *Saxons* made their ordinary conveyance of Lands, &c. without Deed or Writing, by delivery of a *Turff* or *Spear*, a *Staff*, an *Arrow*, or some other symbol, in token thereof. Yea their very Laws (like those of the *Lacedæmonians* called *Rhetra*) were unwritten; till *Ethelbert* their first Christian King, caused his own Laws to be put in writing about the year 605. (as other Western Nations in an age or two before had done) and as *Bede* saith, * wrote them in the Saxon Tongue. The first Charter (if I shall so call it) or Writing, touching Lands and Privileges, was (as a MS. of *Canterbury* reporteth) made by *Withredus* King of *Kent* in the year 694. and (as that Charter it self witnesseth) was appointed to be kept in the Church of our Saviour at *Canterbury*, as a precedent for posterity to imitate; and tho' it appeareth not there in what Language it was written, yet I presume it was in the same with their Law, which was the Saxon Tongue. For there be two copies of it extant in Latin, so differing the one from the other, as thereby they both appear to be translations. For proof thereof, the one of them useth the words *Charta* and *Chartula*, which *Ingulfus* affirmeth to be brought in hither by the *Normans*, that is, above three hundred years after the time of this Charter of *Withred's*. The other *Latin* copy termeth it *Scriptum* not *Chartam*; and the *Saxons* themselves used neither of those words, but called such writings in *Latin Chirographos*, not *Chartas*; as *Ingulfus* there also testifieth. So that it hereby appeareth, that the Prototype or first pattern of Charters which the *Saxons* imitated, was not in Latin but in Saxon.

Saxon Charters in the Saxon Tongue.

Secondly, it is therefore to be presumed (and very strongly) that tho' this Charter of *Beorredus* remaineth to us by a Latin copy, yet the original it self (like a thousand others) was in the Saxon Tongue. Nor could it in all probability be otherwise; for at the very time when it was made, (*viz.* in anno 868.) learning was so generally subverted throughout *England*, by the barbarous *Danes*, that King *Alfred* (who began to reign within four years after the date thereof) saith, ^b *Paucissimi fuerunt eis Humbrum, qui vel preces suas communes sermone Anglico intelligere potuerant, vel scriptum aliquod à Latino transferre. Tam sane pauci fuerunt, ut ne unum quidem recordari possum ex australi parte Thameſis, tum cum ego regnare occiperam.* But as their original Charters were in the Saxon Tongue; so in the Leiger-books in which they are preserved to us, they are often set down in the Saxon, and then (because the Books themselves are in Latin) they are there translated also into Latin, and oftentimes set down in the Latin only without the Saxon; as in the

* Hist. Lib. 2. c. 5.

^b Concil. Brit. p. 378.

Book

Book of *Ramsay-Abby*, which having no Charters in it in the Saxon Tongue, the Author of it saith, * that himself had there translated them all into Latin, after that that Abby in the days of King *Stephen* had recovered her Liberty. Yet I deny not, that Latin Charters might be often used by their latter Clergy-men, when Learning (which in *Beorred's* time was utterly subverted) began at last to recover Life again.

Thirdly, (I conceive) that the Word *Feudum* or *Feodum* was not in use in *Beorredus's* days, (*viz.* anno. 868.) For Proof whereof, we are to consider the Infancy, Youth, and full Age of the *feodal Law*; for according to these several times, the *feodal Lands* had their several Denominations. First, they were called *Munera*, then *Beneficia*, and lastly *Feuda* (as is aforesaid.) *Marculfus* who collected the *Formulas* (or *Precedents* as we call them) of Charters and Instruments of the time he lived in (which was under *Clodoveus II.* King of *France* about the year 660.) maketh mention, in his first Book of *Munera*, and in his second of *Beneficia*, but no where of *Feuda*: And he who a hundred years or more after him collected the Formula's *incerti Autoris*, speaketh divers times ^b of *Beneficium*, but never nameth *Feudum*: For that this Term came not into use till afterwards, when these *Beneficia* began to be granted in perpetuity. *Beneficium Regis* (saith ^c *Bignonius*) *postea Feudum dictum est.* And in another Place he saith, ^d *Beneficium Nomine ea prædia dicta (sunt) — quæ Feuda posteritas dixit; Initio namque vita accipientis finiebantur.* As if he should say, they were called *Beneficia* when they were granted only for Life of the Grantee; but were called *Feuda* when they began to be granted in perpetuity, and not before. *Cujacius* therefore speaking ^e of *Feudatarii*, which Word came into use with *Feudum*, (for Relatives *mutuo se ponunt & auferunt*) saith, that when *Actores, custodesque Prædiorum nostrorum temporarii, perpetui esse ceperunt, &c.* when those who had the use and ordering of our Lands for a certain time, began to enjoy them in perpetuity, and yet retained their Latin Name of *Homines* (our *Men*), they grew then also to be called after new and foreign Names, *Vassalli*, *Leudes* and *Feudatarii*, by the Princes and great Noblemen; who chused rather to grant them Lands in Perpetuity, in consideration that they should do them military Service. And he saith, that these Names were first brought into *Italy* by the *German* Princes. Where (and particularly in *Milan*, as *Merula* reporteth) the *feodal Laws* and Customs have had their Original, and from thence been propagated throughout *Europe*. By this it appeareth, that the Words *Feudum* and *Feudatarii* were not in use till that the Word *Munera* was grown obsolete. Nor afterward, till *Beneficia*, leaving to be temporary or but for Life, became to be perpetual Possessions; which (as I have often said) was not long before the Conquest. So that the Word *Feudum* could not be in use in *Beorredus's* time, who lived two hundred years before.

Fourthly, Tho' the Word *Feudum* were in the original Charter of *Beorredus*, yet doth it not prove that our *Feuds* were then in use. For call them *Beneficia* or call them *Feuda*, certain it is that neither the one nor the other were then hereditary or perpetual, but either temporary or for Life only; which at length begat the Difference between *Feuda* and *Beneficia*; for *Beneficia* in a restrained sense began to signifie no more than an Estate for Life, (in which sense it resteth at this day in our Clergy-men's Livings called *Benefices*) and the Word *Feuda* grew to be understood only of such *Beneficia* or *Benefices*, as were perpetual and hereditary.

To return from whence we digressed. I suppose it now appeareth sufficiently, how some *feodal Words* are crept into Charters and Writings of Saxon Date; and I think I may conclude, that the Words before mentioned (*Tenura*, *Tenentes*, *Tenementa*, *tenere* or *tenendum*, in a feodal sense, or *Feodum* it self)

* In præfatione illius Libri. ^b Chap. 20. c. 21. ^c Ad Marculf. p. 470. ^d P. 550. ^e Proæm. ad lib. Feud. p. 7.

C

were

were not in use among them. Much less Tenure *in Capite*, Tenure by *Knight-service*, Tenure in *Socage*, or *Frank-Almoign*; tho' the like Services were preformed to the Saxon Lordships, by their Thanes and *Theodens*, their *Socmen* or Husbandmen, and their *Beads-men* or Clergy-men, by way of Contract for the Lands received from them; as were after the Conquest to the Norman Lordships by way of Tenure, for Lands holden of them.

The *Neapolitan* and *Sicilian* Constitutions (which had their Original from Princes of *Norman* Lineage) ^d do the Conquest here in *England* 'make mention of *tenens*, *tenere*, *tenementum* and *tenere de Rege in Capite*; but whether the *Normans* carried these Terms into *Italy*, when they conquer'd *Naples* about the year 1031. ^e or brought them from thence into *Normandy*, I cannot determine. Certain it is, that from the *Normans* they came to us in *England*; for being not met with before in any authentick Author, we presently after the Conquest begin to hear of them, even about the third or fourth year of the Conqueror's Reign, as appeareth ^f by his Charter of *Emendationes Legum* in the *Red Book* of the Exchequer, f. 162. b. and in *Lambard's Archaionomia*.

CHAP. IV.

Of Tenures in Capite, more particularly.

No Tenure in Capite among the Saxons. **T**ouching Tenures therefore *in Capite*, I think I may boldly say, that there were none in *England* in the *Saxons* time, after the manner now in use among us.

First, For that their *feodal Lands* (as we have shewed) were not descendable before the Conquest. For tho' there were *hlaford* and *thane* amongst the *Saxons*, that is, *Lord* and *Thane*, or *Servitour*, whom beyond the Seas they called *Seigneur* & *Vassall*, *aliàs Vassallum*, *Dominum* & *Clientem*, while their Feuds were arbitrable or but for Years or Life; yet grew not the Words of *Tenure* into use, till that *Feuds* became descendable to posterities, and thereby obliged the whole succession of heirs to depend and hold upon their Capital Lords by the Services imposed at the Creation of that *Feud*.

Secondly, The Word *in Capite* is like a Relative in Logick; which being a supreme Degree of it self, implieth some other Degrees to be under it, as *Tenant in medio* or *Tenant in imo*, or both, viz. *Tenant in Capite*, *Tenant in Menalty*, and *Tenant Paravale*, or at least, *Tenant in Capite* and *Tenant Paravale*, which inferiour Tenants could not be in the *Saxons* time, for that the granting of *Feuds* in perpetuity (out of which the under-Tenancies must be deduced) was (as I have said) not yet in use.

Tenure in Capite of two sorts. Thirdly, To hold *in Capite* is of two sorts, the one general, which is of the King, as *Caput Regni* & *Caput generalissimum omnium Feodorum*, the Fountain whence all *Feuds* and *Tenures* have their main original; the other special or subaltern, which is of a particular Subject, as *Caput Feudi* or *Terræ illius*, so called because he was the first that created and granted that Feud or Land in that manner of Tenure, wherein it standeth, and is therefore at this day so to be understood by the ordinary Words (in our Deeds) of *tenendum de Capitalibus Dominis Feodi illius*, &c. signifying that the Lands so granted (since the Statute of *Quia Emptores Terrarum*) must now be holden mediately or immediately of him or his heirs or assigns, that was *Caput Feodi*, the first that created or granted that *Feud* in that Tenure, who thereupon was called *Capit*

^d Lib. 1. Tit. 65. &c.

^e Lib. 3. Tit. 21. &c.

^f Norm. Reform. p. 4.

^g In Cul. Resc.

pitalis Dominus & *Caput Terræ illius*; among the Feudists *Capitaneus Feudi illius*. And the Grantee and his heirs were said to be Tenants *in Capite*, because they held immediately of him that first granted that Feud or Land in that manner. Hereupon *David I.* King of *Scots* and Earl of *Huntingdon* here in *England*, was in right of his Earldom (in the time of King *Henry I.*) said to be *Capud Terræ de Crancfeld* & *Craule post Regem Angliæ*. And *Roger de Molbray* about the same time or shortly after, made a Grant in these Words: *Roger de Molbray omnibus hominibus & fidelibus suis Normannis & Anglis salutem. Sciatis quod ego concessi Roberto de Ardenna Clerico amico meo totum nemus de Bederichesleacum omnibus antiquis libertatibus & consuetudinibus ejusdem nemoris, ad tenendum de me in Capite & heredibus meis ita libere & quiete, &c. sicut ego unquam, &c.* The Deed is without date; but note that the direction of it is *Omnibus hominibus fidelibus suis Normannis & Anglis*, which implieth that it was made before *Henry II's* time: For he being of *Anjou* in *France* and bringing in French-men with him, altered then very properly the directions of Charters into *Hominibus & fidelibus suis Francis & Anglis*. Yet I find the same direction, tho' more improperly, to be some time used under the Norman Kings. *Qu.*

So likewise (as before) *W. Marshall* the great Earl of *Pembrok*, in a Charter of his, useth these words about the beginning of *Henry III's* time (as I take it:) *Nisi fortè forinfeca Tenementa tenueris de me (in) Capite*. And ^b *Mat. Paris* in *An.* 1250. making mention of one *G.* a Knight, saith, that *Rex memoratus* (*Hen. III.*) *cuidam Militi tenenti de Ecclesia S. Albani in Capite, &c. Warennam concessit*: Where the Words *tenenti de Ecclesia S. Albani in Capite*, do signifie, that some Abbot of the Church of *St. Alban* first created and granted that *Feud*.

Having thus in general manner prepared my way to the ensuing Discourse, I shall now (God willing) by the patience of them whom it most concerneth, examine such particular assertions, as are produced in the Report, either to prove our *Tenures* and *Feuds* with their dependancies, to have been in use among the *Saxons*, or to disprove what I have affirmed in my Glossary, or in the Chapters here precedent, and will first shew therein as followeth.

CHAP. V.

What Degrees and Distinction of Persons were among the Saxons, and of what condition their Lands were.

FOR the better understanding of our Discourse, it is necessary that we should shew what Degrees and Distinctions of Persons were among the *Saxons*, and of what Condition their Lands were. Touching their Persons, they are by themselves divided in this manner, *Cople* and *Leopl*, *Deegn* and *Deoben*. In *Latin Comes* and *Villanus*, *Tainus* [unus] & *alius*, *singuli pro modo suo*. That is to say, the Earl and the Husbandman, the Thane of the greater sort called the King's Thane, and the Thane of the lesser sort called the *Theoden* or *Under-Thane*. More Degrees the *Saxons* had not in their Laity, and among these must all the Tenures lye that were in use with them. As for their Bond-men (whom they called *Theowes* and *Efnes*) they were not counted members of that Common-wealth, but parcels of their Master's Goods and Substance.

^a Lib. Ramsey f. 42. d. 5. 279.

^b Pag. 157.

Touching Lands among the Saxons they were of two sorts, Bocland and Folcland. *Bocland* signifieth *Terram codicillarem* or *librariam*, Charter-lands: for the Saxons called a Deed or Charter an bec, i. e. *librum*, a book; and this properly was their *Terra hereditaria*: For it commonly carried with it the absolute inheritance and propriety of the Land, and was therefore preserved in writing, and possess'd by the *Thanes* and Nobler sort, as *prædium nobile, liberum & immune a servitiis vulgaribus & servilibus*. In which respect the *Thanes* themselves were also called *Liberales*, as appeareth by *Canute's* Forest-Laws (*Art. 1, 3. & seqq.*) a name not well agreeing with feudal Servitudes. But it seemeth by divers Abby-books, that some Estates for life, which we call *Frank-tenements*, were also put in writing, especially among the latter Saxons. Yet were not these accounted bocland; for they were laden commonly with many feudal and ministerial Services, whereas *Bocland* (as I said) was free from all Services, not holden of any Lord, the very same that *Allodium*; descendable (according to the common course of Nations and of Nature) unto all the Sons, and therefore called *Gavelkind*, not restrain'd to the eldest Son (as feudal Lands were not at first) but devisable also by Will, and thereupon called *Terra testamentales*, as the *Thane* that possessed them was said to be *Testamento dignus*.

Folcland. Folcland was *Terra vulgi*, the Land of the vulgar people, who had no Estate therein, but held the same (under such Rents and Services as were accustomed or agreed of) at the will only of their Lord the *Thane*; and it was therefore not put in writing, but accounted *prædium rusticum & ignobile*.

Inland. But both the greater and the lesser *Thanes*, which possessed *Bocland* or hereditary Lands, divided them according to the proportion of their Estates into two sorts; i. e. into *Inland* and *Outland*.^b The *Inland* was that which lay next or most convenient for the Lord's Mansion-house, as within the view thereof, and therefore they kept that part in their own hands for supportation of their Family and Hospitality. The *Normans* afterwards called these Lands *Terras dominicales*, the Demains or Lord's Lands: The *Germans* *Terras indominicatas*, Lands in the Lord's own use: The *Feudists*, *Terras curtiles* or *intra curtem*, Lands appropriate to the Court or House of the Lord.

Outland. *Outland* was that which lay beyond or out from among the *Inlands* or Demains, and was not granted out to any Tenant hereditarily, but, like our Copy-holds of ancient time (having their original from thence) meerly at the pleasure of the Lord. *Cujacius*^c speaking of this kind of Land, calleth it *proprium Feudum*, that is to say, such Land as, was properly assigned for feudal Lands. *Proprium Feudum est* (saith he) *extra Curtem, & consistit in Prædiis*. As if he should say, That Land properly is a Feud or feudal Land, which lyeth without the Demains of the Mannour, and consisteth in Land not in Houses. We now call this *Outland* the *Tenants Land*, or the *Tenancy*, and so it is translated out of *Birtrick's Will* in the Saxon Tongue^d.

This *Outland* they subdivided into two Parts; whereof one part they disposed among such as attended on their persons either in War or Peace, (called *Theodens* or lesser *Thanes*) after the manner of Knight's Fees; but much differing from them of our time, as by that which followeth shall appear. The other part they allotted to their Husbandmen, whom they termed *Ceorls* (that is *Carles* or *Churles*.) And of them we shall speak farther by and by, when we consider all the Degrees afore said; beginning with the Earl.

^a Vid. Gloss in Verb. Foresta. ^b Ing. Sax. p. 864. ^c Praef. ad libr. Feud. p. 12. ^d Itinerar. Cant. p. 495.

CHAP. VI.

Of Earls among our Saxons.

AN *Earl*, in the signification of *Comes*, was not originally a Degree of Dignity, as it is with us at this day; but of Office and Judicature in some City or portion of the Country, circumscribed anciently with the Bounds of the Bishoprick of that Diocese; for that the Bishop and the Earl then sat together in one Court, and heard jointly the Causes of Church and Common-wealth, as they yet do in Parliament. But in process of time the Earl grew to have the Government commonly of the chief City and Castle of his Territory, and withal a third part of the King's Profits arising by the Courts of Justice (Fines, Forfeitures, Escheats, &c.) annexed to the Office of his Earldom. Yet all this not otherwise than at the Pleasure of the King; which commonly was upon good Behaviour, and but during Life at most. This is apparent by the severe Injunction of King *Alfred* the Great (labouring to plant Literature and Knowledge amongst the ignorant *Earls* and *Sheriffs* of his Kingdom) imposed upon them, That they should forthwith in all Diligence apply themselves to the study of Wisdom and Knowledge, or else forgo their Office. Herewith (saith *Affer Menevensis* who lived at that time and was great with the King) the *Earls* and *Sheriffs* were so affrighted that they rather chose *insuetam disciplinam quam laboriose discere, quam potestatum ministeria dimittere*; that is, To go at last to the School of Knowledge, how painful soever, rather than to lose their Offices of Authority, and Degrees of Honour; which *Alfred* there also declareth, that they had not by Inheritance, but by God's Gift and his: *Dei* (saith he^b) *dono & meo, sapientium ministeria & gradus usurpatis*. This is manifest by divers other Authorities and Examples in my Glossary (*in verbo Comes*) as the Reader, if he please, may there see.

Some conjecture, that *Deira* and *Bernicia* in *Northumberland* and *Mer-* No Earldoms hereditary.
cia in the midst of *England*, were feudal and hereditary *Earldoms* in the Saxon times. Those of *Northumberland* presently after their first arrival under *Hengistus*, about the year 447. that of *Mercia* by the Gift of *Alfred* the Great (about the year 900.) to *Ethelredus*, a man of Power, in way of Marriage with his daughter *Ethelfleda*: but for ought I see it is neither proved by the succession of those *Earldoms*, nor our Authors of Antiquity. For my own part, I think it not strange; that there was not at the entry of the Saxons a *Feudal* and *Hereditary Earldom* in all Christendom. As for this our *Britain*, the misery of it then was such, as it rather seemed an *Anarchy* and Chaos, than in any form of Government. Little better even in *Alfred's* days, through the Fury of the *Danes*; tho' he at last subdued them for his Time. Howsoever three or four Examples in five hundred years before the Conquest differing from the common use, is no inference to overthrow it, especially in times unsettled and tumultuous. The noble Earldom of *Arun-*
del in our days of Peace, differeth in Constitution from all the other Earldoms of *England*; yet that impeacheth not their common manner of succession.

Loyseau^c and *Pasquier*, learned Frenchmen, speaking of the Dukes and Earls of *France*, which *England* ordinarily followeth (and sometimes too in *France*. near the heels) justify at large what I have said; shewing the Dukes and

^a *Affer. de Gest. Alfredi*, p. 21. ^b *Ibid.* ^c *Loyseau de Seignier*, c. 5 p. 106. lin. ult.

Earls in the *Roman* Empire (from whose example others every where were derived) were like the *Proconsuls* and *Presidents* of Provinces, simple Officers, who for their entertainment had nothing else but certain Rights and Customs raised from the People (which we in *England* called *Tertium denarium*.) And that the Dukes and Earls of *France* were Officers in like manner, but had the Seigncurie of their Territory annexed to their Office: so that they were Officers and Vassals both at once, (that is to say) Officers by way of Judicature, and Vassals (whom we call *Feodal Tenants*) for their Seignories of Dukedoms and Earldoms. But (say they) *tenue neant moiens en fief a vie*, &c. holden notwithstanding as a Fief for Life, not hereditary nor patrimonial in the beginning, as afterward they were. This Change they assign to have been begun about the end of the first Line of their Kings; who being at that time weak and simple men, the Dukes and Earls took opportunity to make their Estates hereditary. But it continued not long; for the first Kings of the second Line reduced them presently to conformity. Yet some there were in the remote Provinces, that maintain'd themselves hereditary in despite of the Kings, whereupon ensued many Wars. Thus far both these Authors do concur, and then *Loyseau* addeth further, That at the end of the second Line, *Hugh Capet* having made himself King of *France*, permitted all to hold their Dukedoms, Earldoms, and Seignuries hereditarily; and taking Homage of them as of hereditary Fiefs, each party obliged themselves to support the other and their posterity in those Dignities as hereditarily. This happened in *France* a little before the Conquest of *England*, and from this precedent of *Hugh Capet's*, did our *William* the Conquerour make the Earldoms and Feuds in *England* first hereditary, as we have already shewed in the second Chapter. So that I conclude (as I assumed in the beginning) that the *Saxon Earldoms* were not hereditary, nor otherwise *Feodal* (if we shall so term them) than for Life, whereon neither *Wardship* nor *Marriage*, &c. could depend. Yet I confess that the Dukes and Earls of the *Saxon* times both had and might have great Possessions in other Lands as patrimonial and hereditary, namely their *Thaneland*: and in what condition they possessed them, it shall appear anon, when we come to speak more at large of *Thanes* and *Thanelands*.

CHAP. VII.

Of Ceorls; and that they were ordinarily but as Tenants at will, or having Lands held not by Knight-service.

Ceorls.

THE Division before mentioned, which the *Saxons* made of their own Degrees, leadeth me in this next place (tho' not orderly) to speak of the *Ceorle* (that is of the *Carle* or *Churle*) and Husbandman. The Ancients called him in Latin *Villanus*, not as we ordinarily take it for a *Bondman*, but for him that dwelling in a Village or Country Town, lived by the Country course of Husbandry. Mr. *Lambard* therefore (to decline the misconceiving of the word *Villanus*, doth render it in the *Saxon* Laws by *Paganus*, which signifieth the same that *Villanus* doth, according to the French for a *Villager*, but not according to our English for a *Bondman*. Our *Saxons* otherwhile did term them, like the Dutchmen, *Boors*, that is, such as live by tilth or grasing, and by works of husbandry. Such were the *Ceorls* among the *Saxons*; but of two sorts, one that hired the Lord's *Outland* or *Tenementary Land* (called also the *Folcland*) like our *Farmers*: the other that tilled and manured his *Inland* or *Demeans*, (yielding *Operam* not *Censum*, Work and not Rent) and were thereupon called his

his *Socmen* or *Ploughmen*. These, no doubt, were oftentimes his very *Bondmen*; I therefore shall not meddle with them, but will hold me to the first sort, who having ordinarily no Lands of their own, lived upon the *Outlands* before mentioned of their Lord the *Thane*, as customary Tenants at his Will, (after the usual manner of that time) rendering unto him a certain portion of Victuals, and things necessary for Hospitality. This Rent or Retribution they called *Feorme*, but the word in the *Saxon* signifieth Meat or Victuals; and tho' we have ever since *Henry II's* time, chang'd this reservation of Victuals into Money, yet in letting our Lands, we still retain the name of *Fearms* and *Fearmers* unto this day. The quantity of the *Feorme* or Rent for every Plough-land, seemeth in those times to have been certain in every Country, according to the Nature of the Place. King *Ina* in his Laws did make it so through all the Territory of the *West-Saxons*, as you may see (with much more touching this matter) in my Glossary, *verbo Firma*.

Ceorls.

But inasmuch as the chiefest part of the Fruits and Profits of the Lands thus manured by the *Ceorls* or *Husbandmen*, redounded to the benefit of their Lords, and not of the *Ceorls* themselves; the *Romans* counted them to be as *Bondmen* and not *Freemen*. *Cæsar* therefore speaking of them while they were yet in *Germany*,^b saith, *Plebs pene servorum habebatur loco*: That their common people were in a manner *Bondmen*. And *Tacitus* to the same purpose, *Cæteris servis* (meaning these *Ceorls* or *Husbandmen*) *non in nostrum morem descriptis per familiam ministeriis utuntur; suam quisque sedem, suos penates regit. Frumenti modum Dominus aut pecoris aut vestis, ut colono, injungit. Et servus hætenus paret*. But this Service was no *Bondage*. For the *Ceorl* or *Husbandman* might as well leave this Land at his Will, as the Lord might put him from it at his Will: and therefore it was provided by the Laws of *Ina*^d in what manner he should leave the Land when he departed from it to another Place. And the Writ of *Waste* in *Fitz-Herbert*^e seemeth to shew that they might depart if they were not then well used.

It is apparent also that the *Ceorl* was of free Condition, for that his Person was valued as a Member of the Common-wealth in the Laws of *Æthelstan*^f, and his least valuation is there reckoned to be 200^g, whereas the *Bondman* was not valued at all, for that he was not (as I said) any part of the Common-wealth, but of his Master's Substance: nor was he capable of any publick Office. But the *Ceorl* (tho' he had no Land) might rise to be the Leader of his Country-men, and to use the Armour of a *Thane* or *Knight*^h, viz. an Helmet, an Habergeon, and a gilt Sword. And if his Wealth so increased as that he became owner of five Hides of Land, the valuation of his Person (which they call'd his *Were* or *Weregild*) was increased to two thousand *thrimfas*, that is six thousand shillings, and being then also adorned with other marks of Dignity, he was counted for a *Thane*; as you shall see in the next Chapter.

But (for all this) a *Ceorl* or *Husbandman* (tho' he were a *Freeman*) was not by the Feodal Law of that and later times, capable of a *Knight's-fee*, or Land holden by Military Service; and therefore what Land soever he purchased, was to be intended Land of no such Tenure. And it appeareth further by the Laws of *Æthelstan*, that the five Hides of Land (before mentioned) purchased by the *Ceorl*, were descendable to his Posterity; which sheweth also that they were not *Feodal Land*, for that Feuds at that time were not here descendable, as we have often declared. So that I hope I may conclude, that the *Ceorls* or *Husbandmen* among the *Saxons* held no Land by our Tenure of Knight-service.

Earls capable of Knight's-fee.

^a Cap. 70. ^b P. 116. ^c De Mor. Germ. p. 132. ^d Cap. 65. ^e Fol. 55. C. ^f Cap. de Weregild. ^g Li. Æthelst. ibid.

CHAP. VIII.

Of Thanes, and their several kinds.

SEing then the weight of the Question will rest wholly upon the *Thanes*, we must consider them the more diligently, first in the Quality of their Persons, secondly in the Tenure of their Lands.

Thane,
what.

A *Thane* was (in like manner as the *Earl*) not properly a Title of Dignity, but of Service: so called in the *Saxon* of *Denian servire*, and in Latin *Minister à ministrando*. But as there be many Degrees of Service, some of greater Estimation and some of less, so those that served the King in places of Eminency, either in Court or Common-wealth, were called *Thani majores* and *Thani Regis*; and those that served under them in like manner as under Dukes, Earls, and other great Officers of the Kingdom, and also under Bishops, Abbats, and the greater Prelates of the Church, were called *Thani minores*, or the *lesser Thanes*. And as the Titles of honourable Office and Service in Dukes, Earls, &c. became at length to be made hereditary; so this of *Thanes*, like our Titles of Noblemen and Gentlemen, descended at last with their Fathers Land upon their Children and Posterity. And continued thus till after the Conquest, as appears by some Writs and Charters of the Conquerour.

The Qua-
lity of
Thanes.

Buchanan^a describing the Quality of their Persons, calleth them, *Præfectos Regionum sive Nomarcas* & *Quæstores rerum capitalium*, Governours of Places, principal Ministers of Justice, Chequer-men, Sheriffs, &c. But we will take them as the *Saxons* themselves describe them in the place before mentioned, where it thus followeth, *717 Leopl 7e 7eah þ he he7be fullice 717 h7ða a7ener lanbe, &c.* if a *Churl* or *Husbandman* thrive, so that he had fully five Hides of his own Land, a Church and a Kitchin, a Bell-house, and a Gate-house, a Seat and a several Office in the King's Hall, then he was from thenceforth worthy of the Rights of a Thane: meaning (as I understand it) he was then one of the *greater Thanes* or *King's Thanes*. For the *lesser Thane* is by and by described also in that which followeth, *viz.* *And 717 7egen 7e 7eah, &c.* And if a *Thane* himself so prospered that he served the King, and rid upon his Message as others of his Court, and then had a *Thane* (*i. e.* an *under* or *lesser Thane*) that followed him, which had five Hides (or Plough-land) chargeable to the King's Expedition, and served his Lord in the King's Court, and had gone thrice upon his Errand to the King: he (this *under Thane*) might take an Oath instead of his Lord, and at any great need supply the place of his Lord. And if a *Thane* did so thrive as he became an *Earl*, he had the Rights of an *Earl*. And a Merchant might become a *Thane*, &c.

Mr. *Lambard*^b conceiveth this place to discover but three Degrees among the *Saxons*, *viz.* *Earls*, *Thanes* and *Ceorls*, not admitting the *under-Thane* to be a several Degree. The words seem otherwise, and the *Saxon* division before recited maketh four Degrees, *Earl*, *Ceorl*, *Thegn* and *Theoden* or *under Thane*. Some therefore distinguish *Thanes* into *majores* and *minores*, some into *majores*, *minores* (otherwise called *mediocres*) and *minimi*, whom *Canutus* in his *Forest-Laws* calleth *Minuti* and *Tinemen*. I dare not venture to define them particularly, but will rest upon the *Saxon* division first mentioned, which I find to be pursued by *Norman* terms in the *Laws of Ed. Confess.* and *William Conq.* delivered by *Ingulfus*, *viz.* *Count*,

^a *Hist. Scot. Lib. 6.* ^b *Itin. Cant. p. 52.*

Baron, *Valvasor* and *Villain*. Where he placeth *Count* instead of *Earl*, *Baron* instead of *Kings-Thane*, *Valvasor* instead of *Theoden* or *lesser Thane*, and lastly *Villain* instead of *Churl*. As though the Division both of the *Saxon* and *Norman* times did hold analogy one with the other, and both of them with ours at this Day, *viz.* of *Earls* and *Barons* of the Kingdom, including the *greater Nobility*; *Barons* of Towns and Mannours, including the *lesser Nobility* or *Gentry*; and that of our *Yeomen*, including the *Husbandmen*.

To return to the *Thanes*. This *Saxon* passage hath *per transcennam* shew'd unto us, not only the Quality of their Person, but the Nature of their Land, whereupon all our Question doth depend. And true it is, it sheweth that both they and it were subject to Military Service, call'd in Latin *Expeditio*, in *Saxon* *utrape* and *7epo7ung*, and in foreign Nations *Heribanuum*, that is the calling forth of an Army. And it appeareth by an ancient MS. of *Saxon* Laws in the King's Library, that the *Thanes* were not only tyed to this, but to many other Services to be done unto the King, and that in respect of their Land, which notwithstanding bred no *Tenure in Capite* or by *Knight-service*. The words be these, *Thani Lex est, ut sit dignus reſtitu- dine Testamenti ſui, & ut tria faciat pro Terra ſua*, Expeditionem, Burghbotam & Brugbotam, & de multis Terris majus Landirectum. Exurgit ad Bannum Regis, ſicut eſt Deorhege, ad manſionem regiam, & ſcorpum in hoſticum, & cuſtodiam maris, & capitis, & pacis, & Elmesſcoh, & Ciricſetum, i. e. pecunia Eleemoſynæ, & Ciricſcatum, & aliæ res. Thus in English. The Law touching a *Thane* is; That he have a Power to make a Will, and that in respect of his Land he shall do three Things, *viz.* *Military Expedition*, *Repairing of Castles*, and *mending of Bridges*, and for more Lands to do more *Land-Duties*. To go forth upon the King's Summons to the enclosing of his Park and Mansion-house, and to *..... into the Enemies * Sce-
Lands, and to defend the Sea, his own Head, and the Peace, to pay *Alms-* opp.
monies, *Church-seeds*, *Church-shots*, and other things. Vctitus,
Appara-
tus. Soma.

What is there in all this to shew either a *Tenure in Capite* or by *Knight-service*? It will be said that the *Military Expedition*, and *Warding of the Sea* against Enemies, imply a *Tenure by Knight-service*, and that those and the other Services being to be performed to the King, and upon the King's Summons, shew a *Tenure in Capite*. And no doubt, so would it be for Lands given in this manner by the King since the Conquest. But I conceive that none of all this riseth out of any *Tenure*, or *feodal reservation* made by the *Saxon* Kings in granting these Lands, or by any particular Contract agreed of by the *Thane* or *Subject* in accepting them, but out of a fundamental Law or Custom of the Kingdom, (as ancient as the Kingdom it self) whereby all the Land of the whole Kingdom was obliged to this *Trinoda neceſſitati*, of military Expedition, and building or repairing of Castles and Bridges. So that if this made a *Tenure by Knight-service in Capite* in the *Thane Lands*, then must it follow also, that all the Land of the Kingdom was likewise holden by *Knight-service in Capite*: For it was wholly tyed to those three Services, as appeareth in the Council of *Eanham*^d, (Cap. 22, 23.) where they are commanded to be yearly done. And by the Laws of *Canutus* (Cap. 10. 62.) where they are appointed to be done as Necessity requireth. And also by the Law of King *Ethelred*, who, about the thirtieth year of his Reign, ordain'd, that every^e eight Hides or Plough-land through the whole Kingdom, shall find a Man with a Croslet and Helmet to the *Naval Expedition*. And every three hundred and ten Plough-lands, an ordinary Ship. For these purposes, was the whole Land formerly divided, either by *Alfred* the great or some other precedent King, into 243600 Hides or Plough-lands; and according to this Division were the military and other Charges of the Kingdom impos'd

The
three
Services
upon
Lands.

Trire-
men.

^c *Cap. de diſſinitate hominum f. 163.* ^d *Conc. Brit. ſub an. 1009. p. 520.* ^e *al. 9.*

and proportion'd, without ever any mention of *Tenures in Capite* or by *Knight-service*. Hence it rose that the Saxon Kings in granting of Lands, Liberties, and Privileges, unto Ecclesiastical Persons and others, were usually so careful in reserving *Expedition, Burghbote* and *Brigbote*, as you may see in the Charters of King *Withred*¹, *Ina*², *Æthelbald*³, *Æthelwulf*⁴, *Edgar*⁵, &c. in the *Britain Councils*, as also in the Charters here following, and in a Multitude of others elsewhere besides. Neither did this military Expedition otherwise at that time bind the Saxons to a *Tenure in Capite* or *Knight-service*, than it doth us at this Day in the *Naval Expedition* lately now reviv'd.

Thane-lands not subject to Feudal-service.

For better manifestation that *Thanelands* were subject to no feudal Service, consider, I pray you, the Words of the Saxon passage before mention'd, where it is said that a *Thane* must have three Hides at least of his agener lande, i. e. of his own Land, not *Terra emphyteuticaria*, or *precaria*, not *usu-fructuaria*, or *feodataria*, but as a *Latin Copy* hath it *Terra sue propria*; where the Word *propria* carrieth another Sense than is ordinarily conceiv'd, as to signifie in this place, Land wherein no other Man hath any interest by feudal Superiority or Dominion, but whereof himself hath *meram proprietatem*, the sole and absolute propriety; even the same *Alodium* that is spoken of in the *Report*¹, and which no Man hath or can have now at this Day, but the King's Land holden of no Man in the feudal Sense, (for the phrase of *Tenure* was not then in use amongst the Saxons, nor ty'd any Man to do any *feodal-service*.) Another old Latin MS. therefore reciteth the same Saxon passage in these Words, *Si Villanus* (so they at that time call'd a Husbandman) *ita crevisset sua probitate, quod pleniter haberet quinque Hidas de suo proprio Alodio, &c. dignus erat honore liberalitatis*, quod Angli dicunt *Danerci* per punde: *si autem liberalis homo, i. Degen [Thanus] ita profecisset ut Regi servisset, & vice sua equitaret in Missatico Regis, hic talis si haberet alium [Thanum] sub se, qui ad Expeditionem Regis quinque Hidas teneret & in Aula Regis Domino suo servisset, &c.* Here I must say with *Cujacius*^m, speaking of the Author of the second Book of *Feuds: Proprietatem* [alias] *vocat quod hic Alodium*: Noting thereby that *Proprietas* and *Alodium* are *synonyma*, signifying Land free from all feudal Service and holden of no body. Yet in that sense *Alodium* is here said to be *Terra ad Expeditionem Regis*, Land oblig'd to the Warfare of the King.

I must note also by the way, that he that thus translated the Saxon passage by the words, *qui ad Expeditionem Regis quinque Hidas teneret*, follow'd the manner which before we spake of, in rendring Saxon Customs by Norman phrases. The Reader perhaps will here understand *teneret* in the feudal Sense, for to hold of his Lord, whereas in the Saxon Book the words are no otherwise than *gif he heþe*, i. e. if he had five Hides of Land, so that *teneret* here is no otherwise to be taken than for *possideret*.

To return to our purpose. *Thaneland* might no doubt be tyed to do *Military Service* or *Knight-service*, and yet not holden in *Capite* or by *Knight-service*; for it is one thing to hold by *Knight-service*, and another to be tyed to do it. No man holdeth, that hath not *Tenementum* or *Tenementale quiddam*: But a Man might be tyed to do this military Expedition for his personal Estate (tho' he had no Land) or for his very Person itself, as appeareth by the Laws of King *Ina*, Cap. 52. where it is said *gif se riðcundman, &c.* If the *Sithcundman* having Land forbearth to go the Expedition, he shall forfeit his Land and 120^s. and if he have no Land yet he shall forfeit 60^s. and an *Husbandman* (who if he had Land was but Tenant in *Socage* according to our Law) 30^s. It appeareth also by many Charters of the Saxon Kings that *Thane-lands* were not *feodal*, and that the military Expedition made no *Tenure by Knight-service*. Give me leave therefore to produce some of them, that you may see thereby the use of those times, and what the Kings themselves conceiv'd therein.

¹ Con. Brit. p. ² P. 227. ³ P. 256. ⁴ P. 349. ⁵ P. 433. ¹ p. 29 ^m Lib. 2. Tit. 27. p. 166.

CHAP. IX.

Charters of Thane-lands granted by Saxon Kings, not only without mention of *Tenure* or *feodal Service*, but with all Immunity, except Expedition, &c.

E GO Eadwigh *Monarchiam totius Britanniae Insulae cum superno juva-* Eadwigh.
mine obtineus, cuidam meo fideli Ministro, vocitato nomine *Ælfwine*,
duas Manfas & dimidiam tribuo perenniter illic ubi antiquorum hominum
relatu nominatur at Schylfhinghatunc, habeat quamdiu vivat, & post cui
voluerit impertiat, cum his rebus quæ sibi rite pertinent tam in magnis
quam in minimis. Sit hac Donatio immunis a Servitute mundana, excepto
illo labore, qui communis omni populo videtur esse; not naming Expeditione,
&c. but concluding *Si quis augeat, augeatur: Si quis minuat, careat præ-*
mis æterno, &c. So that here he was freed a *Servitute mundana* both great and
small, that was incident or inherent to the Land by way of *Tenure*, and yet he
was chargeable to military Expedition, and to the repairing of *Bridges, Castles,*
Burroughs, and *Fortifications*, but that not otherwise than as all the Land of
the Kingdom was charg'd, (as before we have shew'd).

Regnante in perpetuum Domino nostro, &c. Ego Eadgarus Rex Anglorum, Edgarus.
caterarumque Gentium in circuitu persistentium Gubernator & Rector, cuidam
fideli meo Ministro vocato nomine Alur. modicam muniminis mei partem Ter-
ra, i. e. in Dorset, & tres Perticas in illo loco, ubi Anglica appellatione dici-
tur at Louk, ut habeat ac possideat quamdiu vivat, & post se unum Hæredem,
quicumque sibi placuerit, derelinquat. Sit hoc prædictum Rus liberum ab
omni malorum obstaculo cum omnibus ad Rus rite pertinentibus, Campis, Pas-
cuis, Pratis, Sylvis; excepto communi labore, Expeditione, Pontis & Arcis
Construptione. Si quis vero hominum hanc meam Donationem cum stultitia
temeritate jactando infringere tentaverit, sit ipse gravibus per colla de-
pressus catenis inter flammis domas tetrarum Demonum catervas, nisi prius ad
satisfactionem emendare voluerit. Istis terminis hac Tellus ambita videtur:
Dif up þe landgemark at Louk, &c. Hac Charta scripta est Anno Domi-
nica Incarnationis, 958.

Mundi denique status Christi moderatoris disponente, &c. Ego Ethelredus Ethelre-
totius Albionis Basileus, cuidam mihi obsequentium *Æthelwoldo* vocatione, dus.
pro ejus placabili obsequio quandam *Terræ* particulam, i. e. decem Manentia
in loco quem *Coloni* *Maningforde* appellant in perpetuam concedo *Hæredita-*
tem, quatenus ille bene perfruatur ac prospere possideat quamdiu præsentis
fruitur vita, & post vitæ suæ terminum cuicumque sibi placuerit *Hæredi* de-
relinquat. Sit autem præfata Terra liberrima ab omni munduali obstaculo,
cum omnibus ad eam pertinentibus in Campis & Pascuis Pratisque ac Curfibus
Aquarum, tribus tantummodo causis exceptis, i. e. Expeditione, Pontis Arcis-
ve *Restauracione*. Si quis autem hanc Donationem pervertere studuerit, per-
petuæ maledictionis incurrat reatum & *Gebennæ æternæ* sustineat incen-
dium, nisi mortis ante exitum hanc præsumptionem emendare curaverit.
Istis terminis ambitur præfata Tellus *Ænrt of eartnepeapdan, &c.*

So King *Ethelred* in the Charter to his Thane *Sealwyne*, granteth five *Caf-*
satos in *Readdn*, cum omnibus, &c. cuicumque sibi libuerit *Cleronomo* dare-
linquat *Hæreditate*, &c. Sit autem istud præfatum Rus liberrimum ab omni
munduali obstaculo in magnis ac modicis, Campis, Pascuis, Pratis; tribus tan-

^a MS. Mon. de Hyde sub tit. R. Ethelredi.

in modo rationabiliter rebus exceptis quæ usuali ritu observantur, i. e. cum glomerata sibi expeditioni compulerit populari commilitonum configere castra, atque cum sua petivit Pontis titubantia muniri vada, ac cum concinni turma Urbium indigent muniri stabiliter septa, &c. Dat. Anno Domini Incarnat. 1014. Indict. 12.

Cnute.

In nomine Dei almi & agie Sophie, &c. Idcirco ego Cnute Rex, Anglorum Gubernator & Rector, quandam Ruris portionem, decem & septem, viz. Terra Mansas, illo in loco ubi jamdudum Solicola illius Regionis nomen imposuerunt at Abbodesbury, meo fideli Ministro, quem noti Affines Orc appellare solent, in perpetuam confirmo Hereditatem quatenus ille bene perfruatur ac perpetualiter possideat, quamdiu Deus per suam ineffabilem misericordiam vitam illi & vitalem spiritum concedere voluerit, deinde namque sibi succedenti cuicunque voluerit Cleronomo jure hereditario derelinquat, ceu supra diximus in æternam Hereditatem. Maneat igitur hoc nostrum donum immobile æterna libertate jocundum cum universis quæ ad eundem locum pertinere dinoscuntur tam in magnis quam in modicis rebus, in Campis, Pascuis, Pratis, Rivulis, Sylvis, Aquarumque Cursibus; excepto communi labore quod omnibus liquide patet, viz. Expeditione, Pontis Constructione, Arcifve Munitione. Si quis autem, &c.

Edward Confess.

And King Edward the Confessor granting duas Mansas & dimidiam in Wudeton, &c. to Thola (Widow of the foresaid Orc, whom in a Saxon Charter he calleth his Man, that is his Thane) saith thus: *In æternam Hereditatem concedo quatenus illa habeat & perpetualiter possideat hanc meam regalem Donationem quamdiu vivat, & post obitum suum cuicunque voluerit Heredi relinquat. Sit autem præfatum Rus liberum ab omni seculari gravedine tam in magnis quam in modicis rebus, in Campis, Pascuis, Pratis, Sylvis, Aquarumque Decursibus; tribus exceptis quæ omnibus hominibus communia sunt, viz. Expeditione, Pontis, Arcifve Restauratione.*

After all these, I will yet add one other of King Eadgar's, having somewhat of note above the rest, as anon we shall observe. It was made to the new Monastery of Hide near Winchester in these Words.

Edgar.

Annunte Altitoni Moderatoris imperio, &c. Ego Edgar totius Britannie Basileus quasdam Villas ut nominantur, Dunketone habens quinque Hidas Terræ & Ecclesiam, Sueyle cum 28 Hidis Terræ, &c. concedo in puram & perpetuam elemosynam novæ Wintonienſi Ecclesiæ beato Petro Apostolorum Principi dicatæ, &c. cum omnibus Utensilibus, Pratis, viz. Pascuis, Rivulis, æterna largita sint Hereditate, &c. Sint autem prædictæ Villæ, Rus, Mansiones, Terræ, Rivuli, omni terrenæ servitutis jugo libera imperpetuum, tribus exceptis, rata viz. Expeditione, Pontis Arcifve Restauratione. Si quis autem hanc nostram Donationem in aliud quam constituimus transferre voluerit, privatus consortio Sanctæ Dei Ecclesiæ, æternis Baratri incendiis, &c. puniatur, &c.

Whatever the phrase be in the Saxon original, (for I take this to be a translation of the Norman time) it here maketh the Lands to be given in *Franck-almoign*, but without mention of *tenendum*, and yet sheweth that they were tied to *Expedition*, &c. yea and calleth it notwithstanding *puram Eleemosynam*; whereas tho' in *libera Eleemosyna* a Rent in old Deeds hath sometime been reserv'd, yet can it not be called *pura*, if any Rent or Service at all were reserved to the Donor.

I have recited these Charters the more at large for that they apparently discover by many Reasons (which we shall set forth in the next Chapter) that the *Thanes* possess'd not their *Thane-lands* either by any *Feodal-service* or by way of *Tenure*.

^b Sic Ed. Conf. in chart. fast. Orco. Minist. 7. ^c MS. de Abbotsh. Chart. 2. ^d Lib. MS. ejusd. Monast. sub Tit. Edgar Chart. ult.

CHAP. X.

Observations upon the precedent Charters, shewing that the Thane-lands or Expedition were not feodal or did lye in Tenure.

These Charters present unto us the general manner of granting and possessing of *Thane-land* among the *Saxons* during the time of their Monarchy, 'till the very coming of the *Normans*. And there is to be observed in them (as in other before mentioned) what hereafter followeth.

First, That the word *Thane* which is here and usually interpreted *Minister*, (that is an Officer or Servant, of *denian servire*) noteth nothing belonging properly to the War, and is not therefore to be understood as *Bracton* fancieth the word *Barones* to be *quasi Robur Belli*, or to import any matter either of *feodal Service* or of *Tenure*. Thane has no direct relation to War.

Secondly, That (as we have formerly observed upon other Charters) so there is not in any of these now produced, one word either of *Tenure* or of *feodal* Signification, which presently after the Conquest became innumerable, as brought in by the Conquerour. Yet well may it be, that *Edward the Confessor* (having his Education in *Normandy*) might (as Travellers use to do) bring some *Norman* words and manners into *England*. No mention of tenure, &c.

Thirdly, That instead of *tenere* and *tenendum* (by which the *Norman* Feudists implied a *Clientary* if not *servile* Dependance, that the Tenant hath upon the Lord) the *Saxons* used *habeat*, *possideat*, *fruat*, or *perfruat* (and elsewhere *gaudeat*) words of Freedom and Immunity. So likewise for *Tenementa* (signifying things holden of a superior Proprietary) they used *Mansas*, *Manentia*, and *Mansiones à manendo*, (as places of abode) or *Casatas à casa*, for a Dwelling-house, otherwise call'd *Hida*, *quasi Tectum à Tegendo*, including under these Names all the Lands that belong'd thereunto. And those that dwelt upon those *Mansas*, &c. they called not *Tenentes*, Holders, as we do, but *Manentes*, as persons abiding there. All the foresaid words being of the middle-age-dialect, not appropriated to the feodal Language. What us'd instead of tenure.

Fourthly, In granting of *Feuds* and *Feud-Lands*, the Consideration is always for matter *de futuro*, as *pro Homagio & Servitio habendo*. But here in granting these *Thane-lands*, the consideration is for service past or present, signified by the Quality of the *Thane*, as *fideli Ministro meo*, or *pro placabili obsequio*, not only without Reservation of any future Service, but with express immunity from all Services: As, to use the words of the Charters themselves, 1. *Ut sint libera vel immunia à servitute mundana*. 2. *Ab omni malorum obstaculo*. 3. *Liberrima ab omni munduali obstaculo*. 4. *Liberrimum ab omni munduali obstaculo in magnis & modicis*. 5. *Æterna libertate jocundum*. 6. *Liberum ab omni seculari gravedine*. Such was the Freedom of these *Thane-lands*, equal and no less than that of the Lands given in *Frank-Almoigne* by King *Edgar* in the last cited Charter, which are there said to be *Omni Terrenæ servitutis jugo libera imperpetuum*. The Occasion of granting Thane-lands.

Fifthly, The feodal Lands might not be aliened without Licence: But the *Thane* by the very words of his original Charter, might grant them *cuicunque voluerit*. Thane-lands alienated.

Sixthly, A *feodal Tenant* or *Tenant by Knight-service* (as we call him) could not devise his Land by Will before the Statute of 32 Hen. VIII. tho' it were with Licence of the Lord and of the King himself, (which Law the *Germans* themselves Thane-lands devised by Will.

themselves do hold even unto this day. And the *Danes* can yet devise no Land by Will (as I am informed) but the *Thane* might devise his *Thane-land* to whom he would, as appeareth by the Words of King *Edward* the Confessor in a Charter to *Thola*, where he saith, *Possideat hanc meam Regiam Donationem quamdiu vivat, & post obitum suum cuicunque voluerit Heredi relinquat*; excluding hereby all Title of Wardship and feodal Duties. To the same effect are the rest of the Charters; and therewith agreeth the Privilege of a *Thane* before mentioned, *Thani Lex est ut sit dignus Rectitudine Testamenti sui*. As for that Passage in the Will of *Brietrick* the *Saxon*, where he seeketh his Lord's Consent that his Will may stand, I conceive it to be in respect of some *Folcland* or customary Land, which according to the use of that time he held at the Will of his Lord, and not in respect of any *Thane-land*. For tho' this *Brietrick* were a man of great Possessions, yet was he none of the chiefest sort of *Thanes* called the *King's Thanes*, but as appeareth by his Will, an *under-Thane* belonging to *Ælfric*, who was Earl of *Mercia*. And how far the Privilege of these *under* or *lesser-Thanes* extended, I cannot yet determine.

Thane-lands granted to Women.

Seventhly, If *Thane-land* were of the Nature of Lands holden by Knight-service, then by the feodal Law of that time it could not *transire à lancea ad fufum*, that is, it might not be granted to Women; for Women were not then, nor long after, capable of *feodal Land*. But the Land here granted to *Thola* was *Thane-land*, as appeareth by the very Words of her Charter; for that it is granted in *eternam Hereditatem perpetualiter possidendam*, which words (making an Estate of Inheritance) were only proper to *Thane-land* otherwise called *Bocland*; not to *Folcland* or popular Land, which was but at Will of the Lord for Years or for Life.

No service upon Thane-lands but what was expressed.

Eighthly, There could no Tenure nor Service lye upon the *Thane-lands*, other than what was expressed in the Charters. For in the end of every of them there was an horrible Curfe (which in those days was fearfully respected) laid by the King himself upon all those that should violate the Charter, (either by adding other incumbrances, or by diminishing the granted immunities.) So that it is not to be supposed that there was any lurking Tenure, or matter of *plus ultra* to impeach them. The curfe beginneth in every of the Charters with these words, *Si quis autem &c.*

Expedition, Repairing of Castles, &c.

Ninthly and lastly, Touching Expedition, and Repairing of Castles and Bridges, which the *Saxons* called *Burghbote* and *Brugbote*, tho' the two first of them be wholly military, and the last serving as well for the Passage of the King's Army as for the Trade and Commerce of his People; yet were none of them either Marks of Tenure or of feodal Service, as appeareth by that we have formerly shew'd, and by the Testimony of these Charters, where (to use the words of *Edw.* the Confessor in that to *Thola*) it is said that they are, *Omnibus hominibus communia*, a common burthen to all Men, as belonging to the safety and sacred anchor both of the Kingdom and Common-wealth. The *Saxons* therefore did not call them *Services* or *feodal Duties*, as things that lay upon the person of the Owner; but *Laxdirecta*, Rights that charg'd the very Land whosoever did possess it, Church or Lay Man. And these Duties were ordinarily excepted in every Charter, not for that they should otherwise be extinguished, but *per superabundantem cautelam*, lest the general words precedent should be mistaken to involve them and to release that which the King could not release. For tho' *Ethelbald* by his Charter to the Monks of *Croyland* did give the site of that Monastery, with the Appendancies, &c. *libera & soluta ab omni onere seculari in perpetuam Eleemosynam*, yet in his Charter of Privileges granted to all Churches and Monasteries of his Kingdom, speaking of the repairing of Castles and Bridges, he confesseth and saith, that *Nulli unquam relaxari possunt*. And I suppose that the word *Expedition*

^a *Ingulfs*. p. 851, 852.

was here omitted by the negligence of the Scribe; for I never find it severed from repairing of Castles and Bridges in any other Charter. And also tho' King *Ethelwulf* by his memorable Charter of Privileges (ratify'd by the great Council of *Winchester* in the year 855.) did by exprefs words free *Sanctam Ecclesiam*, that is all the Churches and Monasteries of his Kingdom, *ab Expeditione & Pontis Extructione & Arcis Munitione*^b, yet the whole Clergy about the year 868. did notwithstanding voluntarily assist his Son *Beorredus* against the *Danes* with all the Power they could, as appeareth, by the Charter of the same *Beorredus*.

CHAP. XI.

More touching the Freedom of Thane-land out of Doomſday.

THO' that which is delivered in these Charters be authentical and need no farther Proof, yet to convince broad spreading Errors the more manifestly, it will not be unnecessary to shew what *Doomſday* it self relateth to confirm it. For whereas Lands holden *in Capite* and by *Knight-service*, could not otherwise be disposed than by Licence of the King or Superiour Lord, *Doomſday* sheweth that the *Thane-lands* might be used and disposed at the pleasure of the Owner, without impeachment of any other. For at *Ebsa* in *Suthry* under the Title of *Ric. fil. Comitis Gisleberti*, it saith, *Hanc Terram tenuerunt novem Teigni & cum ea poterant utere quo volebant*. Plain Latin, but the sense is, That nine *Thanes* held this Land of *Ebsam* (in the time of *Edward* the Confessor) and might do with it what they would. So at *Est-Burnham* in *Buckinghamshire* under the Title of *Milo Crispin*, *Duo Teigni homines Brietrici hanc Terram tenuerunt, & vendere potuere*: And here it seemeth that these *Thanes* were not the King's *Thanes*, but of the lesser sort; for that he calleth them *Homines Brietrici*. So in the same Shire under the Title of *S. Petr. Westmon.* it is said of the same Town of *Est-Burnham*, *Hoc Manerium tres Teigni tempore Regis Edwardi tenuerunt, & vendere potuerunt*.

Thane-lands disposed of at the pleasure of the Owner.

It there also appeareth that the *Thane-land* might be charg'd with a Rent issuing out of it, for it immediately followeth, *& tamen ipsi tres reddiderunt quinque oras de consuetudine*. And it might be restrain'd from Alienation, as where it is said in *Doomſday*, *De ea* (viz. *Lega Pelton*) *sunt in Dominio due Hide; una ex hiis fuit Tainland, non tamen poterat ab Ecclesia separari*. Where the word *tamen* implieth, that altho' *Thanelands* might otherwise be alienated, yet this particularly could not. So likewise might it be entailed upon a Family, as appeareth in the Laws of *Alfred* Cap. 37. But thus *Doomſday* after the Conquest affirmeth the same that the Charters did before the Conquest. And the words both in the one and the other, which shew that the *Thane* might sell or use this Land as he would, do imply an Estate of Inheritance independent of any Lord either feodal or superiour, and was as even the *Alodium* mentioned in the Chapter of *Thanes*; but whether it were descendable only upon the eldest Son, or dividable between all the Sons as in *Gavelkind*, I cannot say, but the *Formula* of *Alodium* join'd with *Marculfus* doth divide it between them all.

Thane-land charged with a Rent.

^b *Conc. Brit. in An. 855 ex Ingulf. Malmesb. & al.*

CHAP. XII.

The Fruits of feodal Tenures, and that they were not found among the Saxons, or not after our manner.

Hitherto we have sought our Tenures among the *Saxons*, and have not found them, tho' the Report^a telleth us, "It is most manifest that they were frequent and^b common in the times of the *Saxons*." We will now follow the direction of our Saviour^c, and see if *by the Fruit we can find the Tree*. The Report saith^d, by Question and Answer, "The Fruits of the Tenure (*viz. in Capite and Knight-service*) what are they? but the (1) Profits of the Lands. (2) Wardship. (3) Livery. (4) Premier Seisin. (5) Relief, mistaken to be an Heriot. (6) Fine for Alienation and the rest: Which rest it^e supplyeth shortly after to be (7) Homage. (8) Fealty. (9) Esuage: Adding again Relief and Wardship," instead whereof I out of a third Passage^f do place (10) Escheats. And it concludeth^g that "As all these Tenures were common in those times, so were all the Fruits of them, &c." Which if it be true, the Question is determined; nay, I yield it, if any one of them agreeing directly with our Tenures be found amongst them; some shew of Fealty and Licence to alien Lands granted for a certain time only excepted, for avoiding captious Disputation.

Their very Names pretend no Saxon Antiquity, but as the *Ephramites* bewrayed their Tribe by their Language, so by their Names these Fruits discover themselves to be of Norman Progeny. And the Report doth not give us one Instance or Example of any of them in all the Saxon times. If it did, the words before mentioned in the Charters to the *Thanes*, declaring that their Land must be *Libera ab omni seculari gravamine*, &c. sweep all away at once as the West-wind did the Grasshoppers in *Aegypt*, and do make the *Thane-Lands* to have the privilege of *Alodium* (here before mention'd) to belong unto them, that is, to be free from all Tenure and Service. It is true notwithstanding, that both the *greater and lesser-Thanes* might have, and had other Lands (besides these that were hereditary) of feudal Nature and holden by military Service (as in the Charter of *Osward* the Bishop shall after appear:) But they holding them like *Folcland* only at the Will of the Lord (whether King or other) or for certain Years, or at most for Life or Lives, their Tenure and Feuds determin'd with the Will of the Lord, the term of Years, or Estate for Life. And then could not any of the Fruits before spoken of, accrue unto the Lord that granted the Land, for that it forthwith reverted entirely into his own Hands, and was to be kept and dispos'd a-new as pleas'd him.

It is apparent therefore by this general Demonstration, that the Fruits we speak of, could not arise out of either of the *Thane-Lands*, (were they temporary or hereditary) if not haply Fealty or some Gratuity to the Lord for Licence that the temporary Tenant might assign his Interest or have it enlarged, (things proper as well to Socage and Folcland as to Feodal.) But let us examine all these Fruits particularly, and see whether and how we find any of them among the *Saxons*; and give me leave herein to produce them in such Order (tho' not logical) as the Report presenteth them to the Reader in their several Places.

^a Pag. 35. ^b Pag. 36. ^c Matth. xii. 33. ^d Pag. 33. ^e Pag. 36. 37. ^f Pag. 33. ^g Pag. 36. 37.

CHAP. XIII.

No profit of Land by Wardship in the Saxon's time.

AS for the Profits of the Land which the King hath now during the Minority of a Ward, it is manifest that the Kings then had no such of the *Thane-lands*; for that the *Thane* had this particular Privilege, that when he dy'd he might make his Will of his own Lands (as it formerly appear-eth) and give them unto whom he would, which was never lawful after the coming of the *Normans*, for any Baron or Tenant by *Knight-service* to do; till the Statute 32. Hen. VIII. Chap. 1. gave free liberty to all men to devise all Socage-land by their last Will in Writing, and no more than two parts only of Land holden in *Capite* or by *Knight-service*, least it should hinder the Lords too much of their feudal Profits. And Socage-lands were therefore long before devisable in many Burroughs, for that thereby the Lord sustain'd no such prejudice. But to conclude this Point in one Word, it shall (I hope) be made manifest in the next Chapter, that there were no Wardships among the *Saxons*, and thereupon it will follow inevitably there could be then no Profits of Lands arising to the King or Lords by Title of Wardship.

CHAP. XIV.

No Wardship in England amongst the Saxons. Objections answered.

IN following the Report I must now speak *de Causa post Causatum*; of Wardship after the Profits of Land growing by it. This being the chiefest Fruit of feudal Servitudes, and the Root from whence many Branches of like Grievances take their Original; the Report laboureth more to prove it to have been in use among our *Saxons*, than it doth in all the rest of them, and enforceth me thereby to the greater Labour in examining it, and discovering the contrary.

Touching the Name (*Wardship*) I confess it carryeth a Saxon Sound, but for Norman God-fathers with whom *Gard* signifying the same that Ward doth with us, and they bringing this Custom into England, our English Ancestors (as in a Multitude of other Words) changed the Norman G. into a W. and so made Ward for Gard, and thereof Wardship for Gardship. Yet to this Day we call him that hath the Custody of the Ward, after the Norman Manner his Gardian not his Warden. But I find neither Ward, Wardship nor Warden, in this Sense, in any Saxon Law, Charter, or Manuscript, or any thing conducing to such Signification: The Proof being in the Affirmative lyeth on the other Side, yet doth not the Report produce one single Case, Text, or Precedent, to maintain their Assertion but like *Pythagoras's* Scholars, resteth wholly upon *ipse dixit*, such and such have said it; and I am now turn'd over to those Authors.

They have chosen a right good Foreman (I confess) Mr Selden, of whom I say as he in *Ovid*, *Nemine in Hectorio Pallada semper eram*. But let us hear what he affirms, according as the Report conceiveth him, where the Words be

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The
Name
Wardship.

Mr. Sel-
den's
Judg-
ment.

be thus. "That *Wardships* were then (*viz.* in the *Saxon's* time) in use, and "not brought in by the *Normans*, as Mr. *Cambden* in his *Brit.* 179. nor "by *Henry III.* as *Randolph Hygden*, &c. would persuade. *Vid. Selden's notes* "to *Fortescue*, 51." The Report says *Vide*, and I say *Audi*. Mr. *Selden* to confute their Opinion attributed to *Rand. Hygden* useth these Words. "Neither is the Custom of *Wardship* so new as *R. Hygden* in his *Polychronicon*, "or rather some others not understanding him, ignorantly make it, by supposing the beginning of it here under *Hen. III.* clearly *Wardships* were before "or from the *Normans* at least". Thus Mr. *Selden*. There may be some amphiboly in the Word *before*, as doubtful whether it shall relate to the *Normans* or to *Hen. III.* but the Occasion of his Speech is to confute the opinion of them that did attribute the Beginning of *Wardships* to *Henry III.* saying, that clearly they were before, and tho' he determineth not how long before, yet he concludeth that from the *Normans* at least, citing *Glanvill* to shew they were in use in *Hen. II's* time, and the *Grand Custumer* of *Normandy* to fetch them higher than so from the *Normans*, who (by the Opinion of *Berhault* that writ the Commentary to that *Custumary*) did first bring them into *England*. Mr. *Selden* (God be thanked) is living to explain himself, and I find (by chance) where he hath done it fully. His Words in the *Titles of Honour* be thus, "These kind of military *Fiefs* or *Fees* as we now have, were not "till the *Normans*, with whom the Customs of *Wardship* in Chivalry (they "began not under *Hen. III.* as most ignorantly *R. Hygden* the Monk of *Chesler* and *Polydore* tells you) came into *England*". And speaking by and by of *Malcolm* second King of *Scotland*, who dyed about two and twenty years before the Conquest, he said: "But in this *Malcolm's* time, *Wardships* were "not at all in *England*". Thus M. *Selden*, whom they so often press against me out of ambiguous Places, is clearly with me.

Lambard's Opinion. Their next Authority to prove *Wardships* to have been in use amongst the *Saxons*, is (saith the Report) that amongst the Privileges granted by *Edw.* the Confessor to the *Cinque Ports* we meet with this, *That their Heirs shall not be in Ward*. For this they cite *Lambard's Perambulation of Kent*, p. 101. but I demand Oyer of the Record, and I verily persuade my self *Nutiel Recorde*, nor in Truth hath *Lambard* averr'd that there is. *Lambard's* Words be these, "The Privileges of these Ports being first granted by *Edw.* the Confessor and *William* the Conqueror, and then confirm'd and increas'd by *William Rufus Hen. II. Rich. I. Hen. III. and King Edw. I.* be great, &c". And in reciting some of these Privileges, he tells us amongst the rest, "That "they themselves (the Inhabitants of the *Cinque Ports*) be exempted from all "Payments of Subsidies, and their Heirs freed from *Wardship of Body notwithstanding any Tenure*. He doth not say that this is in the Charter of *Edward* the Confessor, but that it is among the Privileges granted by him and *William* the Confessor, and then confirm'd and increas'd by the succeeding Kings. Doubtless the Word *Subsidies* here mention'd in this Sense, was not in use either in the Confessor or Conqueror's time, not in many years after till Taxes, Aids, and Tallages were grudged at and restrain'd. I am therefore confident that this came in among the increased Privileges afterward, and it appeareth that Mr. *Lambard* was not persuaded that there was such a Charter of the Confessor's time, and therefore waving it seeketh the Original of the Privileges of the *Cinque Ports*, no farther then the Conqueror. Why then do we father this upon the Confessor, especially seeing the Charter of *Anno 6. Edw. I.* wherein all the Charters of the precedent Kings seem to be mention'd, that of *Edw.* the Confessor is not spoken of.

Magna Charta. The third Assertion is, that in the Customs of *Kent*, (which are in *Magna Charta* of *Tottill's* Edition, and in *Lambard's Perambulation*) there is a Rule

for the *Wardship* of the Heir in *Gavelkind*, and that he shall not be married by the Lord. And those Customs say of themselves, that they were *devant le Conqueste, e en le Conqueste*. The words in *Lambard* be *devant le Conqueste, e en le Conqueste, e toutes heures ieskes en ca*. That is before the Conquest, and at the Conquest, and ever since till now: Which word *now* relateth to the 21 of *Edw. I.* there immediately before mention'd. And to save the Credit of the Author, must be favourably understood to be meant of such Customs, as were in use either before the Conquest, or at the Conquest, or at any time since, in the disjunctive not in the aggregative. For if it be taken conjunctively, then is it notoriously false, for some things mention'd in it had their Original under *Hen. II.* as the Grand Assize, and Justice of Eyre, whereof that of Eyre was not instituted till the Council (or Parliament as we now call it) of *Nottingham, An. Dom. 1176, viz.* in the 22 or 23 of *Hen. II.* And for that of the Grand Assize, it is expressly said in the Customs, that it was granted then by *Hen. III.* Many other things there be, as the Office of the *Crowner*, the manner of *Essoyning*, *Writ of Cessavit*, &c. which I suppose was never heard of before the Conquest. But if you mark it, the words in question, *viz. devant le Conquest, &c.* stand in *Lambard* at a little more distance than the Lines precedent, as if himself conceiv'd them not to belong unto the Text of Customs. And to clear the doubt in the elder Edition^a publish'd by *Tottill* 12. June 1556. no such thing is mention'd; but if it were, there are such other differences in their Copies as both their Authorities may be question'd, and I in the mean time well delivered from this objection. Let us see what followeth.

Fourthly, For the Antiquity of *Wardships* in *England* and *Scotland*. "See *Wardship in Scotland.* "also (says the Report^b) *Hector Boet. lib. 2. Buchanan rerum Scot. lib. 6.* "and the Laws of *Malcolm II.* which prove the Antiquity of *Wardships* in "Scotland and in *England* before the Conquest. For in those times it is "probable the Laws of both Nations did not much differ; as for the times "after it appears they did not, by comparing their *Regiam Majestatem* with "our *Glanvil*. Neither is the bare Conjecture of Sir *Henry Spelman* sufficient to take away the force of those Laws, *Vid. Spelman's Glossary verbo* "Fendum. Upon all this (saith the Report) they (the Justices of Ireland) did "conclude and proceed to Sentence." With the Sentence (as a sacred thing) I will not meddle. But as touching that part of this Argument which --- *In Hector Boethius.* *nostros fabricata est machina muros* --- I'm tyed either to answer or to submit. For *Hector Boethius* therefore, I confess the place to be truly alledg'd, (and that hitherto hath seldom happened) but for the Credit of that Author I wish *Leland* were alive to deliver the censure he hath left upon him with his own Mouth: I forbear it. True it is, he relateth that *Malcolm II.* gave all his Lands well nigh unto his Nobility in Reward of their Service, and that they in Thankfulness to support his Dignity, regranted unto him, *Vardam, Desponsationem, & Releviam al. Relevatam*, *Wardship*, and *Marriage* of their Heirs within Age, and Relief of those of full Age. The Paragraph there is long, but to the effect we spoke of. It is also true that *Buchanan* doth report the like, and since him *Camerarius*, and a little before them all *Johannes Major*; but all their harping is from the sound of one String, which in the Report is not left unstrain'd, *i. e.* the Laws of *Malcolm* before mention'd, where it is said, that *ad Montem Placiti in Villa de Scona omnes Barones concesserunt sibi Wardam, & Releviam de Hærede cujuscunque Baronis defuncti ad sustentationem Domini Regis*. Which because they concern a noble Kingdom, and have been received as authentical by an ancient Parliament, I will not presume to contradict it. But I humbly offer to the consideration of the Learned of that Kingdom, and to those of ours and theirs that are conversant in Antiquities, these particulars following.

^a P. 37. Sect. 160. ^b Par. II. cap. 8. p. 301. ^c P. 123, c. 124. ^d Lib. insrat. Tit. Challing. fol. 1156. ^e p. 37. for

^a Pag. 571. ^b P. 584. ^c Fol. 148. ^d Pag. 58. ^e P. 38.

The Authority of Malcolm's Laws questioned.

First, It being agreed (which the *Scots* affirm) that *Malcolm II.* began his Reign in the year 1004. (*i. e.* above sixty years before the *Normans* conquer'd *England*) how it cometh to pass that *Malcolm* used so many *Norman* words in the *Scottish* Laws, and whether those words be found in any other Monument there before: For in *England* it was not so.

Secondly, Whether their Kings then had not only a *Seal* but *Magnum Sigillum* in the Custody of the Chancellor, and *set-fees* appointed for the use of it; for in *England* it was not so, tho' *Edward* the Confessor had a *Seal* after *Malcolm's* time.

Thirdly, Whether they had *Brevia clausa in cera*, and other ordinary Instruments seal'd *cum Magno Sigillo*, and *Fees* appointed for it; for in *England* it was not so.

Fourthly, Whether they had solemn Presentations to Churches and Hospitals under Seals in that manner; for this was long before the Council of *Lateran*.

Fifthly, Whether they had then the Names of Barons, *Seneschallus*, *Constabularius*, *Mareschallus*, (not in use in *England* in the time of the Confessor) as appeareth, for the two latter, by the *Appendix* to the Confessor's Laws^k; and for their *Seneschallus* called their Steward, *Buchanan*^l says he was brought in by *Malcolm III.* into *Scotland*.

Sixthly, Whether the *Norman* Officers of *Iusticiarius*, *Viccomes*, *Coronator*, *Ballivus*, &c. were then in use by any other Proof than by or from these Laws; & sic de ceteris.

The Agreement of the English and Scotch Laws.

Many other things I pretermit, and take no Exception to the frequent mention of *Pounds* and *Shillings*, tho' I think they were scarce with them in *Scotland*; as not abundant then in *England*, but paid in *Truck* and *Cattel*. But I admit that which the Report saith, that in those times it is probable the Laws of both Nations did not much differ. As for the times after, it appeareth they did not, by comparing their *Regiam Majestatem* with our *Glanvil*. They run much (I confess) *paribus vestigiis*, and oftentimes *totidem verbis, iisdem paragraphis*. Whether of them leads or follows the other, I dare not define and am loath to dispute. The Preface to the *Regia Majestas* sheweth it to be written at the command of King *David*; whom *Skeneus* in his Annotations calleth the first, and saith, he began to reign *Anno 1124. i. e.* 24 or 25 of *Hen. I.* And 'tis certain that our *Glanvil* was not written till the time of *Hen. II.* who began not to reign till 1154. so that if this be true, it must needs follow that we took a great part of the Model of our Laws, or at least the Expression of them from the *Scots*, (which our Ancestors never yet acknowledg'd.) It may perhaps fall out (upon better Examination) that *David I.* may be mistaken for *David II.* But for the part of *Malcolm II's* Laws, which speak of *Wardship*, *Marriage* and *Relief* in *Scotland* at that time to have risen from their own Nobility; *Buchanan* himself recedeth from that Opinion, and concludes, *Hunc morem ab Anglis & Danis potius acceptum credo: Quod in tota Anglia & parte Normanniae adhuc perseveret.* And *Demster* himself their greatest Antiquary, ingenuously confesseth, that there were no *Barons* in *Scotland* till *Malcolm III.* created them. And he might well take his Precedent from the Conqueror, for he liv'd all the time of the Conqueror, and about seven years after: So that if there were no *Barons* in *Scotland* in the time of *Malcolm II.* as *Demster* affirmeth, or the Precedent taken out of *England* for *Wardship*, as *Buchanan* believeth; then could not this Law be made in *Malcolm II's* time, but seemeth rather (by both their Opinions) to be ascrib'd to *Malcolm III.* and that the Error hath risen (as easily it may) in writing II. for III. But in the mean time all this makes no Proof against me.

^k Fol. 112. a. ^l Lib. 7. f. 75. b.

CHAP. XV.

No Marriage of Wards.

AS for *Marriage*, it is here and in some other Places mention'd by the Report, but not a Word any where to prove that it belonged to the Lord in the Saxon time. I will help them with what I meet in the old MS. Book of *Ramsay*, Sect. 120. where it is said, that one *Edwine* Son of *Othulf* gave five Hides of Land to Archbishop *Odo*, *Pro eo quod Regem Eddredum inflexerat, ut ei liceret Filiam cujusdam Viri Vls quam concupiverat, maritali sibi fœdere copulare.* Here it appeareth that the King's Licence or good Will was sought, but the Reason appeareth not. The good Will of King *Solomon* was sought that *Abishag* might be given to *Adonijah* for his Wife, but not in respect of *Tenure* in either Case. It is an express Law of King *Canutus* (L. 72.) ne nýðe man naðer þýr ne mæðen, &c. "That no Man should constrain either Woman or Maid to marry otherwise than where they will, nor shall take any Money for them, unless by way of thankfulness some do give somewhat." If these Passages carry any shew of *Wardship*, I must still let you know that *Knights Fees* were not at this time descendable unto *Women* by the feudal Law, no nor long after, when they were become hereditary in the masculine Line, *Ne à Lancea ad Fusum Hereditas pertransiret*, as you may see by *Cujacius* in *Feud. Lib. 1. Tit. 1.*

The first Law that I meet with touching feudal Marriages is in *Magna Charta Libertatum Hen. I.* yet is there nothing spoken of marrying the Heir Male of the King's Tenant within Age. And touching the Female Issue it is only provided, that the King should be so far acquainted with their Marriage, as that he might be assured they should not marry with his Enemies, lest the *Feuds* or *Feifs* which were given for Service against them, should by this occasion be transferr'd to them. Hear the words of the Charter. *Et si quis Baronum meorum, vel aliorum Hominum meorum Filiam suam nuptui tradere voluerit, sive Sororem suam, sive Neptem, sive Cognatam, mecum inde loquatur; sed nec ego aliquid de suo pro hac Licentia accipiam, nec defendam ei quin eam det, excepto si eam velit jungere meo Inimico. Et si mortuo Barone vel alio Homine meo, Filia Heres remanserit, & sine Liberis fuerit, Dotem suam & Maritacionem habebit, & eam non dabo Marito, nisi secundum velle suum &c.* Ordaining, that the Wife shall be Guardian of the Childrens Lands, or some near Kinsman, *qui iustus esse debet*; and that other Lords observe the like courses touching their Wards.

Thus among the *Normans*: But I don't find in all the feudal Law of these times, any thing founding to this purpose, nor any mention of *Marriage* or *Wardship* of the Body or Lands. I take them therefore to have risen from the *Normans* a little before their coming into *England*, but in a diverse manner, according to the Diversity of the Places, and the moderate or covetous Disposition of the Lords. For it seemeth that tho' the Profits of the Land belong'd wholly to the Lord, and were therefore ordinarily so taken by him; yet some of the Lords deducting only the Charge of Education of the *Ward*, and just Allowances, restor'd him his Lands at full Age, with the surpluse upon Accompt. And the Grantee of a *Wardship* from the King, was in *Normandy* tyed to do it, as appeareth by the 215. Artic. of the reformed Customs; for otherwise they were not Guardians properly and *Tutores rei Pupillaris*, but *Fructuarii* rather, and *suum promoventes commodum*. See the Comment to that Article.

So

beon hepegeata forgyfene: which is thus, *verbatim*, "The Man that in a military Voyage is slain before or in the presence of his Lord, be it upon Land or off of Land, let the *Heriots* be forgiven him." He saith not, let the *Reliefs*, but let the *Heriots* be forgiven him, and I deny not but this might be one of the *Danish* Laws which *Edward* the Confessor took out of *Canutus's* Laws when he compos'd the *Common Law* out of the *West Saxon* Law, *Mercian* Law, and *Dane* Law, if the copies of them were extant; and it is very probable that *William* the Conquerour (or one of his Sons) did turn that Law of *Heriots* into this of *Reliefs*.

For that which my Lord *Coke* hath out of *Doomsday*, is the same which Mr. *Camden* hath in *Barkshire* touching all that Country. *Ut Tainus vel Miles Regis Dominicus moriens, pro Releviamento dimittebat Regi omnia arma sua, & Equum unum cum sella, & alium sine sella; quod si essent canes vel accipitres, prastabantur Regi, ut si vellet acciperet.* Here is *Releviamentum* us'd in the Conquerours time, (which I doubt not,) but our Question is of it in the time of the *Saxons*. That also cited by and out of Mr. *Selden* is of the same Nature, and one Answer therefore serveth to all the three. Yet by way of Corollary, I shall anon discover another Error of this sort, rising even from *Doomsday* it self and the *Normans* possessing this Kingdom of the *Saxons*, but not well instructed in their Laws and Customs: which is as followeth.

CHAP. XVIII.

Differences between Heriots and Reliefs.

Heriots were usual among the latter *Saxons*: *Reliefs* among the elder *Normans* before their coming into *England*. This according to the Custom of the *Feudal Law*, and other Nations: That ordain'd by *Ludovicus al. Clodoveus* King of *France* about the year 511. to tame the *Almans* whom he then had brought to Servitude. I find it not in *England* till the Sovereignty of the *Danes*. The first Laws (which I find) that mention it, are those of *Canutus* before mentioned, who perhaps for the assurance of his Throne us'd this politick Device to have all the Armour of the Kingdom at his Disposition in this manner, when he had dismissed his *Danish* Army. But it falling so out as the *Heriot* being to be paid at or after the death of the *Old Tenant*, and the *Relief* at or before the entry of the *New*; the *Normans* in this did like our Ancestors the *Saxons*, who, because our Christian *Pascha* or *Passover* fell out yearly to be celebrated about the time of the Feast of their Idol *Easter*, call'd our *Passover* by the name of their *Easter*; so they seem to have conceiv'd the *Saxon heriot* to be the same that their *Norman Relief* was, and therefore translated the Word *Heriot* by *Releviamentum* or *Relevium*, and raising the form of their *Feudal Law* in *England*, drew the *Saxon* Customs to cohere therewith as much as might be. But there is great difference between *Heriots* and *Reliefs*; for *Heriots* were *Militie apparatus*, which the Word signifieth, and devised (as I said before) to keep the conquered Nation in Subjection, and to support the publick Strength and military Furniture of the Kingdom: the *Reliefs* for the private commodity of the Lord, that he might not have *inutilem proprietatem* in the Seignory. The *Heriots* were therefore properly paid in Habiliments of War; the *Reliefs* usually in Money: The *Heriot* for the Tenant that died, and out of his goods; the *Relief* for the Tenant that succeeded and out of his Purse. The *Heriot* whether the

* *Brañon* fol. 84. a.

Son or Heir enjoy'd the Land or not: the *Relief* by none but him only that obtain'd the Land in Succession. The *Heriot* whether the Land were fallen into the Lord's Hands or not: the *Relief* in old time not unless it were fallen and lay destitute of a Tenant, whose taking of it up out of the Lord's Hands was in that sense called *Relevium* or *Relevatio*, a taking up of that was fallen, according to the French word *Reliefe*. * *Brañon* well observ'd the difference, saying, *Fit quædam præstatio quæ non dicitur Relevium sed quasi, sicut Heriotum quasi loco Relevii, & quod dari debet aliquando ante Sacramentum Fidelitatis, aliquando post.* *Hotoman*¹ saith, *Relevium dicitur honorarium (Munus) quod novus Vassallus Patrono introitus causa largitur; quasi morte alterius Vassalli vel alio quo casu Feudum ceciderit, quod jam à novo sublevetur.* (*Nov. Leo. 13. his dextris nominat.*)

I stand the longer herein, for that not only the Report but even *Doomsday* it self and generally all the ancient Monkish Writers, have confounded *Heriots* and *Reliefs*. Yet I might have saved all this Labour, for nothing can make the Difference more manifest than that we often see both of them are together issuing out of the same Land. But when all is done, neither is *Heriot* nor *Relief* any Badge of Land holden by *Knight's-service* or in *Capite*, for both of them are found in Lands of ordinary *Socage*. Yet I confess that *Brañon* saith^m, *de Succagio non datur Relevium*; and a little before, *Sed occagio non competit Domino Capitali Custodia nec Homagium: & ubi nulla Custodia, nullum Relevium, sed è contra.* But this serveth my turn very well; for that they in the Report having fail'd to prove that *Reliefs* were in use in the *Saxons* time, (whereof they affirm'd they had full Testimony) it now inferreth on my behalf that if *Reliefs* and *Wardships* were not in use among the *Saxons*, that then also *Tenure* by *Knight-service* was not with them.

Besides all this, the *Heriot* was a certain Duty and settled by Law, the *Relief* so various and uncertain, as the Lords exacted what they list'd for it when it fell into their Hands; constraining the Heir of the Tenant, as it were to make a new Purchase of their *Feud*; whereupon the Feudists called this *Relief* not only *Renovatio* and *Restauratio Feudi*, in *Greek* μετακαμψις, turning or bringing back of the *Feud* to the former Condition or proper Nature of it; but also *Redemptio*, a Ransoming of it out of the Lord's Hands. That it thus stood with us in *England* by and by after the Conquest, appears by that we have shewed before out of the *Magna Charta* of *Henry I.*

CHAP. XIX.

No Fines for Licence of Alienation.

Toucing Fines for *Licence of Alienation*, it is not said what kind of Tenants among the *Saxons* did pay them, nor for what kind of Land they were paid. The *Thane-land* hereditary is apparently discharg'd thereof by the ordinary words of their Charters before mention'd, where 'tis said, that the Owners of Lands may give and bequeath them *cuiunque voluerint*, and that freely, *ab omni munduali Obstaculo*. *Doomsday* also (as we here shewed) doth testify as much, and so doth the very word *Alodium*, which the ancient Authors attribute to these Lands. So that the *Thane-lands* doubtless were free both from the Fine and Licence.

But as touching *Folcland* and Land holden at will of the Lord, tho' continued in ancient time to their Children after the manner of *Copy-holds*; it is

* *Brañon* fol. 84. a. num. 1. ¹ *Verb. Feudal.* ^m *Fol. 85. n. 8.*

no question but that they might both have *Licence for aliening* such Lands, and also pay Consideration for it; as our *Copy-holders* do at this day. I find that one *Brietrick* in the time of King *Ethelred* about the year 984. bequeath'd Legacies of good value unto his Lord's Wife, to intreat her Husband that this *Brietrick's Will* (whereby he had devised many Lands and Goods to Monasteries and divers Men) might stand. And that *Thola* the Widow of *Urke* a *Thane* of *Edward* the Confessor, obtain'd Licence from the same King *Edward*, that she might devise both her Lands and Goods to the Monastery of *Abbotsbury*. But of what Nature these *Licences* were, whether to alienate the Land, or to make a Will, or to give the Land to Monasteries as in *Mortmain*, I cannot determine. If they only intended Alienation, then I understand them only of *Lands* holden (according to the Custom of the Time) at Will of the Lord, or *Folcland*. Yet in that *Thola's* Licence was as well to bequeath her Goods expressly as her Lands; the Licence seemeth to be given therefore to make a Will, which no Man then could do if not a *Thane*. (*Quere.*) But howsoever it be expounded, it must not be extended to the *Thane-lands* or *Land hereditary*, for the reasons before alledged.

And as touching *Fines* for *Licence of Alienation* after our manner (which the Report suggesteth) they could not doubtless be in use among the *Saxons*; for there are not found (as I suppose) here among us before the Time of *Edward I.* and not established afterwards 'till 1 *Edw. III.* where the King granteth that from thenceforth Lands holden in *Chief*, should not be seized as forfeited (which formerly they were) for *Alienation without Licence*, but that a reasonable Fine should be taken for the same. See the Statute.

CHAP. XX.

No Feodal Homage among the Saxons.

Feodal Homage.

OUR word *Man* and *Homo* in Latin, have for many Ages in old time been used by the German and Western Nations for a Servant or Vassal. And from thence *Hominium* and *Vassaticum*, afterwards *Homagium* was likewise used for *Hominem agere*, to do the Office or Duty of a Servant; (not to signify *Manhood* as some^b expound it,) and so also *Vassalagium*. But by little and little all these latter words have been restrained, to note no more than our ceremonial *Homage* belonging properly unto *Tenures*; which I met not with among our *Saxons*, nor any shew thereof in former Ages, unless we shall fancy that the Devil had it in his Eye when he offered to give unto our Saviour all the Kingdoms of the World, if he would fall down and worship him. For here he maketh himself as *Capital Lord*, our Saviour as the *Feodal Tenant*, the Kingdoms of the World to be the *Feud*, the falling (or kneeling) down to be the *Homage*, and the worshipping of him (consisting as the *Feodists* expound it in six Rules of Service) to be the *Fealty*. Pardon me this Idleness, but from such Missemblances rise many Errors.

Homage two-fold.

Homage (as we understand it in our Law) is of two sorts: one more ancient than the other called *Homagium Ligeum*, as due unto the King in respect of Sovereignty, and so done (*more Francico*) to King *Pipin* by *Tassilo* Duke of *Bavaria* about the year 756. The other *Homagium feudale* or *prædiale*, belonging to every feudal Lord, and not begun in *France* till *Feuds* were there made hereditary by *Hugh Capet*, nor in *England* till *William* the Conquerour did the like, as before appears. The Reason of it was to preserve the me-

^a Peramb. Kent, Tit. Mepham. ^b Coke Instit. par. 1 Sect. 85. fol 64. b.

mory

mory of the Tenure and of the Duty of the Tenant, by making every new Tenant at his entry to recognize the Interest of the Lord, lest that the *Feud* being now *hereditary* and new heirs continually succeeding into it, they might by little and little forget their Duty, and substract their Services, deny at last the Tenure it self. We see at this day frequent Examples of it; for by neglecting of doing Homage and those Services, Tenures usually are forgotten and so revolv'd to the King by *Ignoramus*, to the great Evil of their Posterity that neglect it.

But the *Saxons* having only two kind of Lands, *Bocland* and *Folcland*, neither of them could be subject unto *Homage*: for the *Bocland* (which belong'd properly to their *greater Thanes*) tho' it were *Hereditary*, yet was it *Alodium* and *libera ab omni seculari gravedine*, as before is shewed, and thereby free from *Homage*. And the *Folcland* being not otherwise granted by the King or his *Thanes* than at will, or for years, or for Life, the Tenant of it was not to do any *Homage* for it. For Justice *Littleton*^b biddeth us note, that none shall do *Homage* but such as have an Estate in *Fee Simple* or *Fee Taile*, &c. "For (saith he) 'tis a maxim in Law, that he which hath an Estate but " for term of Life, shall neither do Homage nor take Homage".

But admit the *Saxons* had the Ceremony of doing *Homage* among them, yet was it not a certain mark of *Knight-service*: for it was usual also in *Socage-Tenure*. And in elder Ages, as well personal Duty as a predial, that is done to Princes and great Men, either by *compulsion* for Subjection, or *voluntary* for their Protection, without receiving any *Feud* or other Grant of Land or Benefit from them. And he or they which in this manner put themselves into the *Homage* of another for Protection sake, were then called *Homines sui*, and said *commendare se in manus ejus* or *commendare se illi*, and were thereupon sometimes called *Homines ejus commendati*, and sometimes *commendati* without *Homines*, as in *Doomsday* often^c. Tho' we have lost the meaning of the Phrase, yet we use it even unto this Day; *Commend me unto such a Man*, which importeth as much as (our new compliment taken up from beyond the Seas) *let him know that I am his Servant*. See the quotations here annexed, and note, that tho' the *Saxons* did (as we at this Day) call their Servants and Followers *Homines suos*, their Men; yet we no where find the word *Tenure*, or the ceremony of *Homage* among them, nor any speech of doing or of respiting Homage.

CHAP. XXI.

What manner of Fealty among the Saxons.

SO for *Fealty*: if we shall apply every Oath sworn by Servants and Vassals (for *Fidelity* to their Lord) to belong unto *Fealty*, we may bring it from that which *Abraham* imposed upon his Servant, *put thy Hand under my Thigh, and swear*, &c. For the *Saxons* abounded with Oaths in this kind, following therein their Ancestors the *Germans*, who, as *Tacitus*^a saith, took *præcipuum Sacramentum*, a principal Oath to defend the Lord of the Territory under whom they lived, and to ascribe their own Valour to his Glory. So likewise the *Homines commendati* before mention'd, yea, the *Famuli ministriales* and Household Servants of Noble Persons, were in ancient times and within the Memory of our Fathers, sworn to be faithful to their Lords.

These and such other were anciently the Oaths of *Fealty*, but *illud postremum observandum* saith *Bignonius* (a learned French-man of the King's great Council) *Fidelitatem hodie quidem Feudi causa tantum præstari*; shewing

^a Tacitus Lib. 2. Cap. 1. §. 95. ^c North. Terra Will. Ep. & Terra Eid. fl. Spirawic. ^b Germ. §. 46.

F 2

farther

farther that *Fealty* was first made to Princes by the *Commendati* and *Fideles*, without any Feud given unto them, and that the Princes afterwards did many times grant unto them *Feuda vacantia*, as to their Servants: But whether the Oath of *Fealty* were so brought in upon Feodal Tenants, or were in use before, he doth not determine. In the mean time it hereby appeareth, that *Fealty* in those days was *personal* as well as *feodal* or *predial*, which imposeth a necessity upon them of the contrary Part in the *Report*, that if they meet with *Fealty* among the *Saxons*, they must shew it to be *feodal* and not *personal*; for otherwise it maintaineth not their assertion. I will help them with a pattern of *Fealty* in those times, where *Oswald* Bishop of *Worcester* granting the Lands of his Bishoprick to many and sundry Persons for three lives, reserv'd a multitude of services to be done by them, and bound them to swear, That as long as they held those Lands, they should continue in the commandments of the Bishop with all subjection. I take this to be an Oath of *Fealty*, but we must consider whether it be *personal* or *predial*. If *personal*, it nothing then concerneth *Tenures*, and consequently not our question. If *predial*, then must it be inherent to the Land, which here it seemeth not to be, but to arise by way of contract. And being *predial* must either be *feodal*, as for Land holden by *Knight-service*; or *Colonial* as for Lands in *Socage*. If we say it is *feodal*, then must there be *Homage* also as well as *fealty*, for *Homage* is inseparable from a *Feud by Knight-service*: but the Estates here granted by *Oswald* being no greater than for Life, the Grantees must not (as we have shewed) either *make* or *take* *Homage*. And being lastly but *Colonial* or in *Socage*, it is no fruit of a *Tenure in Capite by Knight-service*, nor belonging therefore to our Question. So that if *Fealty* be found among the *Saxons*, yet can it not be found to be a fruit of *Knight-service in Capite*, as the *Report* pretendeth it. See *Fidelitas* in my Glossary.

CHAP. XXII.

No Escheate among the Saxons. What in the Empire.

Scutagi-
um.

THE word *Scutagium* and that of *Escheate*, is of such novelty beyond the Seas, as I find it not among the *Feudists*, no not among the *French* or *Normans* themselves, much less among the *Saxons*. Yet I meet with an ancient Law in the *Novella* of *Constantine Porphyrogenita* (Emperour of *Greece* in the year 780.) that gives a specimen of it, though not the name. *Quadam esse Prædia militaria, quibus cohæret onus Militiæ, ita ut Possessorem necesse sit se ad Militiam comparare Domino indicante delectum: vel si nolit aut non possit se ad delectum exhibere, certam eo nomine Pecuniam fisco dependere, quæ Feudorum omnium Lex est, &c.* This tells us, that there were certain Lands to which the burden of Warfare was so adherent, that every Owner of them was tyed, upon Summons made by his Lord, to make his appearance therein, or else to pay certain Money by way of a Fine, as was common in all cases of Feodal Tenures.

Summons
in the
Empire.

This hath some shew of our *Escheate*, and might well have taken that name from the manner of Summons used in the Empire; which was by erecting a Post or Pillar, and hanging a Shield at the top thereof, an Herald proclaiming that all who held in this manner should at such a day attend the Emperour in his Voyage to *Rome*, for taking the Crown of *Italy*, or King of *Romans*; which the *Ligurine* Poet thus expresseth,^b

^a *Præsent. in Lib. 1. pag. 7.* ^b *Gunter. de Gest. Freder. 1. Lib. 2. p. 391.*

---Ligno

----- *Ligno suspenditur alte*
Erecto Clypeus: Tunc Præco Regius omnes
Convocat à Dominis Feudalia Jura tenentes, &c.

as we have shew'd in our Glossary *Verbo Feudum*. He useth *Clypeus* for a *Shield*, instead of *Scutum*; and from this *Shield* I say it might well be called *Scutagium*, as also from the Service performed in it *cum Hasta & Scuto*. Yet this Summons was not called *Schiltbannum* but *Heribannum*, that is *Indictio Exercitus*, not *Indictio Scuti*.

But to keep nearer the matter. First, our *Saxons* neither used the *Name* nor the *Rules* of the Norman *Escheate*; for they called their going to War upon legal Summons, *ripdræpe* and *utdræpe*, in Latin *Expeditionem* and *Profectionem*. Secondly, they were not tyed to any definite time of Abode, as for forty days, or more or less, but as the Law saith, *ppa a ðon ðeapn rý for gemenelicpe neobe*, so as need shall require for common Necessity. Thirdly, the Mulct or Forfeiture that the Tenant in *Escheate* incurred for not going forth upon that Summons, was uncertain among the *Normans* and us, till the Parliament assign'd it; but among the *Saxons* he that offended in *Ferdwite*, that is, in not going forth in the *Expedition*, was certainly fin'd at 120^s. Fourthly, whereas every Lord among us had the Fine assign'd by Parliament of his own Tenant for the Lands holden of himself; the King among the *Saxons* had the Fine aforesaid of every Delinquent, whose Tenant or Follower soever he were, by all the Laws of the Kingdom^d, that is to say, by the *West-Saxons* Law, by the *Mercian*, and by the *Dane* Law; tho' otherwise they differ'd^e in their *Heriots*, and many particular Customs. So that to talk of *Escheate* among the *Saxons*, is without all Colour or Probability as I take it.

CHAP. XXIII.

No feodal Escheate of hereditary Lands among the Saxons.

Escheats (of *Eschoeir* in French) signifieth things coming accidentally as on the by, or by chance. The *Feudists* therefore call them *Caduca* (à *cadendo*) and *Excadentias*; the black Book of the Exchequer *Escaetas*, *Excidentia* and *Excadentia*: But among our *Saxons* I find no word to express them either properly or paraphrastically. In our Law they be of two sorts, *Regal Escheats* and *Feodal*. *Regal* are those Obventions and Forfeitures which belong generally to Kings by the ancient Right of their Crowns and supreme Dignity. Thus King *David* gave the Lands of *Mephibosheth* accused of Treason, unto *Ziba* (tho' too hastily.) *Feodal* are those which accrue to every *feodal* Lord as well as to the King, by reason of his *Seignory*, and of all the Fruits of *Tenure* none so great as this (if we may call it a *Fruit*) where the *Feud* or Tree it self resulteth back unto the Lord. Let us see therefore if we find any of these *Feodal Escheats* among the *Saxons*.

There is a shrewd Text (I confess) in *Canutus's* Laws. *Qui fugiet à Domino suo vel Socio pro Timiditate in Expeditione navali vel terrestri, perdat omne quod suum est, & suam ipsius Vitam, & manus mittat Dominus ad Terram quam ei dederat, & si Terram hereditariam habeat, ipsa in Manum Regis transeat.* Here is the Appearance of a *Tenure*, of a *Feud*, of a *Forfeiture*, and of an *Escheate*. The *Tenure* lyeth between the Lord and his

Escheats.

Canutus's
Law exam'd.^c *Canut. Ll. ca. 10.* ^d *Canut. Ll. ca. 12, 13.* ^e *Ibid. ca. 69.*

fugitive

fugitive Vassal, whom the Saxons and Germans called his *Man*, we his *Tenant*; the *Feud* in the Land, *quam Dominus ei dederat*; the *Forfeiture*, *in fugiendo*, in the Vassal's running away; and the *Efcheat*, in the Lord's seizing of the Land: *Manus mittat Dominus in Terram quam ei dederat*: Let the Lord take back the Estate which he gave in the temporary *Feud*: But for the hereditary Land, he saith, *transeat* (non *redeat*) in *Manum Regis*. All this is nothing in our Case; for I declared in the beginning that our Question was fix'd upon such *Feuds* as the Law of *England* taketh notice of at this day, that is, of *Feuds* after they were become *hereditary* and perpetual, not of those mention'd by *Gerardus Niger*, which were temporary as at Will of the Lord, or for Years, or for Life, like them here intended by *Canutus*. This very Law observeth the Difference, and discovereth also that *Feuds* were not *Hereditary* in his time, and therefore giveth the *feodal Land*, being but a temporary Estate, back unto the Lord (in whom the *Reversion* was by Inheritance) as a *feodal Right*, but giveth the hereditary Lands unto the King as a *regal Efcheat*; for that there was no mean or intervenient Lord to claim them by any *feodal Tenure*, for that the hereditary Lands among the *Saxons* (otherwise called *Bocland*) were holden of no Body, nor subject to any *feodal Service*, (as we have often declared) and could not therefore *Efcheat* unto any *feodal Lord*. The *Kentish Custom of the Father to the Bough and the Son to the Plough*, suggesteth as much, and sheweth also to have been the general use of *England*, 'till the Conquerour introducing hereditary *Feuds*, put upon us therewith these greater *feodal Servitudes of Wardship, Marriage, Efcheats, &c.* So that the hereditary Lands not being *feodal* in the *Saxon's* time, nor the *feodal Lands* hereditary, there could then be no *feodal Efcheats* among them. And I take it to be considerable whether the Land resumed by the Lord upon his Vassal's running away, be properly an *Efcheat* by the Law of *Canutus*, or rather a Penalty only impos'd in this particular Case.

CHAP. XXIV.

Thaneland and Reveland what: no marks of Tenure but Distinctions of Land-holders.

Thanelands.

Reveland.

There is yet another Assertion, rather shewed than proved, 'That the *Thani majores* or *King's Thanes*, held by personal Service of the King's Person by *Grand Serjanty* or *Knight-service in Capite*. And the Reason following is, that the Land so held was in those times called *Thaneland*, as Land holden in *Socage* was called *Reveland*: So frequently in *Doomsday*, *Hæc Terra fuit Terra Regis Edwardi Thaneland, sed postea conversa est in Reveland*; *Coke's Instit.* §. 117. Thus the Report dischargeth it self upon my Lord *Coke*, whose words be these, "It is to be observ'd that in the Book of " *Doomsday*, Land holden by *Knight-service* was called *Thainland*, and Land " holden by *Socage* was called *Reveland*". I reverence the Opinion of that famous Lawyer with Admiration, but I suppose he speaketh not this *ex Tripode juridico*; for it is impossible, that it and that which is before deliver'd out of the very Charters of the *Saxon Kings* themselves, should stand together, *viz.* That their *Thanelands* should be *liberæ ab omni seculari Gravedine*, and yet be subject to that which of all other was most grievous, *viz.* our *Knight-service in Capite*. It may be answered, (as the Report^a in another place delivereth positively) "That *Tenure in Capite* cannot be transferr'd or extinct by Release or Grant; for it is an incident inseparably annexed to the Crown". The

^a Report p. 34.^b Herefordsc.^c Pap. 25. l. 2.

swer were good if once they had made it appear that both this *Tenure* and this *Law* were in force in the *Saxons* time. There is nothing shew'd to prove that Suggestion, and were it true I should desire no better Argument on my behalf than what the place it self bringeth with it. For if *Thaneland* were converted into *Reveland*, and that *Reveland* signify *Socage-land*, then it is as manifest as the Sun, that *Thainland* did not signify Land holden by *Knights-service in Capite*; for if it did, then could it not decline into *Socage-Tenure*, as their own *Maxime* doth demonstrate.

If there be a Cloud before this Sun, I shall remove it also. My Lord *Coke* citing this place out of *Doomsday*, noteth in the Margin *Herefordsc.* but delivereth both the Title and the Text by halves. The Title is *Hereford. Rex*; the Text thus; *Hæc Terra fuit tempore Edwardi Regis Tainland, sed postea conversa est in Reveland. Et idem dicunt Legati Regis quod ipsa Terra & Censuræ qui inde exit, furtim aufertur Regi*. The very Title discovers the *Tenure*, for if it be *Terra Regis*, (as the word *Rex* declareth it) then it is plainly *ancient Demesne*, and every Lawyer will tell us, that in *ancient Demesne* there was no *Tenure by Knight-service*, but wholly in *Socage*. So that this Cloud now vanisheth into the Air, and our *Tainland* is clearly discovered to be but *Socage*. I shall speak more of it afterwards.

But what Constructions shall we now find for the words in *Doomsday*, *Tainland conversa est in Reveland. (Hoc Opus, hic Labor est.)* It is sufficient for me to have quit my self of the Objection, they must seek some new Interpretation. Yet will I help them what I can in that also: I suppose that the Land which is here said to have been *Thaneland, T. E. R.* and after converted into *Reveland*, was such Land as being reverted to the King after the Death of his *Thane*, who had it for Life, was not since granted out to any by the King, but rested in charge upon the account of the *Reve* or *Bailiff* of the Mannour, who (as it seemeth) being in this Lordship of *Hereford*, like the *Reve* in *Chaucer*, a false Brother, concealed the Land from the Auditor and kept the profit of it to himself; till the Surveyors, who are here called *Legati Regis*, discovered this Falshood and presented to the King, that *furtim aufertur Regi*, as by the words in the latter part of the Paragraph (which my Lord *Coke* reciteth) appeareth. Besides all this, why should the coming of these Lands into the *Reve's* accompt, alter the Nature of the *Tenure*, seeing all Men know that the *Reves* and *Bailiffs* of Mannours govern and dispose the Lands thereof, as well which are holden by *Knight-service* as those in *Socage*.

As for the old French *MS. Customary* (which they affirm doth mention *Tenures by Knight-service* long before the *Saxons*, even in the time of the *Britains*;) I doubt not but there may be such a Passage in it; for the Law which they ascribe to *Edward* the Confessor for proving *Feuds* to be in use in his time, affirmeth also that the *Laws, Dignities, Liberties, &c.* of the City of *London* were at that day the same which were in *Old Great Troy*. But as they in the Report wave the one, so I take them both for *Romances*, and pass them over as not worth an Answer.

Having thus particularly answered every Argument, Inference and Objection, produced in the Report, to prove our *Feuds and Form of Tenures* to have been in use amongst our *Saxons*; I shall now conclude that it neither was nor could be so, unless we shall assume that our poor illiterate *Saxons* (in a Corner of the World) were the Authors of the *feodal Law*, and gave the Precedent thereof to the *Germans, Longobards, French, Italians*, and the *Empire*. For in none of these was it otherwise extant (till about the end of our *Saxon Monarchy*;) then by such Budds and Branches as we formerly have expressed out of *Cæsar, Tacitus*, and some other.

Coke's Citation false.

Sense of *Doomsday*.Tempore *Edwardi Regis*.

The French Customary.

Decurso autem præfati temporis curriculo, viz. duorum qui post eos qui eas modo possident Hæredum Vita spatio, in ipsius Antistitis sit arbitrio, quid inde velit, & quomodo sui velle sit, inde ita stet, sive ad suum opus eas retinere si sic sibi utile judicaverit, sive eas alicui diutius præstare, si sic sibi placuerit, velit, ita duntaxat ut semper Ecclesiæ Servitia pleniter (ut præfati sumus) inde persolvantur. Ast si quid præfatorum delicti prævaricantis causa defuerit Jurum; Prævaricationis delictum secundum quod Præsulis Jus est, emendet: aut illo quo antea potitus est Dono & Terra careat. Siquis vero Diabolo instigante, &c.

The import of the Charter.

The sum of all aforesaid is, that the Bishop's Tenants shall pay and do as followeth:

First, That they shall perform all Duties that belong to Horsemen.

That they shall pay all things that are due unto the Church, and perform all other Rights that belong to it.

That they shall swear to be in all humble Subjection at the Command of the Bishop, as long as they shall hold these Lands of him.

That as often as the occasion of the Bishops shall so require, they shall present themselves to be ready for it, and shall both furnish him with Horses and ride themselves.

That of their own accord they shall be ready to perform all the Work about the Steeple of that Church, and for the building of Castles and Bridges.

That they shall readily help to fence in the Bishop's Parks, and to furnish him with hunting Weapons, when he goeth a hunting.

That in many other cases when the occasion of the Lord Bishop shall require, whether it be for his own Service or for the King's Service, they shall in all Humbleness and Subjection be obedient to the chief Captain or Leader of the Bishoprick for the * Benefit done unto them, and the Quantity of Land which every one of them possesseth.

* Or Fee granted.

That after the Expiration of the three Lives, the Land shall return again to the Bishoprick.

That if there be any Defect in performing the Premises by reason that some shall vary or break the Agreement, the Delinquent shall make Satisfaction according to the Justice of the Bishop, or shall forfeit the Land which he had of his Gift.

I suppose that this was the common manner of Grants and Reservations in those times, and that they were not made otherwise than for Life or three Lives, for so I find them in the Abby-books. And I also suppose that they to whom these Lands were granted, were the *Thani Episcopi* & *Thani Ecclesiæ* spoken of in *Doomsday-book*, and that the Lands themselves were such as in the same Book are usually called Thane-lands, *Ecclesiæ*, *Episcopi* and *Abbatis*.

But I see they were laden with many Services which the Lands of the King's Thane, in respect of his Dignity and Person, were free from. Therefore when this very Bishop by another Charter granted *tres Cassatas*, three Hydes of Land in *Cungle*, *cuidam Ministro Regis*, to one of the King's Thanes nam'd *Alfwold*, and to his Mother (if she surviv'd) during their Lives, he put no Service upon the King's Thane, but saith *plena gloriatur Libertate, excepta Expeditione rata, Pontis Arcisque Constructione*: the common Exception in Grants unto the King's Thanes as before appeareth; and yet the Services thereby excepted belonged not either to the Bishop or the King himself, otherwise than *pro Bono publico* and common Necessity.

After all this I beat still upon the old String, that here yet is nothing to prove *Wardship* or *Marriage*, or (as the Law then stood) a *Tenure by Knights-service*: for we have made it manifest that *Expedition* and building of *Castles* and *Bridges* were no *Feodal Services*, nor grew by *Tenure*. And as for these that were tyed to ride and go up and down with their Lord, *Baraterius*

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CHAP. XXVII.

Inducements to the Conclusion.

Seeing then that neither the *greater Thanes* nor the *lesser Thanes* among the *Saxons* were subject to the Rules of our *Knight-service*; upon whom then (if it were in use among them) did it lye? For as touching the Clergy it is said in the Laws of *Edw. the Confessor*, cap. 11. that the King and the People *magis in Ecclesiæ confidebant Orationibus quam in Armorum defensionibus*. And the Report it self confesseth (*pag. 3. in pede*) "That the Possessions of Bishops and Abbots were first made subject to *Knight-service* in *Capite* by *William* the Conquerour in the fourth year of his reign: for their Lands were held in the times of the *Saxons*, *In pura & libera eleemosyna*, free *ab omni Servitio seculari*. Though this be not true in the latter Part, being strictly taken, (for no doubt their Lands were subject to the *Trinodi Necessitati*, viz. *Expeditioni*, *Pontis Arcisque Constructioni*, as before appeareth,) yet cometh it very fitly to my purpose: for hereby it is evident that if the *Trinodi Necessitas* made no *Tenure by Knight-service* or *in Capite* in the Church Lands, then neither did it in the *Thane-lands* (as before we have shew'd) and then much less in the Land of *Churles* and *Husbandmen* commonly call'd the *Socmanni*; for it is agreed on all hands that their Lands were holden no otherwise than by *Socage*. Therefore if all *Kent* in the *Saxon's* time were *Gavelkind*, then could there be no *Tenures by Knight-service* in all that County. For *Glanvil* (*Lib. 7. c. 3.*) telleth us, "That where the inheritance is dividable among the Sons, it is *Socage*: And his Reason is, because that where 'tis holden by *Knight-service* the *Primogenitus succedit in toto*. This *Kentish* Custom was *ab initio* the general Law of *England*, and of all Nations, *Jews*, *Greeks*, *Romans*, and the rest, and so continueth even till this Day, where the *Feodal Law* hath not altered it; which first happen'd here in *England*, when the *Normans* introducing their *Feuds* settled the whole inheritance of them upon the eldest Son, which the ancient *Feodal Law* it self did not (as we before have noted) till *Feuds* were grown perpetual. The Reason as I take it that begat this alteration, was for that while the *Feud* did descend in *Gavelkind* to the Sons and Nephews of the *Feodatorie*, the Services were suspended till the Lord had chosen which of the Sons he would have for his Tenant, and then it was uncertain whether the party chosen would accept of the *Feud* or not; for sometimes there might be Reasons to refuse it.

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* *Lib. de Feud. Cap. 1. p. 8.*

To return where I left; it makes to the proof of all this that has been said, and (for conclusion) seems to be unanswerable, that the old Inheritance which in the Saxons time belong'd to the Crown, call'd in *Doomsday Terra Regis*, and in the Law books *Ancient Demesne*, containing a great Part of every County, had not any Lands within it (or within any manor thereof) holden by *Knight-service*. For *Fitz-Herbert* saith, that *Nul terres sont antient demesne forsque terres tenus en Socage*. And therefore if the Tenant in ancient Demesne will claim to hold of the Lord by *Knights-service*, it is good cause to remove the Plea, because that no Lands holden of a Mannor which is *ancient Demesne* are holden by other Services of the Lord than by *Socage*: for the Tenants in *ancient Demesne* are call'd *Socmanni*, that is to say, *Tenants del carve*, Angl. *le plough*: Thus far *Fitz-Herbert*. Now if in the Mannors of the King himself, there were then no Lands holden by *Knight-service* throughout all *England*, it will then in all probability follow, that there were none likewise among his Subjects in the Saxons time, and consequently that our *Feudal Law* was not introduc'd before the Conquest. Mr. *Camden* by their own Confession is of the same Opinion; and Mr. *Selden* himself whom they alledge against me, is clearly with me; as before I have shew'd.

If these our three Opinions avail nothing, we have yet a fourth to strengthen us, great *Bracton* the most learned in our ancient Laws and Customs, that hath been in this Kingdom; who speaking of *Forinsecum servitium* as the Genus to these Tenures, saith, *Lib. 2. cap. 16. Nu. 7. fol. 36. a.* that it was call'd *Regale Servitium, quia spectat ad Dominum Regem, & non ad alium, & secundum quod in Conquestu fuit adinventum*. Here *Bracton* also refers the Invention to the Conquest, but the Report waveth his Opinion as well as ours, notwithstanding his great Knowledge, and that he liv'd nearer to the Conquest by two third Parts of the time than we do.

Well, there is yet an elder, and one that might see some that liv'd in the Conquerour's time, the Author of the *black-book* of the Chequer: who speaking of the *Saxon* Laws and those of the Conquerour saith, *Cap. 16. fol. 16. b. Quasdam reprobavit, quasdam autem approbans, illis transmarinas Neustrie (id est Normannie) Leges, quæ ad Regni pacem tuendam efficacissime videbantur, adjecit*. What were those *Neustrian* Laws or what could they be (in all the books of the Law) for preserving Peace, save *Military Tenures*? And the Exchequer it self, where the cognizance of all these Tenures lyeth, was brought in also by the Conquerour.

But *Ingulphus* the Abbot of *Croyland*, liv'd long in the Conquerour's time, and was one of his Domesticks or Familiars, as he termeth himself. And by him it appeareth that the Conquerour nor only generally dispossest the Saxons and gave their Lands to his Normans and others, but chang'd also their manner of conveyance, the form of their Charters and the Course of making Knights, whereupon all the Rules of *Knight-service* have since depended. See his words *p. 901*. For at that time *Miles & per militiam tenens* were all one by *Glanvils* Testimony, *Lib. 7. cap. 3. p. 49*.

But when all fails, I hope they will believe the Conquerour himself, who in a Charter of his Laws and a great Council of the Kingdom, which we now call a Parliament, publish'd by Mr. *Lambard*, useth these words.

Statuimus & firmiter præcipimus, ut omnes Comites, & Barones, & Milites, & Servientes, & universi liberi homines totius Regni nostri prædicti, habeant & teneant se semper bene in Armis, & in Equis, ut decet & oportet. Et quod sint semper prompti & parati ad Servitium suum integrum nobis explendum & peragendum, cum semper opus adfuerit, secundum quod nobis debent de Feodis & Tenementis suis de jure, facere, & sicut illis statuimus per commune Consilium totius Regni nostri prædicti, & illis dedimus & con-

is in a differing Letter from the rest of the Text, and not found in the Copy left unto us by *Roger Hoveden*. I acknowledge it, but I see that here every thing agreeth with the Manners, Laws, Time, and Idiom of the Conquerour: And I conceive that it is fallen out as it did of old in the Councils of *Nice* and *Sardis*, and many other too, several Councils to be joyn'd together. For *Hoveden* mentioneth his copy to be *Decretum in Civitate Claudia*, that is *Gloster*: but *Lambard* his, to be in *Civitate Londra, London*: so that they seem two several Constitutions made at several Times and Places, and here put together into one. Howsoever it be, 'tis very observable; for it discovereth that which elsewhere we meet not with so perspicuously related, That the great Dignities of Earls and Barons or Ministerial Thanes, which before were arbitral or but for Life, and those also of the lesser sort (which enjoy'd the *Knights Fees* no otherwise than in the same manner) were either now erected with us or made hereditary, according to the Testimony of the Feodal Law before recited. 'Till now therefore there could no *Wardship, Marriage, Relief*, or other *Feodal Servitudes* (thereupon depending) be amongst us; nor could the word *Feodum* be taken for *Hereditas*, the one being formerly contrary to the other. For *Cujacius* and the Feudists, *Feud. Lib. 2. Tit. 17. p. 166.* make *Proprietas, Alodium, & Hereditas* to be all one in feodal Sense; and *Feodum* to be contrary to them all, as *res aliena Proprietatis, Servituti obnoxia, & Successionis coercita*; and being until this time not hereditary but arbitral.

The course being thus chang'd by the Conquerour, was presently pursued here in *England* according to the *Norman* manner as appeareth in *Doomsday*, where it is said, *Habet— in eodem Feudo de W. Comite Radulpho de Limes 50 Carucat. Terra sicut fit in Normannia*. He joyneth *Normannia* with *Feodum*, as to shew us whence it came, and where we should see the pattern of it.

The old *Saxon* manner of dividing the Kingdom by Hydes, and levying Souldiers according to the Hydes grew now out of use; and instead thereof the Kings Wars to be supplied by *Knights Fees*, the Number whereof shortly after were accompted, as *Sprott* the Monk of *Canterbury* relateth, to 60215. and of them he saith 28115. were in the Clergy's Hand. The Normans also chang'd the name of an Hyde of Land and call'd it *Carrue, a Plough Land*, and as it seemeth in erecting and laying forth their *Knight's Fees*, assign'd ordinarily two *Carrues* or *Plough lands* to a Knight's Fee. For 'tis noted out of the *Black Register* of St. Edmunds-bury, that *Will.* the Conquerour gave to *Baldwin* then Abbot there, *octoginta carucas Terra unde feodaret quadraginta Milites*. And according to the rate of so much Land in those times, is a *Knight's Fee* at this day valued in the Law books but at five pounds.

CHAP.

* Nat. br. droit, case 13. D.

CHAP. XXVIII.

The Conclusion.

I Will wander no further in this Argument; I suppose I may be bold (out of that which is already said) to conclude that I was not mistaken in referring the Original of our *Feuds* in *England* to the Norman Conquest: and that my conjecture doth not cross the force of any Law. But now I come to an end, I must discover a great Mistaking committed by him that drew the Breviate for the Reverend Judges; for he hath made us all on both sides, like *Pan* in *Ovid*, to towse a Reed-sheaf instead of *Syrinx*, or like *Ixion* to embrace a cloud instead of *Juno*, to labour much about a firmis'd Assertion of his own, instead of that which I deliver'd. The truth is, I have no where refer'd the Original of *Feuds* in *England* to the Norman Conquest. Nay, when I spake of them, I said *habentur plurima, quæ apprime huc conducunt in Anglo-Saxonum nostrorum Legibus*, and this I still affirm; but my words which he hath much perverted are these, *Feodorum Servitutes in Britanniam nostram primus invexit Gulielmus senior*. It was neither my Words nor my Meaning to say, that he first brought in either *Feuds* or *Military Service* in a general sense, but that he brought in the Servitudes and Grievances of *Feuds*, viz. *Wardship*, *Marriage*, and such like, which to this day were never known to other Nations that are govern'd by the *Feodal Law*. There is great Difference between *Servitia Militaria* and *Servitutes Militares*: The one, Heroic, Noble and full of Glory, which might not therefore be permitted in old time to any that was not born of free Parents; no, not to a King's Son (as appeareth in *Virgil*) wherein our *Saxons* also were very cautelous, and accounted a Souldiers shield to be *Insigne Libertatis*: the other, not ignoble only and servile, but deriv'd even from very Bondage. Let not this offend: I will say no more.

30. Julii 1639.



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