

William Somner
A treatise of gavelkind
London
1660

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A Treatise
OF
GAVELKIND,
Both Name and Thing.

Shewing the true Etymologie and Derivation
of the one, the Nature, Antiquity,
and Original of the other.

With sundry emergent Observations, both
pleasant and profitable to be known of Kentish-men
and others, especially such as are studious,
either of the ancient Custome, or
the Common Law of this
Kingdome.

By
(A well-willer to both)
William Somner.

Virg. 2. Georg.

Fælix qui potuit rerum cognoscere causas.

Cranz. lib. 2. Metrop. 9.

Nemo sibi blandiatur de auctoritate veterum, quibus etsi fabulæ displicuerunt, non tamen habebant unde falsitatem earum coarguere possent. Sed nostra ætate crebrescentibus literarum monumentis, inexcusabilis torpor est in fabulis scientes, prudentesque permanere.

LONDON,
Printed by R. and W. Leybourn, for the Authour, and are to be sold by
John Croke at the Ship, and Daniel White at the Seven
Stars in St. Pauls Church-yard. 1660.

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THE PREFACE.

Courteous Reader,

It is now full eighteen years since,
by solemne promise, I became in=
gaged to my Countrey-men, upon
their good acceptance of certain
of my labours, in behalf of our City, where=
with I then presented them, to proceed to
the same, or some other such like underta=
king for the County; a thing, which as I
then really intended, so have I not since
wanted that encouragement for it from the
better sort (expressed by their courteous ac=

ception of those my former labours) which I could expect. But being soon after (*proh dolor!*) overtaken by that impetuous storm (of civil war) not yet quite blown over, causing the distraction, and threatening the destruction of this once renowned Kingdome, I was necessitated to betake my self to other thoughts, chiefly how I might secure my self against the fury, in warding off the danger,

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of the present storm; being not able, I confesse, to reach to that high pitch of sedulity and magnanimity, both in this kind to which the Grecian Socrates is said to have attained, whose thoughts were ever running on his book; insomuch, as but the very next night before he was to suffer death, (regardlesse of his so neer approaching danger, able to indispose the mind, discourage the industry, and shake the constancie of any common spirit) he was desirous to learn Musick, because (saith the Story) he would die still learning somewhat. Being therefore thus diverted, and utterly for the time discomposed for the performance of my promise, I hope not onely to be excused of my Countrymen for (what had not else been hitherto delayed) my County-undertaking, but also to obtain of them yet further respite, in hope of a better opportunity, for the discharge of that debt. For my more easie purchasing whereof at their hands, and that they and others may perceive, that I have not been altogether idle all this while; pitching in my thoughts upon our Kentish Custome of

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Gavelkynd, and being not unfurnished of matter in the progresse of my studies gleaned and gathered from old Records, enabling me, with the help of that little skill I have attained in the Saxon tongue (to the study whereof I was encouraged by my precious friend and ever-honoured Mecœnas, Dr. Casaubon, as is elsewhere by himself truly averred) to some more than vulgar discourse thereof; as a specimen and earnest of my further intentions for the County, I betook my self at spare hours to the perusal, resolving on the publication, of those collected notes and notions, disposing them so, that as they have to satisfaction informed me in the points proposed, so they may be of like use to others, willing to bestow their pains, and lay aside all prejudice in the perusal of them.

Kent, I considered, had been far and neer long celebrated for her Gavelkynd, though not so known either at home or abroad, whether in point of etymologie, or properties, (that especially of Partition, rendring it so incomparably famous throughout the Kingdome) as truth would. To wipe off there=

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(a) Nomina si
nescis perit &
cognitio rerum.
Isid. Orig. l. 1.
cap. 7.

Arist. 1. Phys.
& 2. Meta=
phys.

fore that dust of error, which time especially (that parent of corruption) hath contracted to it, I have in the present discourse laboured chiefly to assert what I conceive to be the true sense and derivation of the term, for the understanding of the (a) name; whence the properties, that especially here instanced, do proceed, for the better judging of the nature of it, according to that end propounded to my self in all my researches, which is to know things, not so much in their present as primitive state, more in their causes than effects: *Tunc enim* (saith the (b) Philosopher) *unumquodque scire arbitramur, cum ejus causas & principia cognoscimus.*

By the process and prosecution of the argument, having a fair and pertinent inducement, if not to treat, yet at least to touch upon, and take notice, as of the Saxons 'Bocland' and 'Folcland', so of the Feudists 'Feudum' and 'Allodium', (a pair of vocables, the latter, that have long and much perplexed many prime mens fancies to disquire and found out their true and proper derivations,

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to the occasion of great varieties in the point, each man abounding in his own, and that, for the most part, a different and singular sense) I thought it not amiss to make one in the number of such Etymologists, and although with singularity, I confess, and dissent from all the rest, yet perhaps so much to the purpose (*absit jactantia dictis!*) as, if not to hit the mark, yet at least to come so neer it as few before have done. Alike singular, as both here, and before in the derivation of Gavelkynd, so afterwards I may be found in that of Socage, yet I trust with so much truth, and that so fully evidenced, as will serve, I hope, to render me with the sober and ingenuous, worthy, if not of thanks, yet of excuse and pardon, if they differ in opinion from me.

Here also (good Reader) be advertised, that whereas, by occasion of our discourse in the third Proposition, concerning the Partition-property in Gavelkynd, I had *obiter*, or incidently, made some mention of the Writ, 'De rationabili parte bonorum,' some

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time (by means of that partition mentioned in the old Kentish Customal) obtaining, and now again (if the endeavours of some may take effect) reviving in this County; it came afterwards into my mind to think it would not be impertinent to the present Discourse, somewhat further to enlarge in that particular: that by enquiry made into the An=

tiquity, and tracing the progresse of the Partition intended by this Writ from its first birth until its full growth, we might be the better able to give judgment, & make the more probable conjecture of the present validity or invalidity thereof. My discoveries therefore being made and communicated to some judicious friends, not without their acceptation and my encouragement for publication, I have adventured to add them at the end of that third Proposition, pag. 91.

As for my thwarting the common opinion, concerning our composition with the Norman Conquerour, and the consequents of it, I offer no Apologie here, as having already made it in the proper place, and that, I also

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trust, so fully, as I may well expect to be excused of it here. In sum, loving truth (the end of all Science) for it self, and altogether unbyassed with any by-respects, whether of vain glory, singularity, or the like, I have made it my constant endeavour in what is here proposed and published, that Truth alone (than which saith the Philosopher, nothing is sweeter, nothing more precious) might triumph over Falshood, Antiquity over Novelty. If hereby I have done either of them any right, or any friends any pleasure, as the chiefest reward I expect for all, I shall desire that such a measure of respect may be vouchsafed, as to those old Records from whence the chief materials in this structure have been taken, so to that ancient learning which hath contributed fitting tools wherewith to work the same materials, and fit them for that use, as may secure and rescue both (uncapable of other recompence) from that scorn, neglect and contempt in the dayes of so much novelty so freely cast upon them, since by falling into

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some hands, so good an improvement may be made of them for the publike.

I may perchance (at first sight, at least) be thought too bold with the common Lawyers, too busie in their Common-wealth, too much meddling in matters of their peculiar Science; yet no otherwise, I hope, than that they and their friends may be willing to excuse me. I am one that honour their profession, and have here done or said nothing out of opposition; my intent being onely in my way to do them service, and their profession right, by holding forth to publike view some Antiquities tending at once to the satisfaction of the one, and illustration of the other. For which purpose I have by me some other things in a readinesse for the publike, and which shall not (God willing) much longer be retarded, in case these my present endea=

Idem 2. Metaphys.

vours (as my past have done) meet with any proportionable encouragement, and the times permit, by the continuance of our Counties peace, (Peace, I say, that mother of Arts:) which with an enlarge=

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ment and establishment of that blessing throughout the three Kingdoms, is a chief subject (courteous Reader) in the daily devotions of

Thine humble Servant,

William Somner.

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The Postscript.

The Reader is here further to be advertised, that both this Preface and the following Treatise were first written more than twelve years ago, have lain by the Authour ever since, and had not now come forth, but upon the encouragement of some worthy and judicious friends. If therefore any thing (whether for language or otherwise) in either the one or the other, seem improper, uncouth, or unsuitable to the present times, his patience and pardon is humbly craved and expected.

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To expedite such (in their perusal of this work) as are ignorant, but studious, of the Saxon Language, the Authour (although he have but lately set forth a Saxon Dictionary) hath thought it very fit here to prefix the Saxon Alphabet and Abbreviations.

a b c . . .

a b c . . .

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Errata.

Pag. 4. lin. 21. and customary. lin. 22. yeelded it. p. 18. l. 8. Bians. p. 21. l. 1. after Consuetudo. l. 18. Snave. l. 27. Shorham. p. 24. l. 18. Oale-gavel. p. 25. l. 2. Clyve. l. 16. Chartham. p. 26. l. 20. of it in that composition. p. 27. l. 5. rents and services. p. 29. l. 7. find it in. l. 28. to the Tenant, better. l. 31. Fremfeld. p. 30. l. 27. not alienable. p. 31. l. 21. Gamelletum. l. 25. Hervicus. p. 34. l. 10. rather say. l. 14. malam. l. 18. firmam. l. 20. construe. p. 36. l. 2. Counties. p. 37. l. 9. the which word. p. 38. l. 18. woruldcunde. *ibid.* eorpcunde. l. 27. of former times. p. 39. l. 13. Herlewinum. p. 55. l. 21. of times. p. 58. l. 14. æquivalentem. p. 72. l. 4. retained. p. 83. l. ult. construe it thus. p. 96. l. 2. Salvo. p. 117. l. 4. Drofmannus. p. 119. l. 8. Demesne. p. 123. l. 6. those and succeeding. p. 142. in marg. L. 1. ff. si ag. p. 162. l. 24. And as it is. p. 175. l. 1. priori. *ibid.* in marg. Burgor. apud Scotos.

Some literal and such like other smaller faults there are, besides mis-pointings: which being as easily amended as observed, are therefore here pretermitted.

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GAVELKYND.

Among the many singularities of Kent, that of so much note, both at home and abroad, commonly called Gavelkynd, may seem to bear away the bell from all the rest, as being indeed a property of that eminent singularity in the Kentish-mens possessions, so generally in a manner, from great antiquity, over-spreading that County, as England at this day cannot shew her fellow in that particular; yet so unhappy the whilest are both Kentish-men and others, in the right understanding both of name and thing, that although it be the daily subject of every mans discourse, even of all professions, yet remains it hitherto, both in the one respect and in the other, so obscure, and in so much want of further illustration to make it known, as if never yet by any seriously considered of. Purposing therefore to contribute my best assistance towards a right and full discovery; in order thereunto, and for my more methodical proceeding,

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I shall branch out my discourse into these five following heads or propositions: viz.

1. The true etymologie and derivation of the name, including a plain confutation of that which is commonly received.
2. The nature of Gavelkynd-land in point of partition.
3. The antiquity of Gavelkynd-custome, in point especially of partition, and why more general in Kent than elsewhere.
4. Whether Gavelkynd be properly a Tenure, or a Custome; and if a Custome, whether inhe= rent in the land or not.
5. Whether before the Statute of Wills (32 and 34 Hen. 8.) Gavelkynd-land in Kent were devise= able, or not.

PROPOSITION I.

The true etymologie and derivation of the name, including a plain confutation of that which is commonly received.

To begin with the first: (the true Etymologie and derivation of the name, &c.) By the common and received opinion of these dayes, obvious and easie to be found, both in the writings and discourses of Kentish-men and others, this Custome (as commonly called) owes its name and original to the nature of the land in point of descent. To consult (for instance) a few of the multi=

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tude of printed opinions looking that way, collected from the most eminent of our modern and late Writers, as well Antiquaries as Lawyers, and intending to steer a retrograde course in this re-search, I shall begin with one of the latest, Sir Edward Coke, who in his Notes, or Illustrations upon Littleton, tit. Villenage,

Sir Hen. Spelman, in voce 'Gaveletum'.

Britannia, in Kent.

/* The English Lawyer, p. 73.

/* Interpreter, in voce.

Sect. 210. verb. *en Gavelkinde*, glosseth the text thus: 'Gave all kynd: for' (saith he) 'this Custome giveth to all the sons alike.' Not long before him, another learned Knight and famous Antiquary, taking the word to expound in his Glossary of antiquated words, saith, that it is termed Gavelkynd, either, *Quasi debitum vel tributum soboli, pueris, generi*, i. e. 'as it were of right belonging and given' (intimated in the two first syllables, *gafel*, or *gafol*;) 'to the issue, children, or kynd,' (signified by the last, *cyn*, or *kynd*;) Or else secondly (saith he) from *gif-eal-cyn*, i. e. 'given to all the next in kindred.' Verstegan (to ascend in our gradation one step higher) censurcth the word of corruption, saying, that it is corruptly termed 'Gavelkynd', for 'Give all kynd,' which after him is as much to say, as, Give each child his part. From whom Mr. Cambden differs as little in time, as in opinion, when he saith it is called 'Gavelkynd', that is, saith he, 'give all kynne.' Before all these, Mr. Lambard, (the first that undertook the etymologie, and whom, beside the former, /* Judge Dodderidge, /* Dr. Cowell, the Authour of the New Terms of Law, and many more, *longo agmine*, are known to follow) in his explication of Saxon words prefixed to his 'Archaion', verb. 'Terra ex scripto,' is clear for the derivation of the word from the Saxon *gife-eal-cyn*: *Credo* (saith he) *ut terra illa Gavelkyn, quasi gife-eal-cyn,*

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Perambul. p. 528.

id est, omnibus cognatione proximis data, dicatur. But afterwards, (as if upon second thoughts altered in his opinion) he coupleth this derivation with a second, and so at length is found to share his opinion of the words original between two conjectures, grounded both upon the nature of the land; the one in point of Descent, the other of Rent and Services. In reference to the former of which, he saith, that, 'Therefore the land was called either Gavelkyn, in meaning, give all kyn, because it was given to all the next in one line of kinred; or, give all kynd, that is, to all the male children: for kind' (saith he) 'in Dutch signifieth yet a male child.' And in relation to the latter, he saith, that, 'It is well known, that as Knights-Service land required the presence of the Tenant in warfare, and battell abroad: so this land (being of Socage tenure) commanded his attendance at the plough, and other the Lords affairs of husbandry at home: the one by manhood defending the Lords life and person, the other by industry maintaining with rent, corn and victual his estate and family.' 'This rent' (as there he adds)

- + ni a customary payment of works, the Saxons called *gafol*,
- + and thereof (as I think) they named the land that yeilded *gafollette* or *gafolcynd*, that is to say, Land letten for rent, or of the kind to yeild rent,' &c. The Authour (I confesse) modestly leaves it free to the Reader to receive either of these conjectures, or to refuse both, as it shall best like him: but the former of the two, being *prima facie*, of a more plausible sound and allusion than the other, (an advantage very considerable with most men, whose guidance notwithstanding is not alwayes to be followed:) and that having gotten the start of her fellow in time, hath not fail'd to keep it

+ Pag. 4. lin. 21. and customary. lin. 22. yeilded it.

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(a) See the addition to Dr. Casaubons Treatise of Use and Custome.

(b) See Sir Ed. Coke, Instit. part. 1. fol. 115. a.

ff. de Reg. Jur. l. quod ab initio.

ever since, having proved the more acceptable of the twain, and by this time found so many followers, and those, like the first Authour, of so great credit, as that whosoever shall contradict the one, or dispute the other, can do neither without exceeding prejudice; so difficult a lesson it is with some to unlearn, (a) whose minds are as hardly weaned from an opinion which their fancie hath once approved, as others are from an habit or a custome, which if inveterate and long-settled, though corrupt and vicious, is very hardly left off, and laid aside. Yet, as the Common Law (b) determines of a Custome, that if the rise, the original thereof can so be traced, as it can appear that it first began within time of memory, it is no Custome, nor shall obtain or prevail as a Custome; so in case, by tracing the present derivation to the well-head, I shall shew, together with the time, the error of its first original, not to be salv'd by long tract of time, (for, *Quod ab initio non valuit, tractu temporis non convalescit.*) I trust I shall not fail, nor fall short of what mine endeavours drive at in this matter; the weaning (I mean) of sober and judicious minds from an opinion so erroneous and ungrounded as this, I doubt not, upon trial, shall appear to be, though thus long continued, and in it self specious and plausible enough. However, being convinced in mine own judgement of the error, that I may not seem to swallow it for company, to the prejudice of truth, for that (I say) if for no other reason, I have resolved to protest against it: and yet, not to seem singularly affected without a cause, I shall not do it by a bare denial or dissent, as he that thought it sufficient for Bellarmines confutation to give him the

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(c) Duarenus, Comment. in Tit. de Pactis, p. 49. a.

lie, but by representing withall my inducements thereunto, I hope to put the matter out of doubt, that I have studied the Readers satisfaction herein as well as my own, by a learned mans (c) example, whose words in a like case, as very apposite in this, I shall here borrow for the close of my Apologie: *Etsi me non lateat, (saith he) quam lubrica, plenaque discriminis res sit, quæ per tot secula, tot homines eruditi uno consensu probarunt, rejicere velle, rationes tamen eas in medium adducere visum est, quibus adductis hanc interpretationem damnare ausus sum.* Nor is this (I take it) *magno conatu nugas agere*; the discovery and refutation of popular errors having been a task for many worthy pens, in cases of as small concernment as this perhaps may seem to be. To the matter then.

Whether the name of Gavelkynd was at first imposed with, or in respect to the nature of the land, in point of descent, or not, is indeed the matter in question. The common opinion (I confesse) affirms it, wherewith joyning issue in the negative, I shall endeavour to refute it by a double proposition; one negative, shewing that this is a wrong, and mistaken; the other positive, or affirmative, declaring what is the right and genuine construction of the term.

As for the former, though it carry with it a seeming allusion to 'Gavelkynd' in sound, yet if we look advisedly into the true nature of it, we may, and peradventure must, conclude the etymologie from 'Give-all cyn,' 'Give-all-kynd,' or the like, unnatural at the least,

and far fetcht, if not violently forc'd. For first, admitting 'Kind' to signifie a male-child in the Dutch or Belgick tongue, as it doth not more than a female,

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(d) See Killianus Diction. verb. 'Knecht'.

Lamb. Peramb. p. 547.

Vid. Dictionar. nostr. Anglo-Sax. in voce.

being a word common to children of either Sex ('Knecht' indeed with them, as 'Cniht' with our Ancestours, the English-Saxons, is of that (d) signification:) yet is not this kind of land so restrained in point of descent onely to the males, but that (as in the case of land descendible at the Common Law) the females in their default, that is, where the males are wanting, are capable of succession to it, and in the same way of partition with the males. Nay, is any of the sons dead in the fathers life time, leaving a daughter behind him, such daughter shall divide with her uncles in this land. What then? shall we admit 'kynd' to signifie the issue, be it male or female? as indeed it doth either, coming of the Saxon, or old English, cennan, or cennian, *parere*, to bring forth, whence with them the word or participle *frumcenned*, for the first-begotten, or first-born, *ancenned* for the onely begotten, *eorðcend*, *terrigena*, one that is born, or bred of the earth; yet is not this land so tied to the issue, but that in default thereof, i. e. where that is wanting, such as be in the transversal or collateral line (as in other lands descendible at the Common Law) may and do inherit it: as (for instance) when one brother dieth without issue, all the other brethren may and do inherit, as doth their respective issue too, in case of their default, *jure re-præsentationis*, but with this restriction in the nephews case succeeding with their uncle, viz. that the descent is then *in stirpes*, not *in capita*. Neverthelesse, it goeth not as the Irish (e) Gavelkynd, to all the males of the same lineage, (for in this, as in other inheritances, *pro-pinquior excludit (f) propinquum*) nor yet neither to all the next in one line of kinred, as they pretend that

(e) Davies Reports, Le Irish Cust de Gavelkind, fol. 49.

(f) *Bracton de acquiren. rer. dominio. fol. <6>4 a.*

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are for *gife-eal-cyn*, taking *cyn* to signifie kindred, as indeed it doth, for then brothers and sisters both, being alike neer in degree, should equally inherit, (a thing it seems allowed by the old German custome, witness what we have from (g) Tacitus; *Hæredes successorum sui cuique liberi*, &c. not restraining the succession to the male-issue, as neither doth the (h) Civil Law:) whereas we know, that as by the (i) Feudal Customes abroad, where males are, the females are excluded from succession, so by the Common Law of (k) England, women (or females) shall not partake with males, according to that rule laid down in the Statute called 'Prærogativa Regis,' cap. 16. *Fœminæ non participabunt cum masculis*, which (by the way) is understood onely of such as are in equal degree. But doth 'cyn' or 'kynd' here intend and denote a mans issue, the Gavelkynders children? What may we say then to a conveyance of land in Gavelkynd to a Guild, or Corporation, aggregate of many, suppose an Hospital; (as an instance of that nature shall be produced (l) by and by:) they are a dead hand, how then is the etymologie in that case justified? Where's the 'kynd', the parties issue here, to make good the derivation? But since, by occasion, mention is made of such

(g) De morib. Germanor.

(h) l. inter filios. l. famil. hercis. l. si quis a liberis. ff. de lib. agnosc. l. si man. jor. in fi. l. communi di. vid.

(i) Lib. 1. Feud. tit. 6. Parag. 2. & ibi Hotom.

(k) Ll. Hen. 1. c. 70. Glanvil. li. 7. c. 3. Bracton, fol 65. a.

(l) And another in the Appendix, Scriptura 9.

a gift, or conveyance, to strangers from the proper issue or heirs, let me thus far further adde, that in case it be called Gavelkynd, from *debitum vel tributum soboli*, i. e. due, or given to the issue, as some are of opinion, how comes it then to passe, that, as before the Statute of Wills, Gavelkynd-land might by deed, or other lawful conveyance (and that *Domino*, in this case *incon= sulto*, and *invito* too, contrary to the nature of what

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(m) See Vul= teius, de Feud. li. 1. c 8. nu. 37. p. 341.

(n) Glanvil. lib. 7. cap. 1.

(o) See the 5 Proposition.

(p) Perambul. p. 544.

(q) Anno 18. Edw. 1.

(r) Lib. 3. fol. 374. a.

with the Feudists is properly termed (m) Fee:) be freely given, or sold away from the heir by the custom to a meer stranger, (contrary to the old Common Law of (n) England, except in some few cases, as in Frankalmoigne, or in marriage with a mans daughter, a reasonable part might be given, with some limitations and distinctions between Land of Inheritance and Purchase:) as now since the Statute of Wills, (if not before, as some of late seek to perswade us, a matter which I shall reserve (o) *altiori indagini*;) it may be, and daily is by devise of will and testament; How is the next heirs right to this land preserved, when there is that freedome of giving, or devising it away? Or how can this liberty & that etymologie consist? Yet further, doth not Mr. Lambard somewhere (p) say, that no Gavelkynd partition could be challenged, but onely where the custome of division had prevailed, and that Gavelkynd was not tried by the manner of Socage-services, but onely by the touch of some former partition? If so, no land then could properly be called Gavelkynd, wherein this custome of partition had not yet obtained: what shall then be thought of those new created Tenures in Gavelkynd, whereof until the Statute of (q) '*Quia emptores terrarum*,' examples are very obvious aud frequent in the old Records both of the Cathedral at Canterbury, and of the neighbour Abbey of St. Augustines, and elsewhere, affording many ancient grants of land in Gavelkynd? to what original shall the name there be referred? to any customable partition? nothing lesse: for where can that be found in Gavelkynd-land of novel Tenure, for want of that competencie of precursory

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time of them necessarily presupposed (to frame the custome in) who conceive the name taken from such accustomable partition? Moreover, if partition were the thing that gave name to Gavelkynd, then should all partible land wheresoever be so called: but there is in parts abroad (out of Kent) partible land not called Gavelkynd. *Ergo*, &c. For the assumption see the Stat. 32. Hen. 8. cap. 29. purposely made to change the customary descent of the land of Oswaldbeck Soke or Lordship in Nottingham-shire. And what

doth (r) Bracton intimate lesse in his *sicut de Gavelkynd*, *vel alibi ubi terra est partibillis ratione terræ*? Adde hereunto, that the word, as to the main part of it, 'Gavel', frequently occurs in the old records of some manours out of Kent, sometimes simply, but for the most in composition; for example, 'Gavel-erth', 'Gavel=ate', 'Gavel-lond', 'Gavel-man', 'Gavel-swine', 'Gavel-wood', 'Gavel-rod', &c. (of which more anon.) And shall the same thing, (contrary to that rule of Law, l. 1. ff. 'De

rerum permutatione') *diverso jure censer*? For I suppose none will render it there (being out of Kent, and where no Gavelkynd partition taketh place) 'Gife-eal'. Nor will this derivation any better stand with 'Gavel', where it helps to the composition of some words here used in Kent, in former times at least, besides that of 'Gavelkynd', such as are all or most part of those aforementioned, to which I may add 'Gavel-rip', 'Gavel-ote', 'Gavel-sester', 'Gavel-bred', 'Gavel-bord', 'Gavel-timber', 'Gavel-corn', 'Gavel-refter', &c. whereof also I shall in=
 treat further by and by. Is it then (lastly) to be supposed, that the lands meer descent in this kind to all the heirs alike, supposing a plurality of heirs, was all

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the regard those Ancestours of ours had to sway and regulate their judgement by, to whom the name, the term, doth owe its first original? Was that in probability ground enough to satisfie them of the congruity and sutableness of the name to and with the nature of the thing named, as names we know should /† be? *Vix credo*. I doubt it for my part.

/† Conveniunt rebus nomina sæpe suis.

In brief then, to recollect what hath been said: 1. If females are capable of this succession as well as males, where the male issue faileth. 2. If collateral kinred are capable thereof as well as those in the descendent line, where such heirs are wanting, (in both which kinds Gavelkynd land differs not from that at the Common Law:) 3. If Corporations may hold land in Gavelkynd. 4. If such land may be passed away to meer strangers from the right heirs. 5. If none may properly be called Gavelkynd-land, where an accustomed partition hath not made way for it. 6. If there be partible land elsewhere (out of Kent) that is not called Gavelkynd. 7. If 'Gavel' (the fore-part of the word) found in some Records of land out of Kent, and of others in Kent, will not bear the derivation of it from 'Gife-eal', without absurdity. 8. And lastly, if names are to be imposed with respect to the nature of what is (s) named, then is 'Gavelkynd', after these mens premised derivation, in some sort a very scant, narrow, and partial, in other a most incongruous and improper term to expresse the nature of the land by. Surely, there was something more peculiar to Gavelkynd-land, and of more note and eminencie in it, better serving to distinguish it from other kind of land, than this derivation of theirs seems to intimate, and which first gave

(s) Nomina cum re consentiant, Plato de Sapient.

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occasion to the imposition of that name upon it, which leads me to my other, the positive, or affirmative proposition, asserting the true sense and construction of the term, and shewing whence it was at first imposed, and afterwards continued.

'Gafol', what signifying.

Wherein I must confesse, Mr. Lambard was as happy to go right in the latter of his two conjectures, as he was before unluckie to misse of the right in his former, yet in this passively unhappy though, that the former, through the advantages aforementioned, wholly took, and was accepted of all, whilest the latter was received and embraced of none: but no great marvel, since, whilest some, through ignorance could not judge of, others haply for company, would not

question so plausible a derivation. But to the purpose.

To such as are any thing vers'd in Saxon monuments, 'Gafol' is a word very obvious, but varied sometimes in the Dialect, as being written now *gafol*, anon *gael*, here *gaful*, there *gafel*. I shall give you a few instances where it occurs, and in what sense. Tribute mentioned in the 17 of St. Matthews Gospel, verses 24, and 25, as also in the 22 of the same Evangelist, verses 17 & 19, is in the Saxon Translation of the Gospels, turned *gafol*. In the 25 chapter of the same Gospel, at the 27 verse, it serveth to expresse what there in our modern English Translation is called, in some books, 'advantage', in other, 'usury', agreeable to that in the Saxon Psalter, Psal. 54. vers. 11. where *usura* in the Latine, in the marginal version or reading of the word, is rendred *gael*. *gafola* occurring in the first of King Withreds Laws of Sir Henry Spelmans Edition, in the first Volume of the Councils, pag. 194. is of that

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learned Knight expounded to us by *Redditus vel Pensiones*, as it is again in his Latine Version of Pope Agatho's decretal Epistle, pag. 164. of the same Councils, by *Redditus*. In an old Sanction of King Edgars, recited by Mr. Selden in his notes upon *Ædmerus*, pag. 153. what is there in the Latine read *solitus census*, in the Interlineary Saxon Version we find rendered there *gewunlic gaful*. Hereunto I might adde heaps of instances taken from the Saxon Laws, the 'Mare clausum,' and elsewhere, but I forbear to expatiate: and to be short, 'Gafol' is a word, which, as *Gablum* in Doomsday-book, the skilful in the Saxon tongue, with Sir Hen. Spelman elsewhere, turn by what *Gabella* is expounded abroad, viz. *Vectigal, Portorium, Tributum, Exactio, Census*, in Latine, but in English, with Verstegan, 'Tribute', 'Tax', or 'Custome', to which with (s) Mr. Lambard, and (t) Sr. Edw. Coke, let me adde 'Rent': witnesse, besides the former quotations, what occurs in an ancient will or deed (u) of one Athelwird, the Donor of certain land at Ickham in Kent to the Cathedral at Canterbury, in the year of mans redemption 958. where you may read: Hefter his dage Eadrið gif he libbe it bruce wið þone gaele þe hit /† gecwepen is, þet synd v. pund, 7 eache gere enne dag ferm into ðan hiren, þ' is þanne xl. sesters eleþ, &c. And anon after again: Wiþ ðane geleke gael þe hier binnen gecwepen is, &c. The former of which passages, under favour of the skilful in that language, I shall render thus in our modern English: 'After his dayes,' (or 'death') 'Eadrith, if he live, shall enjoy' (or 'use') 'it, yeilding that rent which is imposed on it, that is, v. pounds, and every year' (or 'yearly') 'one dayes farm' (or 'victual') 'unto the

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Glossar. verb.
'Gabella'.

(s) Peramb.
p. 529.
(t) Instit. p. 1.
fol. 141. a.
(u) In Archiv.
Eccles. Cant.

/† forte here.

Containing
four gallons,
so Fleta lib. 2.
cap. 12.

Covent, that is, xl' (measures called) 'Sextaries of ale,' &c. And the latter thus: 'With the same' (or 'like') 'Rent that herein is appointed.' Let me adde what in another like Record, both for time and place, occurs thus. And efter hire twegre dage uo se arcebiscop Eadsipe þessa, gif he lang libbe þanne hi, oðer hwo his æftergen=gle ðanne by, bute sume of hire frend þet lond furþor on þas arcebiscopes gemede ofgon mage torigten gae=le, oðer to oðer forewerde, swo hit man þanne uinden

mage wip pane arcebiscop þet þanne libbe. That is, 'And after both their dayes' (or 'deaths') 'let Eadsith the Arch-Bishop, if he survive them, have' (or 'take') 'these lands, or else his Successour for the time being, unlesse some friend of theirs, by' (or 'with') 'the Arch-Bishops favour, may continue to hold that land at' (or 'upon') 'the accustomed rent, or upon what other contract' (or 'condition') 'may be had' (or 'made') 'with the Arch-Bishop then living,' (or 'for the time being.')

I shall adde but one instance more from the grant of Bocking (a known place in Essex) to the same Cathedral, by one Ethelrich, in the year of Christ 997. And ic gan þerto twey se hide þet Eadrip gaelet eche gere mid hialue punde. That is: 'And I also give those two hides' (of land) 'that Eadrith renteth' (or 'hireth') 'yearly for half a pound.' So that to me it seems clear, that *ponere terram ad gablum*, is as much as to hire, or let out land by or for rent or farm, and by consequence, *terra ad gablum posita*, taken in its proper and genuine acception, is land hired, or letten out to farm, or for rent. In the latitude of the word it comprehends besides, all censual, or tributary land, as also what we call customary land, (in that sense wherein

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(x) Coke, In=stit. p. 2. p. 58.

(y) Spelm. Gloss. in voce.

(z) Lamb. Archaion, fol. 45. cap. 2.

(a) Spelm. Gloss. in voce.

Consuetudines, Customes, denote (x) Services) and so takes in all Rent-service land, which with our Saxon Ancestours, who called the rent or service paid or done for such land, (y) *land-gabel*, and *land-gafol*, was, by a transposition of the syllables, called and known by the name of *gafolland*, or the like: (z) *butan ðam ceorle þe on gafollande sit*. i. e. 'Except the Churle' (or Countrey-man) 'that occupieth censual land,' as one would say now, Except the Country Fermor, or the like. He seems by this to be properly *unlandagend*, i. e. one that had no land of his own, such a one as had, being called *land-agend-man*, i. e. *terræ proprietarius*, a landed man, as the word is (I take it) to be rendred, not *Viator*, a way-faring man, or the like, as some (a) have guessed. But to keep us to our 'Gafol', within and under which term and notion, not onely the generality of rent and customary, whether payments or services, was comprehended and comprised, simply; but what we at this day call Rent-corn, Rent-honey, Rent-barley, and the like, the special and particular rents and services, I mean, by the custome of some manors yeilded by the Tenants to the Lords thereof, though now for the most part turned into moneys, were in elder times, in composition, called 'Corn-gavel', 'Hunig-gavel', 'Bere-gafol', &c. Without impertinencie I hope, I shall here present the Reader with a list of as many of them, as with much content to my self, I have ransacked old Records to find out for this purpose, with an assay of mine own at their several expositions, and they are divisible into two sorts, the one beginning, the other ending with 'Gavel'. Both of them follow.

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corne.	
erth.	
rip.	Wood-
med.	Work-
ote.	Swine-
dung.	Corne-

	rod.	Peny-	
	tymber.	Malt-	
Gavel-	refter.	Les-	Gavel
	bord.	Leaf-	
	swine.	Hunig-	
	wood.	Were-	
	sester.	Twy-	
	werk.	Bere-	
	noht.	For-	
	fother.		
	bred.		

Gavel-corn. In the list of the Rents and Services reckoned up in a Lieger-book of the Church of Canterbury, as charged upon that Churches manour of Adesham in Kent, this in particular thus occurs: *Item de Gavel-corn 66. sum.* Doubtlesse it is the same with that in a composition made between the Abbot and Covent of St. Augustines at Canterbury, and their Tenants of Minster and Hengrove in Thanet, anno 19. Hen. 6. called 'Corn-gavel', and there thus described: *Et quod quatuor Swillingæ & dimidia, & quarta pars unius Swillingæ residuæ tenebantur & tenentur de prædictis Abbate & Conventu per fidelitatem & relevium, & per redditum & servitium vocatum 'Corn-gavel', viz. reddendo eisdem Abbati & Conventui, & successoribus suis annuatim, in*

Corn-gavel. 17 <sig D>

festo S. Michaelis Archangeli, de qualibet Swillinga earundem 4. Swillingar. Quindecim quarteria & quinque buschellos ordeï palmalis, & 15 quarteria & 5 buschellos avenarum, & de prædicta medietate & quarta parte unius swillingæ secundum ratam portionis ordeï & avenarum illas medietatem & quartam partem contingentis, deferend. & cariad. ad costas & expensas prædictorum tenentium usque ad granarium dictorum Abbatis & conventus infra monasterium S. Augustini prædictum, vel per servitium reddendi pro qualibet acra dictarum quatuor swillingarum in eod. festo S. Michaelis octo denarios, & pro dictis medietate & quarta parte unius swillingæ secundum ratam portionis illas medietatem & quartam partem unius swillingæ de prædictis ordeo & avena contingentis, in casu quo prædicti tenentes prædictum ordeum & avenam in eodem festo in forma prædicta non solverint. Thus the composition, whereby it is apparent what 'Gavel-corn' signifies, namely (as before was intimated) Rent-corn.

Cavel-erth. In an Accompt-roll of the Arch-Bishop of Canturburies manour of Reculver in Kent, anno 29. Edw. 1. this service, under the title of *Arura*, occurs thus: *Item respondet de xxxv. acris de consuetudine arandi Gavelherthe.* In an old Customal /* of Gillingham manour in Kent, of about that age, I read thus: *Item sunt ibi quinque juga, quodlibet arabit unam dimidiam acram ad semen frumenti, & seminabit, & herciabit, & dimidiam acram ad semen ordeï, & herciabit, & unam virgatam ad avenam & herciabit & warectabit, dimidiam acram ad ordeum, & nihil recipient, & vocatur istud opus Gavelerth.* This then (it seems) is a certain Tillage-service, like the *arura* in Bracton, fol. 35. b. due

/* In Archiv. Archiep. Cant.

ing, &c. a certain quantity (more or lesse) of his Lords Demesnes, not alwayes performed in kind, but bought out and redeemed sometimes with money. *Et de 10. sol. de 10. acris de Gavelerth relaxato hoc anno*, quoth an old Rental sans date of the Arch-Bishops foresaid manour of Reculver. It was of some affinity, as with

Biaus. + the French Poictovines *Biaus*, so also with that which
 Benerth. Mr. Lambard calling 'Benerth', expoundeth by service which the Tenant doth with his cart and plough. With his plough indeed, and also with his harrow, but not (that I find) with his cart, it being a meer tillage-service, as 'Gavelerth' is, & alwayes performed *precario*, as the Frenchman saith, *precairement*, upon request and summons, (in aid, and for the help and ease, when need was, of other Tenants bound to do the like *de gablo*, i. e. as I conceive, *ex debito*, and without summons:) and with allowance of (more than regularly was afforded in the other (a) service) a coredy, i. e. diet, or victual, (fometime called 'Benebred') during the employment. Glanvils *precarias carucarum forinsecarum*, lib. 8. cap. 3. may hence be understood. Matthew Paris in his History of England, pag. 895. of the last Edition, making mention of a *Breve inauditum*, (as he there calls it) i. e. an unheard Writ, issued by Hen. 3. recites this as a part of it: *Similiter inquiratur de carucis precariis*, which by the learned Authour of the Glossary, at the end of the work, is thus illustrated: *Erant & precariæ* (saith he, speaking of several sorts of Ploughs) *quas scilicet in necessitate aliqua eminentiori, colonus unus a proximo* (b) *precario mutuabatur*. Hence the phrase in many old Customals and Rentals

(a) *Et omnes tenentes de isto jugo debent arare, herciare, seminare, de semine Archiep. unam acram sine cibo, quia Gavelerth. Custumal of Tenham manour.*
 (b) Should he not rather have said, *Dominus ab hominibus suis?*

+ p. 18. l. 8. Bians.
 19

of plowing this or that quantity of the Lords land by his Tenant, *de prece, de precaria, ad precariam*, and the like. *In precariis carucacum & in auxilio herciandi vi. sol. viii. den.* saith an old Accompt-roll (c) of Saltwood manour. The meaning of such passages in records of that kind as this: *arant preces semel ad conredium* (d) *Curia*, &c. and the like may hence be pick'd out. It took name (this of 'Benerth') I conceive, of the Saxon *bene, postulatio*, as Mr. Lambard, and before him Jornadensis, translating the Saxon Laws, turn the word occurring in the title of the eighth of King Ina's Laws, as Sir Hen. Spelman doth by *Rogatis*, Concil. tom. 1. pag. 583. Whence (probably) Fleta, lib. 2. cap. 84. speaking of those Ploughs, calls them *Carucas rogatas*.

Gavel-rip. A certain Service (the same, I take it, with Bractons *messura*, fol. 35. b.) undergone by the Tenants of some manours tied to reap their Lords corn for him, which if redeemed, or taken in money, was usually termed 'Rip-silver'. Of the former, in the Customal (e) of Westwell manour in Kent, I read: *De consuetudine metendi xl. acras & dimid. de Gavel-rip in autumpno xl. s. vi. d.* And in another like record, I meet with the latter thus explained to our hand: *De sulinga de Witstable xvi. de Ripsilver, quia homines de Witstable solebant antiquitus metere apud Bertonam*. And as in Tillage-service, certain tenant were bound to it *de gablo*, others *de prece*; and thence the one service cal=

(c) In Archiep. chiv. memorat.
 (d) Customal of Monkton manour in Thanet.
 (e) In Armar. Eccles. Cant.
 Ripsilver.

- led 'Gavelerth', the other 'Benerth'; so for reaping also, there were some that held by 'Gavelrip'-service, other by 'Bedrip'-service, (the old Glossary at the end of Hen. 1. Laws hath it 'Benripe':) that done *de gablo*,
- Bedrip.
Benrip.
- 20
- without any bidding or summons, and for the most part without coredy; this *de prece*, upon bidding or summons, and regularly with coredy: *In villa de Ickham* (saith the old Custumal of that manour of Christ-Church) *sunt xvi. Cotarii, quorum quilibet habet v. acras, & hæ sunt earum consuetudines: Ducunt brasium, &c. & quilibet tres preces, i. e.* (saith the old marginal Glosse there) *quando rogantur per servientem Curia, debent metere, sive aliud facere quod expedit Domino per tres dies, & si noluerint facere, possint artari, &c.* As I gave you some instances before of 'Gavelrip', so I might also of 'Bedrip'; but, for brevity sake, I will onely refer you to that in Sir Hen. Spelmans Glossary, verbo 'Bidripa', which being barely mentioned there without exposition, may hence be understood. And as 'Bene' in 'Benerth' is of a Saxon original, so likewise 'Bede' here in 'Bedrip'; and indeed they are univocal, drawn (this) from the Saxon *biddan, petere, rogare*, and applied to this service upon the same ground that bydel, to a Crier, Beadle, Summoner, Bailiffe, so called from his office, which is to warn, summon, give notice, &c. as these Tenants were to be warned, summoned, in a word, bidden, to come and perform this service: *Et de Cxcix. operibus magnæ precariæ provenien. de omnib. tenentibus Domini, tam liberis, quam nativis, infra dominium Domini, quorum quilibet domum habens de quo fumus exiit, inveniet unum hominem ad magnam precariam, si ad hoc summonitus fuerit, &c.* as it is in Accompt (f) of the manor of Harwe, now called Harrow in Middlesex, anno 21. Rich. 2.
- Bidrip.
- See Spel. Glossa. in 'Bedellus'.
- A service of much affinity with the former. In an Accompt-roll /* of Terring manour in Sussex, anno 11.
- (f) In Archiv. Archiep. Cant.
Gavel-med.
/* In Archiv. memorat.
- 21
- + Edw. 1. it occurs thus: *Consuetudo metendi quæ vocatur Gavelrip*, follows *Consuetudo falcandi quæ vocatur Gavelmed*. And anon after: *Et pro una septimana dum falcatur stipula quæ vocatur Gavelmed*. It needs no further opening.
- Gavel-ote.
- (g) In Archiv. memorat.
- I read thus in an (g) old Custumal, (sans date) of Southmalling manour in Sussex: *Borga de Wellingham. Operarii. Omnes isti operarii de W. debent reddere annuatim de qualibet virgata unum quarterium avenæ, quod dicitur Gavelote in xl/ma*. In an Accompt-roll of the same manour, I find a charge sutable: *Idem respondet de octo quarteriis, quatuor bush. avenæ receptis de gabulo Customariorum de Wellingham*. And for the redeeming it with money, an old (h) Accompt, (sans date) of the
- (h) Ubi sup.
- + Abbey of St. Augustines manours of Swane and Borewaremersh in Rumney mersh, furnish us with an instance of it thus: *Et de avena de gablo vendita iii. s.* Like to that in old (i) Accompt-roll of Gillingham manour by Rochester: *Et de x. s. vi. d. de quinque quarteriis, duob. bush. de Gavelote de reddito venditis.*
- (i) Ubi sup.

- Gavel-dung. A service (like to that spoken of by Littleton, under the title of Villenage) to carry the Lords dung out of the site of the manour, unto the land of his Lord, &c.
- (k) Ubi sup. + whereof in an (k) Accompt-roll of Storham manour in Sussex, of about Edw. 1. time, under the title of *Consuetudines & servitia de omnibus Borghis extra bo=scum præter Suthram*, I read in the Accomptants charge as follows: *Idem respondet de consuetudine extrahendi fimum debita per Custumarios tenentes xxvii. virgatas*,
 + p. 21. l. 1. after Consuetudo. l. 18. Snave. l. 27. Shorham.
 22
dimid. & i. ferling. in Borgh de Gote, Middelham, A=stone, Northlington, & Wellingham in una septimana post festum S. Michaelis cum auxilio Molmannorum, quod servitium vocatur Gaveldung. See the Grand Cu=stumier of Normandy, cap. 53. in fine.
- Gavel-rod. What service this was, the place it self where it oc=curs sufficiently explaines unto us, and that is an old
- (l) Ubi sup. (l) Extent of the manour of Terring in Sussex, anno 5. Edw. 1. where under the title of *Virgatarii operarii de Wadeherst*, we have it thus: *In borga de Wadeherst sunt xv. virgatæ, dimid. & i. firling terræ nativæ, quarum quælibet debet claudere unam perticatam sepis circa curiam de Malling, & debet pro pollis & clautura quam facere solebat ad Natalem beati Johannis Baptistæ annuatim red=dere i. d. ob. quod dicitur Gavelrod & Burghard, &c.*
- Burgh-yard.
 Gavel-timber. Certain Rent-timber to be used in repairing the Lords mansion-house, or some appertaining Edifice, and as some Records do specifie it, 'Rafters'. Whence
- (m) Ubi sup. in an (m) Accompt-roll of Norbourne manour in East Kent, anno 31. Edw. 3. as a part of the Accompt=ants charge there, I read thus: *Et de CC. refters de Gavel-tymber, de redditu, quilibet de longitudine xiii. ped. de quibus proveniunt de tenemento de Borewaresyle C. & de tenemento de Monynden C.* Another like Roll of the same manour calls it 'Gavel refter'. And much of the same nature was the next called 'Gavel-bord', where=of in the last cited roll mention is thus made. *Et de CCC. Gavelbordis de redditu, quilibet de longitudine iii. ped. dimid. unde, &c.* These rents and services were wont to be charged upon their Wealdish Tenants, such as occupied their Wood-lands. And so was the next.
 23
- Gavel-swine. And by an inversion of the syllables, 'Swine-gavel'. A wealdish service (I say) signifying Rent-hogs, or Rent-swine, so called when paid in kind, (*Et de vii. s. x. d. de iii. porcis de gablo venditis ad parocum de Maghe=feld, &c.* As it is in a roll (n) of accompts of Mayfield manour in Sussex, anno 11. Edw. 3.) otherwise 'Swine-paneges', and 'Swine-money', and the like, when namely they were redeemed with the peny, or with money, which was usually paid at 'Paroc'-time, that is, when the Lord, or his Bailiffe and Tenants met upon the place in the Weald, to hold a Paroc, a Court-like kind of meeting, (whereof I have by me a record of some kept about Edw. 1. time) not much unlike the Forest 'Swaine-mote', where (*inter alia*) and accompt was taken of this service in particular, and generally of what hogs or swine had been taken in to feed and fatten the

- year past, or the last Pannage or masting-time, and rent accordingly paid and received for the same. Hence I take it (from 'Paroc', I mean,) the name of that place by Bleane-wood near Canterbury, which we at this day call the 'Paddock', for the 'Paroc'.
- Gavel-wood. Sometimes written and called 'Wood-lode', 'Wald-lode', and otherwise, by an inversion of the syllables, 'Wood-gavel': a custome or service incident to some Tenants, to carry home their Lords wood for him. An old
- (o) Ubi sup. (o) Accompt-roll (sans date) of the Arch-Bishop of Canterburies manours, in South-malling, hath this mention of it in the Accomptants charge: *Et de xviii. s. iii. d. ob. de fine cariandi Gavelwood de consuetudine.* It often occurs in like records of divers other manours, under that diversity of names.
- Gavel-sester. A certain measure of Rent-ale. Among the articles
- 24
- to be charged upon the Stewards and Bailives of the Church of Canterburies manours *infra Cantiam*, according to which they were to be accomptable, this was wont to be one: *De Gavelsester cuiuslibet braci ni braciati infra libertatem maneriorum, viz. unam lagenam & dimidium cervisiæ.* Another old Record calls it 'Tolsester' in these words: *De Tolsester cervis. hoc est de quolibet bracino per annum unam lagenam de cervis.* as it is in an old book of the same Cathedral, amongst the rents of Assise of Halton manour in being undoubtedly the same, in lieu whereof the Abbot of Abbington was wont of custome to receive that peny mentioned by Mr. Selden, in his learned Dissertation annexed unto Fleta, newly published, cap. 8. num. 3. and there (by some mistake, haply of the Printers) termed 'Colcester peny,' for 'Tolsester peny.' Nor differs it (I take it) from what in the Glossary at the end of Hen. 1.
- Tol-sester. Laws is called 'Oate-gavel'.
- Oate-gavel. + A service charged upon Tenants, for example; In Gavel-werk. Charing manour in Kent, an old (p) Rental whereof (p) Ubi sup. of Edw. 1. time hath it thus: *Grenehelle Eadmundus filius Thomæ de Grenehelle de uno jugo debet, &c. — arabit unam acram 6. pedes, & metet unam acram, dimid. & 9 pedes, de Gavelwerk.* This admitting also of a transposition of the syllables, is sometimes found written 'Werk-gavel', in barbarous Latine, *Werkgabulum*, as in an (q) Accompt-roll of the Arch-Bishops manour of Tunebrugge (now called Tunbridge) of Hen. 3. time, and signified Rent-work, which was of two sorts, the one personal, by the Tenants person, which they called *Manuopera*; the other by his carriages, thence termed *Carropera*, and they both met (I take it) in Villeins called *Gaigneurs*.
- Manuopera. + p. 24. l. 18. Oale-gavel.
Carropera. 25 <sig E>
- Gavel-noht. In an old Custumal of our Cathedral at Canterbury manour of Clyne in Kent, I find them thus coupled: *De Gavelnoht vel Gavelfother de Ostreland.* The latter seemeth to expound the former, shewing them both to import what at this day we call Rent-fodder: the latter word in which composition cometh (as I suppose) of the Teutonick 'Voeder', or the German 'Futer', which we at this day pronounce 'Fodder'. Of the
- Fodrum.

Feudists it is called 'Fodrum', to whom I refer such as desire a further explanation of the term, wherein the learned Hotoman (I take it) is more copious than the rest, in his Commentary 'De verbis feudalibus,' in voce. Let them also have recourse to our learned Glossarist, in verbo 'Fodrum'.

- Gavel-bred. In the Custumal of the same Churches manour of
 + Chatham in Kent, it occurs thus: *Allocantur per annum pro Gavelbred ad herdemet. iii. sum. dimid.* It is the same (I take it) which I find elsewhere thus expressed: *In pane ad Gavelbred, de consuetudine arantium & mentium, ii. sum.* So an Accompt-roll (r) of Charing manour in Edw. 1. time. Nor is it probably any other than what in the Custumal (s) of West-Farlegh manour in Kent is termed 'Averbred'. *Allocantur per annum pro averbred, iii. s. ii. d.* It seems to be a proportion of food or victual allowed to the baser sort of Tenants, such as the *Custumarii, Cotarii, Villani*, and the like (the *Gaigneurs*) towards their coredy, or sustentation, during their employments in the Villein-services of their Lords, such as those reckoned up by the Authour of the *Mirroir*, chap. 2. sect. 28, where he saith: *Et ascuns per villeins costumes d'arrer, ower, charrier, sarclir, fauchir, scier, tasser, batre, ou tielx autres man-*
 (r) Ubi sup.
 (s) In Archiv. Eccles. Cant. Averbred.
Gaigneurs.
 + p. 25. l. 2. Clyve. l. 16. Chartham.

26

ners d' services, which were not alwayes attended with such allowance; whence my Authour goes on, adding, & *ascun foits sans reprise d' manger.* And thus far of the particular rents and services, whose names begin with 'Gavel', to which I might adde that of *gafol hwitel*, occurring in the Laws of King Ina, cap. 44. Now to proceed to those ending with it.

- Wood-gavel.
 Werk gavel.
 Swine-gavel.
 Corn-gavel.
 Of which the first four, ('Wood-gavel', 'Werk-gavel', 'Swine-gavel', 'Corn-gavel') having their several expositions in their proper places, viz. in the former list of services, whose names begin with 'Gavel', I passe from them to the rest of like termination.
 Peny-gavel. In the Conquerours, and some succeeding Kings Charters, made to St. Augustines Abbey at Canterbury, the present service occurs by the name of *Gabulum denariorum*, the tithe whereof here excepted from these, was elsewhere granted unto other Monks, whereof see Mr. Seldens History of Tithes, pag. 321, 330, 331. It was a rent usually reserved and paid in money, witness the mention and description of it without composition, between the Abbat and Covent of St. Augustines and the men of Thanet, whereof before in 'Gavel-corn', and speaketh thus: — *Tenantur de prædictis Abbate & Coventu & Prædecessoribus suis per fidelitatem & relevium, & per redditum & servitium vocatum Peny gavel, viz. reddendo annuatim eisdem Abbatui & Coventui & eorum Successoribus de qualibet swillingarum xlii. swillingarum in festo S. Martini in hyeme decem & novem solidos & octo denarios, & de prædicta quarta parte unius Swillingæ in eodem festo annuatim quatuor solidos & undecim denarios, & pro qualibet acra dictarum xxxviii. acrarum terræ de Swilling-*
 + p. 26. l. 20. of it in that composition.

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- land in eodem festo secundum ratam portionis redditus eadem xxxviii. acras terræ contingentes, &c.*
- Malt-gavel. In the Customal of the Church of Canterburies manour of Mepham in Kent, amongst the rest of the
- + rents services there, this occurs for one: *De xxi. sum. iii. bush. de Maltgavel, &c.* It signifies Rent-malt, and is the same (I take it) that in another like Record (an old Rental of Eastry manour in Kent) is called 'Malt-shot', and thus expressed there. *De Malt-shot termino circumcisionis Domini xx. d.* But so called, I trow, when compounded for in money; otherwise, upon the same ground, 'Malt-peny', as the old Customal of the same manour frequently nameth it.
- Malt shot.
- Malt-peny.
- Les-gavel. So called, peradventure, in relation to some greater rent or service arising and paid out of the same land, that this, at some other part or season of the year (I guess hereat by an old (t) Customal of Charing manour, where indeed I found it so:) and so 'Les-gavel', quasi 'Lesle-rent', or 'Lesle-service'. I take it to be the same that in the Customals and Rentals of some other manours, I find written 'Lesyeld', and 'Lesgeld'; unlesse it be mistaken for the next, 'Leaf-gavel', thus occurring in an old Accompt-roll of the Church of Canterbury: *Et de xii. l. iii. d. ob. de annuo redditu assis. cum Leafgabulo ad terminum S. Martini;* which I conceive to be the same with what in a like Record of Hathewolden (now Halden) manour in Kent, is called 'Lef-silver': *Et de xviii. d. de Lef-silver in Hathewoldum.* The old Customal of Tenham manour in Kent, calling it 'Lyef-yield', thus explains it: *Tenentes de Waldis non possunt arare terras suas ab equinoctio autumpnali usque festum beati Martini sine licentia. Et ideo, reddunt annuatim di-*
- (t) In Archiv. Archiep. Cant.
- Les-yeld.
Les-geld.
- Leaf-gavel.
- Lef-silyer.
- Lyef-yield.
- + p. 27. l. 5. rents and services.

28

- midiam marcam ad festum S. Martini, sive fuerit Pessoa, sive non. Et vocatur Lyef-yeld.* Whereby it seems to be a tribute paid by certain Wealdish Tenants, for liberty to plow their grounds during a certain season of the year, viz. *tempore Pessonæ*, which, because of some prejudice that might thereby redound to the Lord in his Pawnage, was not permitted without his leave.
- Hunig-gavel. *Gabulum mellis*, as the old (u) Rentals of Chistlet manour in Kent seem to term what some ancient Accompt-rolls (x) of Otteford and other manours call 'Hunigavel', both one and t'other signifying Rent-honey.
- (u) Ubi sup.
(x) Ubi sup.
- Were-gavel. *Item de Weregavel vi. d. aliquando tamen plus, aliquando minus.* Thus in the (y) Customal of the Canterbury Cathedrals manour of Leisdowne in the Isle of Shepey. It seems to be a rent paid in respect of Wears or Kiddels, to catch fish withall, pitch'd and plac'd by the Sea-coasts, and, until 'Magna Charta' forbade it, in some rivers too, whereof see further in Sir Hen. Spelmans Glossary, verbo 'Kidellus'; and in Sir Edw. Cokes Institutes, part 2. pag. 38. and elsewhere.
- (y) In Archiv. Eccles. Cant.
- Twy-gavel. In an (z) Accompt-roll of the manour of Reculver in Kent, anno 16. Edw. 3. this service, in the charge there, thus occurs: *Idem respondet de 814 & dimid. ped. clausur. hayag. fac. circa manerium, ex consuetudine, unde de Twygavel 200.* I meet with it elsewhere al=
- (z) In Archiv. Archiep. Cant.

- so, but with explanation no where. Taking liberty of conjecture, I conceive it to be some double kinde of service by the 'Twy' preposed, as elsewhere 'Twysket' (an imposition upon the Tenants of Aldington manour by Romney mersh, for maintaining the Sea-coasts there,
- 29
- and other like defences against inundations:) is termed *Duplum*, as thus: *Computus de duplo Wallæ, quod vocatur Twysket*. So the Accompt-roll of that manour in the sixth year of St. Edmunds Archbishopprick.
- Bere-gafol. Is termed of our learned Glossarist, verb. 'Berewica', by *tributum hordeaceum*: elsewhere, viz. verb. 'Gabella', + by *Redditus hordeaceus*. You shall finde in the 60th. of King Ina's Laws, in Mr. Lambards Archaion. If it were not Rent-barley, I should take it for the 'Drincelean', occurring, as in the last chapter of the 'Leges Presbyterorum Northumbrensium,' in Sir Hen. Spelmans Councils, pag. 502. So also in the 87th of King Cnutes Laws in the Archaion, and in this latter place rendred in the old Version in Brampton, (just as 'Oryncelan', mistaken for 'Drincelan', in the old Glossary at the end of Hen. 1. Laws) by *Retributio potus*. If so, it seems to be the same with what was afterwards called 'Scot-ale', where of you may read in Matth. Paris, the Charter of the Forest, Bracton, the Mirroir, and elsewhere. King Hen. 2. in his charter to the citizens of Canterbury, acquits them of it: *Ita quod* (saith he) *Viccomes meus Cantuar. vel aliquis alius Ballivus Scotalam non faciet*.
- Potura. It's sometimes called *Potura*, and was a contribution by the men and Tenants towards a Potation, i. e. a Drinking, or (as some yet speak) an Ale, provided to entertain the Lord or his Bailiffe withall, coming to keep Court, or the like, raised by a proportion or rate + (more or lesse) according to the better or meaner condition. In an old (a) Custumal of Southmalling manour in Sussex, in that part of it intituled, *Bortha de* + *feld*, I read as followeth: *Item si Dominus Archiepiscopus fecerit Scotall. infra boscum, quilibet terram tenens* + p. 29. l. 7. find it in. l. 28. to the Tenant, better. l. 31. Fremfeld.
- 30
- (b) Ubi sup. *dabit ibi pro se & uxore sua iii. ob. & vidua vel Kota-rius i. d.* In the (b) Extent of the manour of Terring (to give you another instance) anno 5. Edw. 1. this 'Scot-ale'-service is thus remembred: *Lewes. Memorandum quod prædicti tenentes debent de consuetudine inter eas facere Scotallium de xvi. d. & ob. ita quod de singulis sex denar. detur i. d. ob. ad potandum Bedello Domini Archiepiscopi super prædictum feodum*. Bracton saith, It is sometimes called 'Filctale' (fol. 117. b.) which our learned Glossarist, in voce; correcting, reads 'Fildale', and is in some sort followed by Sir Edw. Coke, Institut. part 4. pag. 307. With the *Varia lectio* before Bracton, I should rather read it 'Gildale', and then indeed, as it comes neerer the other 'Scot-ale', so with that better answers to our present 'Bere-gafol'; 'Gild', 'Gafol' and 'Scot', being as it were Synonyma, and univocal.
- Filctale. Fildale.
- Gild-ale. Observed to be alwayes paid by the Tenant *per avail* to the mesne Lord, not to the chief, and thence called in some old records and deeds, *Foris-gabulum, quasi extra (vel præter) gabulum quod Domino capitali*
- For-gavel.

- debetur*: just like the French mans *Surcens*. Will you have an example? John then the son of Richard at Horsfald, by his (c) deed, dated anno 1242. gives to Warin of Stablegate, a parcel of land, to be holden to him and his heirs, or to whomsoever he shall give, sell, or assigne it, (a clause without which, by the account of those elder times, land was not alienated from the proper (d) heirs:) paying to the Prior and Covent of Christ-church Canterbury (Lords, it seems, of the Fee) certain annnal rent and hens, and to the Feoffor and his heirs i. d. yearly, *de forgabulo*, &c. Some other instances of this kind might be added, but I must con=
- (c) In Archiv. Eccles. Cant.
- + of those elder times, land was not alienated from the proper (d) heirs:) paying to the Prior and Covent of Christ-church Canterbury (Lords, it seems, of the Fee) certain annnal rent and hens, and to the Feoffor and his heirs i. d. yearly, *de forgabulo*, &c. Some other instances of this kind might be added, but I must con=
- (d) See the Mirroir, p. 16.
- + p. 30. l. 27. not alienable.
- 31
- Mete gavel. tract, passing over 'Metegavel', whereof mention is made in the old Glossary, at the end of Hen. 1. Laws, and there in Latine rendred *Cibi gablum*. Now a word or two of 'Gavelet'.
- Gavelet. Gavelate. This, I must tell you, was no Rent or Service, but betokeneth a rent or service with-held, denied or de= teined, causing the tenements forfeiture to the Lord; whence those words of Fleta, reciting the Statute 'De Gavelleto:' *Et ex tunc vocentur tenementa illa* (not *For= schoke*, as in Tottells Edition of the Statute, followed by Cowell in his Interpreter, but) *Forisfacta*. See Fleta, pag. 119. It is taken (I confesse) of some for a Synonymy with 'Gavelkynd', and to import land letten for rent, or the like; and *per me licet*; the acception shall passe for me, as warrantable enough from the latitude of the term; but in the sence wherein the Statute (10. Edw. 2.) and other ancient records (all that I have ever view'd) do take it up, it seems to carry no other meaning than the deteinment of rent or service, whence that of (e) Sir Edw. Coke: 'Gaveletum' (saith he; I adventure to cor=
- (e) Instit. par. 2. pag. 204.
- + rect it so, as supposing it corruptly printed 'Gavelletum') 'is as much to say, as to cease, or let to pay the rent. *Breve de Gavelleto in London est breve de Cessavit in biennium, &c. pro redditu ibidem, quia tenementa fuerunt indistrin=*
- + *gibilia.*' Thus he. In the Kentish Eyre of Hervicres de Stanton, recorded in a Manuscript of St. Austins at Canterbury, among the Pleas there concerning the Abbat and Covent, pag. 106. it occurs thus: *Et po= stea per quandam consuetudinem quæ vocatur Gavelate usitatam in comitatu isto de terris & tenementis de Gavel= kinde, pro redditibus & servitiis quæ a retro fuerint de eisdem per plures annos devenerunt eædem terræ in manus*
- + p. 31. l. 21. Gamelletum. l. 25. Hervicus.

32

- cujusdam Abbatis*, &c. I have often met with the word in old Accompts of the Arch-bishops manours, from which I could present you with a cloud of instances, but for brevity sake, I shall trouble you but with one, and that taken from a (f) Roll of Ringemere in Sussex, in Edw. 3. time. *Item* (saith the Roll) *de defectu redditus cujusdam curtilagii jacentis Gavellate quod fuit Aliciæ Hammerii, per annum in manu Domini iiii. d.* The sence, I trow, which I gave you of 'Gavelet', is by this time sufficiently asserted, which, if compared with the term it self, will appear very natural, being derived and compounded of 'Gavel' and 'let', or 'late'; a word
- (f) In Archiv. Archiepisc. Cant.

(this latter) fetch'd at first (if I mistake not) from the Teutonick 'Laeten', signifying, as we are taught by Kili-anus in his Etymologick Dictionary, *linquere, relin=quere, omittere, dimittere*, just (I take it) as our old Saxon *lætan* seems to do. The Germans have it 'Lassen', the French 'Laisser', we at this day 'Let'. The termina= tion is found in some other words now antiquated and obsolete as well as this: for example, in 'Hereslit', which by the common opinion of Expositours, sounds as much as *armorum depositio*, or *exercitus desertio*, coming from 'Her', (saith Lindenbrog in his Glossary) *exercitus*, and 'lassen', *deserere*. Sir Hen. Spelman (I confesse) as to this latter syllable, is of another mind, writing it 'slit', and 'slite', and construing it by *fissura, diruptio, separa= tio*, and so will have 'Hereslit' to signifie *diruptionem ex= ercitus*. For my part, under favour, I conceive, that between the latter syllable in 'Hereslit', and the latter syllables in 'Laghslite', 'Manslihte', 'Theofslithe', and the like, there is this difference to be observed, that name= ly in the former, 'Hereslit', the latter syllable is 'lit',

33 <sig F>

(g) See But= lers English Grammar, pag. 19, 34, & 35.

Gavel-man.

(the 's.' being here a note of the (g) Genitive case, and pertaining to the former syllable:) signifying *deser= tio, derelictio*; in the other 'slihte', 'slyhte', or 'slite', be= tokening, *ruptio, violatio, &c.*

Gafol-gylda.
(h) In Archiv. Archiep. Cant.

(i) Ub sup.

Gaveliken= deys.

As Rent and Service in general was understood by 'Gable', 'Gavel', &c. simply, and particular rents and ser= vices denoted by an application of it to particulars, as in the former compounds, so the man, the Tenant that paid the one, and performed the other, was sutablely called of old, as in the 6th. and 22th. of King Ina's Laws, 'gafolgylda', more of late, 'Gavelman': whence (for example) that passage in an (h) Accompt-roll of Terring manour in Sussex, anno 11. Edw. 1. *Et de iii. s. vi. d. de incremento redditus de Simone Theodulfi, de una virgata & dimid. cum uno messuagio in Salwenton — traditis eidem Simoni hoc anno in servitium de Gavel= man, quantum Gavelman debet de tanto tenemento*. He was one of those (I conceive) that in a fore-cited Ex= tent of the same manour, are thus differenced and di= stinguished from other sorts of Villeins: *Villani de Terring qui vocantur Gavelmanni*. By an endorsement upon an old (i) Custumal of Charing manour, I find that Otteford manour had its *Gavelmanni*. And a= mongst the then Tenants of Charing manour, and the services charged upon them in that Custumal, I read of some there termed in one place *Gavelikendeyes*, in ano= ther *Gavelmanni*. The term, I conceive, may properly be given and applied to our Kentish Tenants in Gavel= kynd.

One thing more I have to note, before I leave 'Ga= ble', 'Gavel', &c. viz. that where it comes into mention (as it often doth, in the 'Reddendum' of deeds, or feoff=

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Mala.

White-rents,
Blanc ferm.
Black-rents,
Black maile.

ments) with 'Mala', it there properly signifies, and is strictly to be taken for Services or Customes; as on the other side, 'Mala', there as properly betokens Rent, or Ferm, which being chiefly two-fold, was distin= guished into White-Rents (*Redditus albi*, 'Blanc ferm') and Black-Rents (*Redditus nigri*, 'Black maile':) that, paid regularly *in pecuniis*, in silver, and therefore cal=

(k) See Spelm. Glossary, verb. 'Ferma alba.' + Coke, Instit. part 2. 19. and 44.

(l) Skenæus de verbor. signific. verbo 'Firmarius'.

led 'White'; this, 'Black', because, for the most part paid *in pecude*, or the like, say (k) some: if I might add an expression, I should rather *in blado*, or, if that be not full enough, *in annona*, comprehending all sorts of provision, wherewith the Lords table was furnished, and himself and family fed. And consequently, where I meet with a Tenant holding *per gablum & malum*, as there were many such of old, and I could instance in some, as in Charing, Monkton, Reculver Broke, and other manours in Kent, I should, if I were to play the Expositour, render it *per servitium & fermam, vel red=ditum*. The tenure continues to this day in Scotland, + whence they (l) conserve *Firmarius* by a 'Mail-payer', a 'Mailer', or 'Mailman'. The word (as I conceive) is originally British, coming of their 'Mael', which in the Welsh Vocab. is in Latine rendred *Lucrum, emolumentum, quæstus*, as 'Maelio', the verb, *Lucrari, quæstum facere*. The Saxons used it in the same sence as with the Latines, *vectigal, stipendium*; whence this in the Chronicle of Abbingdon, anno M L. *þæs ylcan geares he sette ealle þa litsmen of male*. Which the Latine Chronicle of Flor. of Worcester, and others give thus: 1051. *Rex Eadwardus absolvit Anglos a gravi vectigali, &c.* Hence also thus in the same Chro. Mlv. *7 þ' sciplið gewende to Legeceastre 7 ðær abiden* + p. 34. l. 10. rather say. l. 14. malam. l. 18. firmam. l. 20. construe.

35

heora males þe Ælfgar heom behet. l. (according to the same Latine Histories) *Classis Algari Comitis Leogecestram devecta, stipendium, quod eis promiserat, ibi expectavit.*

By this time, the Reader is satisfied (I hope) touching the true construction of 'Gavel', 'Gafol', 'Gable', or how=ever else he shall chance to find it written, both as the word is taken simply, and as it used besides in composition, in each importing 'Cens', i. e. Rent, either in money, provision, or works. And being thus far advanced in the dispatch of our positive Proposition ('what is the true sence of Gavelkynd') I must now desire the Reader, in the next place to observe and consider with me, that, as there are divers sorts of land to be found, both in this County and elsewhere, by the nature of their Tenure not 'Censive', or 'Censual', nor of the kind to pay or yeild 'Gavel' (that is, such Rent, or Rent-service, whether in money, provision, or works, as ariseth from ignoble, base, and plebeian Tenures, in which onely 'Gavel' is conversant) to those of whom such lands are holden, those namely holden *in Alodio*, in Frankalmoigne, (or Mortmaine, as called (m) also abroad, because yeilding the Lord no profit, as being in a dead hand) in Knights-service, in Frank fee, and the like; so is there also, such as that holden in So=cage, or Burgage Tenures, or the like, (though free) which contrariwise is Censual, liable to Rent, in some one or more of the kinds premised. To distinguish therefore, if not generally what land is, from what is not, of 'Gafol-gilden' nature, or of the kind to yeild or pay 'Cens', yet specially to put a difference between (what alone is properly and anciently called (n) Fee)

Land Censual. Land not Censual.

(m) Hotoman. de verb. Feudal. in verb. 'Manus mortua.'

(n) See Spelm. Glossary, verb. 'Feudum scutiferum,' & 'Feudum ignobile.'

36

(o) Cowels Interpreter, verb. 'Chivalry'.
(p) Lamb. Peramb. p. 545.

+ Knight-service land and it, under which double head is comprised the generality of our whole Countries lands, answering, as to that dichotomy of Chivalry and Socage Tenures, whereunto all the land in England in the hands of common persons is (o) referred, so also to that known distinction of their lands in Normandy (from whence, as some (p) surmise, we received our Gavelkynd, whereof more hereafter) unto 'Fief de Haubert,' and 'Fief de Roturier' (that is the Noblemans Fee, and the Husbandman or Ploughmans Fee:) for distinction sake, I say, of Censual or rented land, or Rent-service land, from what, like Fee properly so called, being holden *per liberum servitium armorum*, yeilded no Cens, Rent, or Service, whether in money, provision, or works; the former of the twain was called Gavelkynd, that is, (as Mr. Lambard rightly in the second of his fore-mentioned conjectures) of the kind, or nature to pay or yeild rent, or land holden, not properly in Fee; but as the Feudists are wont in this case to distinguish *contractu censuali*, as being letten out with, or under condition, to pay Cens or Rent, or with a reservation of Cens or Rent, like unto those in the charters of the Conquerour, and (his son) Hen. 1. the one to Battell, the other to Reading Abbeyes, expressly called *Terræ censuales*, and there opposed to Fee, witness this provision occurring in each charter: *Terras censuales nec ad feudum donet, nec milites, nisi in sacra veste Christi faciat, nec de possessionibus Ecclesiæ quam teneat aliquid feudaliter absolutum, sed ad censum annuum & servitium Abbati & monachis debitum*. See Clement Reyners Apostolatus Benedictinor. in Anglia, tract. 2. pag. 137, & 154.

Terræ censuales.

+ p. 36. l. 2. Counties.

37

'Kind' (in Gavelkynd) what signifying.

It is no simple word (Gavelkynd) but a compound of 'Gavel' and 'kynd': the latter syllable whereof (to proceed on to that) cometh and is contracted of the Saxon *gecynde*, a word frequently occurring in the Saxon Sermon set forth and published by Mr. Fox in his Acts and Monuments, and again of late by Mr. Lisle, as an Appendix to another Saxon piece, a Treatise of the old and new Testament; in the version or translation of the word they both concur, rendring it in our modern English (q) 'Nature'. To give an instance or two: *æfter soþum gecynde*, i. e. 'after true nature.' Hit is on *gecynde*, i. e. 'it is naturally,' and the like. It will peradventure be objected, that Mr. Lambard, in his Perambulation, pag. 495. meeting with the word several times in the Saxon will of Byrhtic of Mephram, in this often repeated passage there: *innon þ' gecynde*, alwayes translates it, (after the old Latine version in 'Textus Roffensis') 'within that kinred,' and in a marginal note against it, calleth it, 'a kind of gift in taylor.' But, for reply, if I may have leave freely to deliver my sence, that version is not good: for, under favour, *gecynde* there importeth not (as that Translation would) 'kinred', but rather 'kynd', nature, sort, quality or condition, and consequently *innon þ' gecynde* there, if rightly, is thus (I take it) and not otherwise, to be Englished, viz 'in that kind,' or, after that nature, or, upon the same terms, or, with the same condition, ha=

(q) As doth also Mr. Wheloc in his Latine version thereof in his Bede, pag. 471.

'Gecynd' misconstrued by Mr. Lambard.

ving relation (if you mark it) to the tie upon the next precedent legacies, gifts or devises of other land, charged either with alms, or with rent, in way of alms, payable thereout by the Legataries or Devisees, for the Devisor or Testator his souls health. Had it been

+ p. 37. l. 9. the which word.

38

otherwise, so namely that kinred had been intended in that place, I suppose the Donor or Testators expression would rather have been this: *innon þ' cynrine*, *innon þ' mægþe*, *innon þ' cneorisse*, or the like, words more proper (I take it) for such an expression than that of *gecinde*.

(r) Lambard, Glossary before his *Archaion*, verb. 'Præfectus'.

To proceed then, and having thus at length discovered from what roots the denomination of our *Gavelkynd* first sprang, namely, from 'Gavel' and 'Gecynde', let us now put, or couple them together: for whose better conjunction, and smoother pronunciation, former times have filed and pared off the former syllable from the latter word 'Ge', (a preposition much used of our Ancestours, the English Saxons, but for the most part (r) superfluously:) and left it a bare monosyllable, 'kind', which in the termination of many Adjectives, they used to write and pronounce *cunde*, as *worucunde*, *godcunde*, *eorcunde*, *sipcunde*, &c. for secular, divine, &c. By means of which contraction (usual in words of this compound nature, as 'Wærongetuce', 'Burg-gemote', 'Halig-gemote', 'Scire-gereve', 'Portgereve', and such like, are at this day written and pronounced, 'Wapentake', 'Burgmote', 'Halimote', &c.) the words being put together, are read 'Gavelkynd', and accordingly, or with very little variation, constantly written in records, deeds, and other monuments of times. Thus (for example) in a number of deeds and conveyances, which I have (s) seen recorded in the *Lieger-books* of the Cathedral at Canterbury, and *St. Austins late Abbey* there, phrased all of them after this manner: *Tenendum ad* (or *in*) *Gavelikendam*. Thus also in the inquisition cited and exhibited by Mr.

(s) Whereof some copied here, in the Appendix, *Scriptu*, 4a, 6a, 7a, 8a, 9a.

+ p. 38. l. 18. *woruldcunde*. *ibid*. *eorþcunde*. l. 27. of former times.

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Lambard, in his discourse of the Kentish Customes, at the end of his *Perambulation*, where the phrase or expression of *tenuit in Gavelkind*, is sundry times obvious. Thus again in an ancient deed of feoffment belonging to *Herbaldowne Hospital*, whereby a parcel of land is given to the poor people there, *in perpetuam eleemosynam*, and to *Gavelkind*, as the deed is phrased. The gift (by the way) is somewhat more remarkable than ordinary in several respects; wherefore, and the rather because it is but short, I think it not amisse to give it a full recital.

Sciant præsentēs & futuri nos filios Wilbaldi, Herbwinum & Eilwardum, heredes suos Thomam & Paganum, concessisse infirmis de Herbaldune, unam acram & dimidiam terræ, scil. Langenekre, cum fratre suo Wiberto infirmo in perpetuam eleemosynam, and to Gavelkynd: Reddendo sibi duos denarios in die Sancti Nicolai. Hoc concedunt filiæ suæ

Basilica & Hawis.

From the tenour of this deed or conveyance, I collect and conceive; first, that this land was of the nature of what by the Feudists is called *patrimonialis, gentilitia, profectitia, hereditaria*, and that the Donors or Feoffors held it by descent, because their heirs do here concur and consent with them in the act of alienation, according to the ancient common (t) Law of England, whereby a man could not alienate such lands as he had by descent, without the consent of his heir, though it were otherwise in point of purchase, witnesse (besides the authorities in the margin referring to prin-

(t) Glanvil. lib. 7. cap. 1. Cowel, Instit. lib. 2. cap. 20. num. 7. Coke, Instit. part 1. fol. 94. b. See Bracton, lib. 5. fol. 407. b.

+ p. 39. l. 13. Herlewinum.

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ted books) the following passage in a Charter recorded in a Lieger of the often alleaged Cathedral at Canterbury of certain land (all which the party had) in Southwerk, given to that Church by Norman le Wautier, in the year of Christ 1204. which thus speaketh: *Et quia prædicta terra de libero catallo, & proprio perquisito meo fuit, & non de aliqua hereditate parentum meorum, ideo Deum inde & S. Thomam Martyrem, & Sanctos Cantuariensis Ecclesiæ, & conventum monachorum ejusdem, heredem (u) meum legitimum inscribo, & hac mea carta in perpetuum constituo.* To which many more such like might easily be added from the same 'Promptuarium'. The Feudists in this case distinguish between *Feudum novum & antiquum*, as may be seen in Vulteius, de Feudis, lib. 1. cap. 10. num. 72". In the next place, the Reader may please to observe with me, that as (x) Britton distinguisheth of a double tenure in Mortmaine, the one called 'Almoigne', or 'Aumone', simply, the other 'Frankalmoigne', describing the former to be a gift in alms, but not free alms, because (saith he) a certain service is retained or reserved to the Feoffor, cap. 66. fol. 164. b. so this in hand is no alienation in Frankalmoigne: the Feoffors (it seems) not intending to give the land in that absolute manner, but, in token of Seigniorie, to reserve something of service to themselves, phrase their gift, not *in puram eleemosynam*, or *in liberam eleemosynam*, (one of which words, viz. either *pura* or *libera*, is (some say, others say (y) both) essential to the making it a tenure in Frankalmoigne, and to the excusing it from service) with which the next following words ('and to Gavelkynd') could not have consisted; pure alms, or Frankalmoigne, excluding the

(u) This seems to thwart Glanvil. lib. 7. c. 1. fol. 46. a. *Potest itaque quilibet*, &c. and Bracton, fol. 62. b. (x) Cap. 66. fol. 164. b.

(y) Bracton, l. 2. c. 10. fol. 27. b. Coke, Instit. part 1. fol. 94. b.

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return of all but divine services and burthens; they phrase it not therefore, I say, *in puram*, or *liberam eleemosynam*, but onely *in perpetuam eleemosynam*, and to *Gavelkynd*; by the former of these words, investing the Hospital with an estate in perpetuity; by the latter, and the *Reddendo* following, saving and reserving to themselves a quit-rent, as it were, *in signum domini*; that is, they reserved to themselves the service, and granted to the Hospital the *usum fructum*: or they granted the *utile dominium* to the Hospital, and reserved the *directum* to themselves. So that whereas Bracton and (z) others make mention of a tenure *in feodo quoad servitia, & non in dominico*, referring to the chief

(z) Lib. 2. c. 19. fol. 46. b. Item l. 4. fol.

263. b. Coke, Instit. part. 1. fol. 1. b. verb. "Fee simple". Fleta, lib. 5. c. 5. parag. 26.

Lord; and of another *in feodo & dominico, & non in servitio*, referring to the Free-holder, the former may here be referred to the Feoffors, the latter to the Feofees in this deed. But this *Parergon*. And now to wind up all (concerning this first Proposition) and not to enlarge with any further instances (wherein I might be infinite) for asserting this truth of our Gavelkynds derivation: 'Gavelkynd', we see, is the lands right name, whose Etymologie was never wrested to 'Gife-eal-cyn', whose signification of Censual, Rented, land, or Rent-service land, was never questioned till that within our fathers memories, one and all, by a kind of errour, *jure veluti successionis*, transmitted to them, run a head in a wrong and mistaken derivation.

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PROPOSITION II.

The Nature of Gavelkynd-land in point of Partition.

Partible land, and Parceners two-fold.

(a) Fol. 278, 374, 428.

(b) Lib. 7. cap. 3.

Disallowing then Gavelkynd (as to the name of it) to be derivative from Partition, our next enquiry shall be, if (on the contrary) Partition ow it self to Gavelkynd, or to what other cause. Before I further enter into which research, or offer any resolution to the "Quære", give me leave to preface it with certain rules, grounds and principles, in this case fit to be premised. You are then desired to take notice, that here in England, we acknowledge no land (no inheritance) partible or divisible, but what is so either (first) by Law, as in the case of Females, succeeding for lack of Males, whether in Knight-service land or Socage, which in this point differ not, or what (secondly) is so by Custome, as in our present case of Gavelkynd, and such like? no parceners of land (I say) in point of inheritance or succession, but either according to the course of the Common Law, or by Custome, as termed by Litleton, and our more modern books, the same in effect with what of elder time, in Bractons (a) language, are called, 1 *Ratione personarum*, 2 *Ratione rei vel terræ*. In the next place, let me adjoyn what in this point of Partition is delivered by those two ancient and famous Sages of our Law, Glanvill, and Bracton, whereof the former (b) speaketh thus: *Cum quis ergo hereditatem habens moriatur, si unicum filium heredem habu-*

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(c) The Scottish reading is, *si fuerit Socagium illud antiquitus divisum*. See Reg. Majest. lib. 2. c. 27.

erit, indistincte verum est, quod filius ille patri suo succedit in toto. Si plures reliquerit filios, tunc distinguitur utrum ille fuerit miles, sive per feodum militare tenens, aut liber Sokemannus: quia si miles fuerit vel per militiam tenens, secundum jus regni Angliæ primogenitus filius patri succedit in totum, ita quod nullus fratrum suorum partem inde de jure petere potest. Si vero fuerit liber Sokemannus, tunc quidem dividetur hereditas inter omnes filios quotquot sunt per partes æquales, (c) si fuerit Socagium, & id antiquitus divisum: salvo tamen capitali messuagio primogenito filio pro dignitate aesneciæ suæ; ita tamen quod in aliis rebus satisfaciet aliis ad valentiam. Si vero non fuerit antiquitus divisum, tunc primogenitus, secundum quorundam consuetudinem, totam hereditatem obtinebit; secundum autem quorundam consue-

(d) Li. 2. c. 34.
fol. 76. a.
Vid. Flet. l 5.
c 9. Parag. 15.

tudinem, postnatus filius heres est. Item si filiam tantum unam reliquerit quis heredem, tunc id obtinet indistincte quod de filio dictum est. Sin autem plures filias, tunc quidem indistincte inter ipsas dividetur hereditas, sive fuerit Miles, sive Sokemannus pater earum, salvo tamen primogenitæ filiæ capitali messuagio sub forma præscripta, &c. Thus Glanvill, harmoniously followed, and almost verbatim of (d) Bracton, whose words on this argument are these: *Si liber Sockmannus mortuus fuerit pluribus relictis hæredibus, & participibus, si hæreditas partibilis sit & ab antiquo divisa, hæredes (quotquot erunt) habeant partes suas æquales, & si unicum fuerit messuagium, illud integre remaneat primogenito, ita tamen quod alii habeant ad valentiam de communi. Si autem non fuerit hereditas divisa ab antiquo, tunc tota remaneat primogenito. Si autem fuerit Sockagium villanum, tunc consuetudo loci erit observanda. Est enim con-*

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(e) Lamb. Peramb pag. 538.
Coke, upon Littl. Sect. 265.

suetudo in quibusdam partibus, quod postnatus præfertur primogenito, & e contrario, &c. Hereunto let me subjoin in the third and last place, that common principle amongst us, and obvious in our books, viz. that prescription in Gavelkynd-land, as it is not (e) needful, so neither is it good. The reason is, whereof I pray take notice with me, that (as Mr. Lambard hath it) the custom of Gavelkynd is general, spreading it self throughout the whole Shire, into all lands subject by ancient Tenure unto the same, such places onely excepted, where it is altered by Act of Parliament, and therefore 5. Edw. 4. 8. and 14. Hen. 4. 8. it is said, that the Custom of Gavelkynd is (as it were) a Common Law in Kent.

Having thus premised, I shall now make it my endeavour to shape such a resolution or answer to the propounded *Quære*, as may consist with these principles. And briefly, my answer here is negative, viz. that Partition doth not owe it self barely to Gavelkynd, either *ex vi termini*, by reason or force of that denomination, or *ratione rei*, from the nature or condition of the land; that property alone of the lands being Gavelkynd, or so called, not sufficing to render it partible. First, as for the name, the term, that that will in no wise bear it, is (I conceive) a thing sufficiently cleared in our Discourse upon the first Proposition, wherein the term is vindicated from that mistaken construction, by the error of latter times obtruded on it, nor can such a derivation any way consist with the premised principles, Partition in Gavelkynd-land, from the term or denomination of it, being reducible to none of the there assigned causes of Partition. As inconsi-

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Objection.

stant also with those causes and grounds of partition (that dichotomy or bipartite distinction of partible land into, 1 that by Law, and 2 that by Custome) is the attributing that property of partition in Gavelkynd, to the nature or condition of the land, there being no mention of any such third sort of partible land to be found in our Books. If it be replied, Yes surely; for Bracton is expresse for a partition *ratione rei vel terræ*, in the places above quoted, that especially where he saith (as fol. 374. a.) *sicut de Gavelkind, vel alibi ubi*

Solution. *terra partibilis est ratione terræ.* Such indeed are his words, and withall 'tis not to be denied, that such is the nature and condition of Gavelkynd-land, being not onely subject and liable to what the Civilians in their phrase are wont to call, *Judicium*, or *Actio familiæ herciscundæ*; *De communi* (f) *dividundo*, the Feudists, *Adæquatio*, *Paragium*, we in our language term it 'Co=parcenary', 'Land-shifting', and the like; but withall so subject to it, as that partition doth always accompany land of that nature, and is indeed as inseparable from it as the contrary from Knight-service land. Whence then is it? Before I answer, observe first with me for an answer to these passages in Bracton, that as before each of them, in one (g) place, we have his *si hæreditas par=*
 (f) See Fulberts Dialog. part 2. cap. 6. Of Parceners.
 (g) Fol. 76. a.
 (h) Fo. 428. a. quem sequitur Fleta, lib. 6. c. 48. parag. 2.
tibilis sit, & ab antiquo divisa, so likewise after them, in another (h) place, his *tenementum partibile inter plures cohæredes — & semper solet dividi ab antiquo*. Where= by (conferring place with place, for reconciling Bra= cton to himself) we may plainly understand what is meant by those two mesne or intervening passages in Bracton, namely, that not the bare nature of the land, but ancient customes joynt concurrence with it, is in=

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tended, and of him implied in each place, though not expressed, to render the land or inheritance partible. The like help, under favour, must be allowed Glanvill, to reconcile his, *Sciendum autem quod si quis liberum ha= bens Socagium plures habuerit filios qui omnes ad heredi= tatem equaliter pro equalibus proportionibus sunt admit= tendi*, lib. 7. cap. 1. fol. 46. a. to his, *Si vero fuerit liber Sokemannus, tunc quidem dividetur hereditas inter om= nes filios, quotquot sunt per partes equales, si fuerit Soca= gium & id antiquitus divisum*, eod. lib. cap. 3. fol. 49. a. Briefly, were it so that Gavelkind-land were partible by vertue either of the name or nature of it, without ac= cession and concurrence of Custome, then all lands as soon as granted out in Gavelkynd, whereof examples are obvious, and till the (t) Statute of 'Quia emptores terrarum,' frequent, were *ipso facto* partible, contrary to that common and received ground, whereof before, that none are such, i. e. partible with us, (except that de= scending for want of males to females) but what are so by custome. As then not to the name, so neither to the nature of Gavelkynd-land alone, is such partition owing.

(i) Anno 18. Edw. 1.

And is it then to Custome or Prescription? For the latter, 'tis clearly repugnant to what is before laid down by way of grounds or principles, it being a known rule in our Law, and obvious in our books, that Prescription in our Kentish Gavelkynd, as it is not wanted, so neither is it admitted to come in plea. What say we then to Custome? Surely, since neither to the name or nature of the land, nor to Prescription, nor yet (neither) to the Common Law so diametrically opposite to it; to that, I mean to Custome, it is, or I

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(k) Perambul. fol. 544.

know not else to what, that this partition mainly owes it self. Agreeable whereto is that of (k) Mr. Lambard, where he saith, that 'no Gavelkynd partition could be chal= lenged, but onely where the custome of division had pre= vailed,' and that, 'Gavelkynd was not tried by the manner

(l) Fol 36. a.
and fol. 48. a.

Dilemma.

(m) Coke, In=
stit. part 1.
fol 110. b. and
fol. 113. b.

of the Socage services, but onely by the touch of some former partition.' But if so, then an objection here meets us resolved into a question thus, What shall then be said to Gavelkynd-land of novel Tenure, upon the grant of lands, till then happily holden in Demesne, to one or more persons in Gavelkynd, as was usual before that Statute of 'Quia emptores terrarum,' and until when a man might create in his land what Tenure he pleased, granting out (as (l) Bracton hath it) in Socage, what he held in Knight-service, and *e converso*? what, I say, shall we resolve concerning the point of partition here? since no particular custome or usage of partition had ever took place, to give to such division either foundation or precedent. We are here (me thinks) threatened with a Dilemma: for either the land was not partible, and why then called Gavelkynd? or, if partible, yet not by custome, being but newly turn'd from some other Tenure into Gavelkynd, and wanting both Time and (the daughter of it) Usage, (the (m) essentials of a custome) to render it partible that way. Here then is work for an Oedipus, but the resolution of the main doubt, to which I will now more closely apply my stile, will at once clear both.

Truth is then, that 'tis neither from Custome alone, nor yet from the nature of Gavelkynd-land alone, that this partition springs, but partly from the one, partly from the other, and so from both together. It must

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be granted that Gavelkynd-land, *ex sui natura*, is partible thus far, and in this sence, that by an inherent quality, it is capable of partition by Custome; that indeed may and doth render it partible, as Knight-service land properly it cannot, by reason of a repugnancie thereto in the nature thereof: but in this respect it differs not from Socage land in general, which by the nature of it, is capable of partition, and by Custome may be, and in many places *extra Cantium* is partible, where the plea (I take it) ought to run, *quod terra illa a toto tempore, &c. partibilis fuit, & partita*, agreeable with that of Glanvill, *si fuerit Socagium, & id antiquitus divisum*, which Bracton seemeth somewhat more fully to explain by his, *si hæreditas partibilis sit, & ab antiquo divisa*. Now then, *reddendo singula singulis*, that such land is *partibilis*, i. e. partible, (the former part of plea) is, in Kent, from Gavelkynd, elsewhere, (in particular manours at least) from Socage; that it is, or rather was *antiquitus, partita*, i. e. anciently parted (the pleas latter part) is from Custome or Prescription: Partition in the meanwhile in our Gavelkynd, being but a single property or branch thereof induced by Custome; the term in its full latitude comprehending all other properties accompanying land of that nature and tenure, such as 'Dower of the moyety,' 'Suffering for felony without forfeiture of estate,' and the rest contained in the Kentish Customal, as properly depending of Gavelkynd as partition doth, and in respect whereof the land may as well be called Gavelkynd, as because of Partition.

Objection.

But admitting Socage-land to be generally, by the nature of it, *consuetudine mediante*, capable of partition, as well as Gavelkynd, how comes it then to passe

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(will some say) that this partition-property is more appropriate to it than Socage-land in general, and that they so much differ in their terms? From the agreement of the Kentish-men with the Conquerour, saith the common opinion. I shall answer that anon. In the mean time, said we not but now, that Custome is the thing whereto we ow this partition? And if so, why then seek we any further after its original? Customs, we know, cease to be Customes, when once they can be traced to their first beginnings, it being the main essential part of a Custome to be of an unknown rise. But be it so, that Custome carries such a stroke here, what kind of Custome is it, or how shall we find such a Custome for it, as may consist with Gavelkynd-land of novel Tenure, whereof before so often? *Hic labor, hic opus est*, here's the point indeed. Why, in short it is no other than a custome generally spreading it self throughout the whole Countrey in land of that nature. What elsewhere, I mean in other Shires and Counties, they properly call by the name of Socage, whether free or base, we here in Kent are wont to call by the name of Gavelkynd: or if you please (in (n) Mr. Lambards expression) all Socage-service here properly so called, is clothed with the apparel of Gavelkynd, and under it, in a large acception, is understood all such land within the County, as is not Knights-fee, or Knights-service land, the term serving here, as that of Socage elsewhere, to contradistinguish it from Knight-service land, as 'Fief Roturier,' or rather Inheritance Roturier (all other being improperly and corruptly called 'Fief', or 'Fee', that is not holden *militiæ gratia*, the ground of all (o) Fees) is used in Normandy to differ-

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rence that from 'Fief de Haubert,' or 'Noble Fief.' Now into all land of this kind, by a general or universal custome of the whole County, hath this property of partition been introduced; insomuch, as what land was granted out in Gavelkynd, by such as before held it in Demesne or the like; as, for want of time and usage, it had no particular custome introductive of that property of partition, so neither did it want the same, the generality of the Custome extending it self to all Censual land, or land letten out for Cens, and sufficing to render it partible, as occasion should be offered, though but newly dimised. To this purpose (p) Mr. Lambard: 'Although' (saith he) 'it were so that the land were never departed in deed, yet if it remain partible in nature, it may be departed whenever occasion shall be ministred.' Granted out, I say, and holden in terms for Cens, conceiving a necessity of that or the like expression in the 'Habendum', or other part of the grant, to make it capable of this and the other properties incident to Gavelkynd, not intending here the very numerical word or term (Gavelkynd) but that or some other of equivalent sence and signification with it, for example, *Reddendo* such or such a sum *de gablo, de censu*, and the like (whereof, for illustration sake, expect some copies of old grants in the (q) Appendix to this Discourse.) These indeed, & such as these, were the more usual expressions in elder grants, that of *Tenendum in Gavelkynd*, & the like, being sought of me in vain before H. 2. dayes, nor afore-time doth the term occur in any wri-

Objection.

Solution.

(n) Peramb.
p. 545.

(o) Hotom. de
Feud. l. 2. tit.
52. parag. 1.
Item Disput.
c. 5. Spelm.
Gloss in Feud.
scutifero, p.
260.

(p) Peramb.
pag 536.

(q) Scriptu.
1, 2, 3.

ting or monument whatsoever, save onely in this passage in Spot (St. Austins Monk and Chronicler at Canterbury) who saith, that anno 1063. (Abbas) *tradidit*

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terram de Dene in Gavelkende Blakemanno & Athelredo filiis Brithmeri. But from Hen. 2. dayes downwards, it is obvious in many grants of land recorded and extant in the Liegers of Christ-church Canterbury, the late Abbey of St. Austins there, and many other of the Kentish religious houses, until about the time of that (r) Statute, 'Quia emptores terrarum,' which forbidding the letting out of land by any man to be holden of himself, and consequently cutting off all new Tenures, and the creation thereof, stopped the current of all such grants of land in Gavelkynd for the future.

(r) Anno 18. Edw. 1.

That such an expression, as *Tenendum in (or ad) Gavelkynd*, or the like, was necessary to render the granted land partible, after the custome of Gavelkynd, without the help of Prescription requisite in partible land elsewhere out of Kent, may in part appear by a Record of a controversie happening now full 400 years agoe, between one Burga, sometime the wife of Peter de Bending Plaintiffe, and the Prior and Covent of Christ-Church Canterbury, Deforciant or Defendant, touching the moiety of the manor of Well, by them granted to her said husband *ad feodi firmam*, challenged by her (s) *tanquam francus bancus suus*, which controversie was debated and decided in Eire, and is recorded in the Liegers of that Church, from whence I shall present the Reader with a copy of it, not unworthy his perusal in the fore-remembered Appendix, Scriptura 5. Neverthelesse, it will here I think be necessary, that we distinguish times: for what at first in Kent was only partible, because of the Tenure in Gavelkynd, I persuaded my self was afterwards, in tract of time, partible, and did communicate with Gavelkynd-land in that

(s) See Braconton, lib. 4. tract. 6. c. 13. which laid to chap. 15. eod. tract. the instance there seemeth to be a Kentish case concerning a widow of Graveney (anciently written 'Gravenel') by Feversham.

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property, by being Socage land, though not expressly holden in Gavelkynd, it sufficing at length to shew (as (t) Mr. Lambard hath it) the Custome at large, and to say, 'that the land lieth in Kent, and that all the lands there be of the nature of Gavelkynd.' By what means this was wrought, or by what degrees our Socage land arrived at this universality of partibleness, is not so easily discovered. That the sundry favours of Gavelkynd-custome should intice many to creep into it, and by one and one (upon occasion of the intestine troubles that ensued the deprivation of King Richard the second) to shroud and cover themselves under the safety and shadow of the priviledges that do wait upon it, is an opinion of some, whereunto I cannot subscribe, as conceiving no Tenures in Gavelkynd to be so late as Rich 2. dayes, which this opinion would infer, with what consistencie with the (u) Statute of 'Quia emptores terrarum,' made so long before, and prohibiting the creation of new Tenures, I cannot see. But to let the manner passe, the thing (the over-spreading the Countrey in processe of time with this Tenure) is very obvious and apparent, witness an ancient Statute (made anno 18. Hen. 6. cap. 2) taking knowledge, that 'There were not at that day within the Shire above xl. per-

(t) Peramb. pag 538.

(u) Anno 18. Edw. 1.

sons, which had lands to the yearly value of xx. pounds, without the Tenure of Gavelkynde; and the greater part of this County, or well nigh all, was then within this Tenure.'

To proceed, ascribing this property of partition in Gavelkynd-land to the custome of the Countrey, what shall be said then to the partible land (more or lesse) abroad in other Counties? is such Gavelkynd-land, and

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so to be called, or not? or is it from Gavelkynd that such partition there obtains? I conceive not. For first, our Kentish Gavelkynd Custome, considered collectively, with respect to all its branches, is not to be restrained to this one particular property, but (as before is intimated) consists of many other as singular properties besides, and which may as well challenge a share and right in the Customes name, as may that of Partition, such as is 'Dower of the Moyety,' 'not to forfeit lands for Felony,' and the like; and though in point of Partition it may be like ours in Kent, yet in other properties incident to our Gavelkynd, it might, and no doubt but doth differ from it. Besides, that such partible land elsewhere should be called Gavelkynd, will not stand with our premised grounds, excluding Prescription in Gavelkynd-land, whereas in such places abroad, though haply not in whole Counties, yet in particular Manours, I conceive it's necessary, even in their 'Gavelonds', whereof I find mention made in several manours out of Kent, as some in Kent, to shew, *quod terra illa a toto tempore, &c. partibilis fuit & partita*, the accustomed actual partition of it being there as necessary to be pleaded and proved, as its capability of such a property. Add hereunto, that if all partible land were Gavelkynd (rendred such by partition alone) then were

(x) Fol. 374 a

(x) Bractons, *Sicut de Gavelkynd vel alibi ubi terra est partibilis ratione terræ*, an improper expression. We are told that this Custome of Gavelkynd partition takes place, (hath done at least) in other countries, or counties besides Kent, and Littleton instanceth in North-Wales. But what custome, I pray? a custome indeed, like to that in the Scottish (y) Socage land, of

(y) Skenæi Annot. in Reg. Majest. lib. 2. cap. 21, & 27.

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partition; that's true, and testimonies of it are obvious, such as, besides that of Littleton, 'Statutum Walliæ,' the Welch History, and some Acts of (z) Parliament.

But still, I say, no Gavelkynd-custome, taken in its true, plenary and compleat acception, comprising all the properties of it obvious in the Customal. As then for other Countrey-mens communicating with us of Kent in the Tenure, I conceive it first came up, by way of imitation of our example, in Ireland especially, and amongst the Welch-men, in whose Vocabulary or Dictionary the word is sought in vain, as it is also in that old Statute which concerns them, ('Statutum Walliæ') where though mention may be found of a custome there obtaining of partition of their lands, like to that of our Kentish Gavelkynd, yet without any one word of Gavelkynd. And if perhaps it may be found in their deeds, charters, or other records, yet (as one (a) saith in a case not much unlike conditioned to this of ours, whose words with very little variation I shall

(z) See 21. Edw. 1. 34. Hen. 8 26. & Girald. Cambrens. Itine. rar. Camb. lib. 1. cap. 7. By the way, how do our Britains claim descent from the Trojans? sith with them the eldest son, by prerogative of primogeniture, monopolized the whole inheritance. Whereof see Mr. Seld. Jan. Angl. lib 1.

pag. 24. Vit. Basinstoch. Hist. lib. 3. pag. 207. (a) Rover. Illustrat. Hist. Monast. S. Jo. Reomaen. p. 618. num. 168.

therefore take up here:) *Susplicari licet hanc vocem pluribus illorum chartis actisque publicis, non tam illorum quam pragmaticorum usu ac instituto invectam.* i. e. 'tis to be suspected that it had its imposition, and was first transmitted hither by our Lawyers, who borrowed the term to make use of it for illustration sake, like as of late (I am perswaded) the Parliament did in that Stat. 34. Hen. 8. cap. 26. where the term of Gavelkynd haply is but borrowed, to help describe and illustrate that partible quality there mentioned of the lands in Wales, which I am the more induced to conceive, because in a former Statute concerning Wales, namely that of the 27th of the same King, cap. 26. making mention of

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this partition, Gavelkynd is not at all remembred. In imitation then (as I conceive) of the Kentish-men, the generality of whose partible land of long time hath notoriously been known by that title, and whose lands alone of all the Counties of England at this day be of the nature of Gavelkynd of common (b) right, this name or term of Gavelkynd in lands elsewhere of like condition in matter of descent, hath been taken up and is retained.

(b) Coke, Instit part 1. fol. 140. a.

Objection.

By that which hath been said, I may be thought to incline to their opinion, who hold that 'Socage' and 'Gavelkynd' are Synonyma, terms identical, and of one and the same signification here in Kent, and that consequently what land here is of Gavelkynd-nature, is of Socage-tenure; as on the other side, what land is of Socage-tenure is of Gavelkynd-nature. I answer, No: for I require in this case, I mean to make Socage land here in Kent *ipso facto* partible, after the custome of Gavelkynd, that it be granted out and holden in Gavelkynd (c) expressely, or in terms equivalent, as I said before, yet with that distinction oftentimes wherewith I there qualified it. Notwithstanding, I am not of their mind, who distinguishing between free and base Socage in Kent, make the natures of their descents divers; the free Socage (say they) descending to the eldest alone, the base falling in division between him and all his brethren. Thus (d) Mr. Lambard in the person of others; to help justifie whose distinction, with the inference upon it, he there exhibits an Inquisition taken after the death of one Walter Culpepper, making mention of divers parcels of land and annual rents holden by the deceased at his death, some *in libe-*

(c) As in the Appendix, Scriptu. 4, 6, 7, 8, 9.

(d) Peramb. pag. 593.

+ p. 55. l. 21. of times.

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rum feodum, others in Gavelkynd, the former of which, by the verdict of the Jury, was to go to the deceaseds eldest son (e) alone; the latter, in common amongst him and the rest of his brethren. Thus the Inquisition, which (as Mr. Lambard there follows it) cleerly distinguisheth free Socage from the Gavelkynd, interpreting, it seems, *liberum feodum* there by Free Socage, and it may be rightly; however I crave leave of dissent, and (as it is but fit) shall give my reasons: For my part, I never found Free Socage any where expressed by that term, or in Latine rendred *Liberum feodum*, nor perhaps to those of more diligence, and more conver-

(e) In which respect 'Free Socage' is not likely to be here intended, since Glanvill never mentions 'Free Socage,' but under the notion of partible land, as l. 7. c. 1. and l. 13. c. 11.

Liberum feodum.

(f) In Archiv. Archiep. Cant.

(g) Lib. 5. fol. 329. a.

(h) Vulteius de Feudis, lib. 1. cap. 8. pag. 353.

(i) Cowell Interpreter, verb. Ancient Demesne, from Fitzherbert.

Gafolland. Werkland.

sant with our Law-records than my self, hath it ever occurred under than notion. Nor have I met with any Free Socage, as this here, not subject to the rendering of some kind of service, either *in denariis*, or otherwise. By *Liberum feodum*, I understand some time *Feodum militare*, which is often in old Records called *Liberum feodum*. In a very ancient (f) Rental of Southmallin manour in Sussex, we have this title: *Liberi feodi*, and under it: *Godefridus Walensis tenet III feodos milit. in tenemento de Mallin, & quartam partem unius feodi apud Terring per liberum servitium armorum suorum. Will/mus de Bransa tenuit apud Adburton unum feodum militis, per liberum servitium armorum suorum.* And so some others. Apposite here is that of (g) Bracton: *Notandum* (saith he) *quod in servitio militari non dicitur per liberum servitium, & ideo quia constat, quod feodum tale liberum est, &c.* Some time also by *Liberum feodum*, I understand (what I conceive it doth principally denote unto us) 'Frank Fee,' that is, by the Feudists definition, such *pro quo*

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nullum omnino servitium (h) præstatur, and therefore is of them reckoned *inter Feudastra*, or *Feuda impropria*. And such as this seemeth to be meant by *Liberum feodum* in that Inquisition, because it is there *in terminis* expressed to be holden (just after the manner of Frank Fee, by the precedent definition of it) *absque aliquo servitio inde faciendo*. And if Frank Fee, then in probability not Socage: for as all the land in the Realm (say our Books) is either 'Ancient Demesne,' or 'Frank Fee,' so none (say they) is to be accounted Ancient Demesne, but such as is holden in (i) Socage. Frank Fee then being opposed to Ancient Demesne, which is Socage, cannot it self be Socage. Nor will Bractons distinction of Socage into *liberum* and *villanum*, applied to that difference in Mr. Lambard, of free and base Socage, by which the one should consist of money, and the other of base services, be warranted (as himself there observes) from the ensuing Inquisition, some lands being therein denoted to be of Gavelkynd-nature, which nevertheless do yeild none other but money alone, and none there of that nature charged with works, besides that of Suit of Court, improperly called Works, as not coming under the notion either of *Manuopera*, or *Carropera*, to which double head all works of this kind are wont to be referred.

Hence let none perswade themselves, that Gavelkynd-land was not, or by its nature is not liable to Works: for albeit that 66. of King Ina's Laws in the Archaion, seemeth to counter-distinguish 'Gafol', and 'Werk'; and though moreover 'Gafolland' and 'Werkland' occur in some manours out of Kent, as of a distinct and different nature, (yet both servile, and opposed to

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what there is called *terra libera*, denoting, I suppose, Free Socage) yet most certain it is, that both *Gablum* and *Opera* do often meet, and are found in Gavelkynd-land. Witnesse the old Custumal of Monkton manour in Thanet, belonging to the Church of Canterbury, mentioning the particulars of what servile works the Tenants there stood charged with for the 18 Swo=

(k) — *terram trium aratrorum, quam Cantiani Anglice dicunt 'three Swoinges'*, &c. as in the Charter of K. Offa, in the Antiquities of Canterbury, p. 211.

lings (so many plough-lands, I take (k) it) holden of the Monks in Gavelkynd. Witnesse also this passage in King Johns Charter made to Hubert the Archbishop, for the changing Gavelkynd-land into Knights-Fee, at large exemplified by Mr. Lambard, Peramb. pag. 531.

Xenia, Averagia, & alia opera quæ fiebant de terris iisdem convertantur in redditum denariorum æquivalentur. Witnesse in the third and last place (not to multiply instances in a case so cleer) an Inquisition found after the death of Isabella de monte alto, widow, sometime of Orpington, recorded in a Lieger of that Cathedral, whereof expect a copy in the Appendix, Scriptura 10.

(l) See Spelman's Glossary, verbo 'Lazzi'.

'Tis true indeed at this day, and time out of mind (haply from Richard the seconds (l) time) such servile works (properly called Villein-services) have been, as they still are, intermitted, or rather quite ceased; inso-much as all our Gavelkynd-land, in point of service, now differs nothing from Free Socage, as it stands described and defined of Bracton; being such *ubi fit servitium in denariis*, (to use his own words) all the Tenants burthen, his whole service, being onely *servitium crumenæ*, pecuniary, such as payment of money for rent, suit of Court, and such like; nay, in many grants of land in Gavelkynd that I have seen, I find no tie at all upon the Tenant, no covenant or contract between his

+ p. 58. l. 14. æquivalentem.

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(m) In Archiv. Eccles. Cant.

Lord and him, to require of him any such base services, there being *ut communiter*, and regularly, a reservation onely of rent in money, suit to his Court, or the like: yet I must tell you (as a reason hereof, in my judgement) that, though Gavelkynd, in the genuine sence, sound land letten for 'gable', 'cens', or 'rent', consisting chiefly *in denariis*, (whence in an old (m) Customal of Eastry manour in Kent, I read: *In eodem manerio mutati sunt octo Cotarii pro Gavelkende. Medleferm tenet unum messuagium, tres acras, quæ solent esse Cotar. modo reddit xl. d. de gablo*, and so divers more, which haply will be better understood, if I add what occurs in an old Accompt-roll of the Archbishops manours for the year 1230. in Charing Bailives receipt: *Et de xiii. s. iiii. d. de fine Cotariorum, ut Cotariæ suæ ponentur ad redditum*;) yet commonly upon such grants in Gavelkynd the Tenant parted with such a sum of money to his Lord, *in gersumam*, i. e. in consideration of that grant, and by way of Fine, as may seem equivalent to the base services otherwise imposeable and to have been charged upon that land, and upon the Tenant in respect thereof; or if not, probably, (as in Gavelkynd-land, by vertue of King Johns fore-mentioned Charter, turned into Knights-fee) he had his rent increased and augmented to an equivalent value of his services to be redeemed; the cause in chief of the excuse of Gavelkynd-men from base services of latter times, and at this day, being (I conceive) no other than the Tenants buying them out, and consequently the change of the same (as Littleton hath it of Socage in general) into money, by the mutual consent of Lord and Tenant, whereof expect some examples to be presented

Gersuma.

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(n) Peramb.
pag. 533.

in the Appendix, Scriptur. 11, and 12. In the mean time have here an instance or two taken from some old Accompt-rolls of the Archbishops manours of this and that summe paid & received for enfranchising the land from customes and services, and changing it into Knights-fee, whereof in the last-remembred Accompt-roll, and in the receipt of Cerring (now called Charing) manour there: *Et de ii. s. ix d. ob. de incremento redditus Thomæ de Bernfeuld de termino Sancti Johannis, ut terra sua de cætero sit libera de consuetudinibus per feodum militis. Et de xiii. d. quad. de incremento redditus Thomæ de Bending, ut terra sua sit libera per feodum militis, de termino S. Johannis.* And so some others there, as also in Maidstone and other Archiepiscopal manours, and such may well be reckoned among lands of that sort, which in a copy of the book of Aid, cited by (n) Mr. Lambard, are noted to be holden in Knights-service, *per novam licentiam Archiepiscopi.* But to return to our Gavelkynd, which if not extensive to Free Socage, they may seem to stand in need at this day of some other character (to keep them unconfounded) than Bracton in the definition and description of the latter doth propose, in regard the service of both equally consisteth in money.

To recapitulate now what hath been delivered concerning partition in Kentish Gavelkynd-land: It is (as hath been shewed) neither from the name, nor from the nature of the land alone, nor from prescription, nor yet from any particular custome, that this property there proceedeth; but partly from the nature of the land, and partly from custome, not (I say) a particular one, but a general custome extended throughout the

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whole County in censual land, or land letten for Cens, or (what is all one with it) 'Gavel', or 'Gafol', to say, holden in 'Fief' (or Inheritance) 'Roturier', as called in Normandy, and other parts of France; the Antiquity whereof, and how beginning in Kent, and why more general there than elsewhere, shall be the argument of our next Discourse.

PROPOSITION III.

The Antiquity of Gavelkynd-custome, (in point especially of Partition) and why more general in Kent than elsewhere.

(o) Peramb.
pag 545.

Master Lambard (o) inclines in his opinion to conceive this custome brought hither out of Normandy by Odo (Earl of Kent, and bastard brother to King William the Conquerour) and that we received it thence by his delivery; an opinion inconsistent with the Custumal it self of his own Edition, the very close whereof (if it may be credited) layeth challenge to the custome before the Conquest. For my part I conceive it may carry an Antiquity far greater than the time of the Norman conquest, being probably as old (in the name I mean, I will not say in all the properties of it, though happily I may in point of Partition) as 'Gafol-land' it self, from which (if considered in the term) it as little differs in sence as in syllables; to what our Saxon Ancestours called 'Gafolland', their Successours, and we

(p) Spot, in the lives of the Abbats of S. Augustine at Canterbury, cited by Mr. Lambard, both in his Glossary before his Archaion, verb. 'Terra ex scripto,' and in his Perambul. pag. 28.

To discover an old error as acceptable, as to deliver a new truth.

at this day (for a fuller expression of the nature of it) having added one syllable, and so calling it 'Gavelkyndland'. Yet I would not be thought of his (p) opinion, who would bear the world in hand, that the Comons of Kent continue their priviledges by means of a composition entred with the Conquerour at Swanscomb. No, under favour, we ow them not to that, or any other such like specious stratagem, nor are behold= ing either to Stigand the Archbishop, or Egelsine the Abbots policie to contrive, or to their and our Coun= trey-mens valour to compasse, their continuance for us in such a way. I am not so prodigal of my historical faith, as to cast or squander it away upon commentiti= ous fables: for I account this no better, however swal= lowed of the vulgar, whom I dare not to encounter in any dispute about it, as despairing of successe, though using never so effectual convincing arguments to dis= ingage them in the belief of it; and therefore appealing from them, I shall apply my self to the more literate and judicious, by intendment not so tenacious of a spe= cious tradition, but that they can with patience both hear it questioned, and, if occasion be, refuted; not unwilling to desert it, if, upon trial, it may prove un= sound and spurious, and accounting it as thank-worthy to discover an old error, as to deliver a new truth, e= specially since truth is not more often, nor more easily, lost by too much altercation, than error is contracted and continued by too little. I will not undertake, nor do I mean to make it my task here, to shew how it came to passe, that Gavelkynd is in a manner proper, and Villenage improper onely to Kent, no other County partaking with it, either in that degree of commonnesse

and uiversality wherewith Kent is overspread of the former, or in the immunity it enjoyes from the latter; the finding out the true cause whereof hath not escap'd my diligence, although my skill I confesse it hath. But, be that as it will, and albeit I cannot in the affirmative shew what was, yet in the negative, that this was not the means whereto we ow the continuance of our Gavelkynd-customes at and since the Conquest, shall be my next assay to prove, and that by shewing what more than suspition of error this Monkish relation (for such it is) deserveth to fall under with men of un= biassed and dis-ingaged judgements. But first, will it please you to hear the story it self, as it is already En= glished by the illustrious Authour of the Illustrations upon the Poly-olbion, pag. 302. who there suspects the same as not of clear credit.

'When the Norman Conquerour had the day, he took his journey towards Dover Castle, that he might with the same subdue Kent also; wherefore Stigand Archbishop, and Egelsin Abbat, as the chief of that Shire, observing that now whereas heretofore no Villeins had been in Eng= land, they should be now all in bondage to the Normans, they assembled all the County, and shewed the imminent dangers, the insolence of the Normans, and the hard con= dition of Villenage: They resolving all rather to die, than lose their freedome, purpose to encounter with the Duke for their Countries liberties. Their Captains are the Arch=

(q) 'Green boughs,' as Mr. Lambard hath it: a likely matter, at that time of the year, being about November.

Bishop and the Abbat. Upon an appointed day they meet all at Swanescomb, and harbouring themselves in the woods, with (q) boughs in every mans hand, they incompasse his way. The next day the Duke coming by Swanescomb, seemed to see with amazement, as it were a wood approach=

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ing towards him, the Kentish men at the sound of a trumpet take themselves to arms, when presently the Archbishop and Abbat were sent to the Duke, and saluted him with these words: Behold, Sir Duke, the Kentish men come to meet you, willing to receive you as their Leige Lord, upon that condition, that they may for ever enjoy their ancient Liberties and Laws used among their Ancestours, otherwise presently offering war; being ready rather to die, than undergo a yoke of bondage, and lose their ancient Laws. The Norman in this narrow pinch, not so willingly as wisely, granted the desire: and Hostages given on both sides, the Kentish men direct the Normans to Rochester, and deliver them the County, and the Castle of Dover.'

(r) See Cambdens Britann. in Kent.

(s) Hist. of Croyland Abbey.

Thus Spot, St. Austins Chronicler at Canterbury, living under Edw. 1. he, I say, and onely he, and such others as of latter times write after his copy: for before him, and in that Interim of more than 200 years, between the Conquest and the time he wrote, no published Story, no Chronicle, no Record of any kind, Kentish or other, may be found to warrant the (r) relation; a matter the whilest so remarkable, as, if true, not likely to escape all our Historians pens that were before him, those especially about the Conquest. Amongst which (s) Ingulphus silence is the more remarkable, since he is so particular and punctual in relating and recounting the Conquerours oppugners, and their proceedings. When afterwards Rochester Castle, kept by Odo the Conquerours brother, against William Rufus in the year 1088, was by him besieged (a thing of as small moment at least as this) why, all the Stories with one consent were full of it, particu=

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(t) Psal. 54. 17 Psal 51. 1. in marg. Psal. 72. 8. in marg.

larly Malmesbury and Paris (amongst other occurrences) tell of a much declined nick-name, wherewith those were threatned that should refuse to come to the Kings assistance in that action, which the former hath *Nidering*, the latter, *Nithing, quod Latine nequam sonat*, say both, and rightly, if it come, as I conceive it may, from the Saxon *nipe*, i. e. *nequitia, malitia*, as it is in several places found in their (t) Psalter; a nick-name this, of such infamy, as fastened upon the most detestable and barbarous Villeins, such as were guilty of despoiling and rifling the dead, which the 83. of Hen. 1. Laws calleth *Weilreif*, a term (identical, I take it, with *Walaraupa* in the Legis Boior. tit. 18. cap. 3. parag. 1.) which 'Textus Roffensis' thus illustrates in a place: *walreaf is nithinges dæde, gif hwa ofsacen wille do þ' mid eahta 7 feowrtig sulborenra ðegena. i. e. (according to the Latine version in Jornalensis, where this Law occurs, as the 21th of those of King Ethelred, at Varnetung:) Wealreaf. I. mortuum refare est opus nithingi: si quis hoc negare velit, faciat cum xlviii. Thaynis plene nobilibus.* This (of *nipinges dæde*) is that surely which the old Glossary (new set forth) at the end of Hen. 1.

(u) *Testis falsus in uno, red=ditur suspectus in omnib.* Fa=rinac. de testib. q. 67. n. 3.

afore-said Laws, harps upon, in the word 'Refare', and is there glossed by *opus nithingi*, as also in the word 'Wealreaf'. But to return to our Story, that I mean of the siege laid to Rochester-castle, which though of as small, if not lesse, concernment than the other here in question, could find many Chroniclers to record it, and must this needs escape them all, till Spot had got it by the end? Besides, observe with me (what Mr. Selden there, and Mr. Lambard before him both note) his commixture of (u) a falsity about Villenage,

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Kent conque=red by the Normans.

affirming it was not in England before that time, which is apparently false by choice of testimonies, both from our Laws and other Saxon monuments, so obvious as I will spare to repeat them, setting that aside until I have dispatched the main matter of the Story, the composition, I mean, between the Conquerour and the men of Kent, with the occasion of it, which as it wants the warrant of confirmation by other elder Hi=storians, not onely silent of it, but agreeing in asserting an universal conquest, so in flat contradiction of it, we find cleer testimony in Florentius Wigorniensis and Ro=ger Hoveden, of our Counties fellow-suffering with her neer and more remote neighbours of Sussex, Sur=rey, Hampshire, Middlesex, &c. in the devastations, depredations, and other miseries of a countrey inva=ded, subdued, and (at least in some parts) harried by the Norman Conquerour, immediately upon that sig=nal victory of his over the English, at the place where afterwards he founded that Abbey, from the Battel there fought, called Battel-Abbey in Sussex. You shall have my Authours own words: *Interea* (say they, (x) having but newly told the Story of that fatal battel:) *Comes Gulielmus Suthsaxoniam, Cantiam, Suthamtunensem provinciam, Suthregiam, Middelsaxo=nam, Herefordensem provinciam devastabat, & villas cremare, hominesque interficere non cessabat, donec ad villam quæ Beorcham nominatur, veniret:* &c. To this let me add a passage from the Story of the same Spot, where, after mention made of an Annuity, or Rent-charge given to his Abbey, by one Sulburga, the Lady of Brabourne, about the year 861, he subjoyns this: *Istum redditum* (saith he) *& jugum terræ apud Horton,*

(x) Flor. Wi=gorn. an. 1066. Rog. Hoveden, fol. 258. a.

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(y) See Order. Vital. ann. 1070.

& terram de Hengestehell juxta Wivelesburgum, Hugo de Monford abstulit, cui & Episcopo Baiocensi Willielmus Bastardus fere omnes terras Cantiaë contulit, contradicen=tibus monachis, sed minime prævalentibus. Now if the Conquerour seized almost all the Kentish lands, and gave them to his brother, the Bishop (y) of Bayeux, and Hugh Monfort, (as you may find further verified by Domesday-book, with cleer evidence of the like distribution generally throughout the Kingdome, whence that of (z) Ingulphus: *Deinceps ergo comita=tus & baronias, episcopatus & prælatias totius terræ suis Normannis Rex distribuit, & vix aliquem Anglicum ad honoris statum, vel alicujus domini principatum ascen=dere permisit:*) how is it likely that Kent should escape or speed so well, as by that specious Story of the Swanescumb encounter and accord, the Monk would bear the world in hand? Truth is, by the way, the

(z) Hist. Croyl. fol. 512. b. See also Eadm. Hist. pag. 6. *Usus ergo,* &c.

(a) See the Epistle in the Appendix, Scriptur. 21.

Harpies of those rapacious times (the Conquerours kinsmen and countrey-men) laid about them notably for the fattest morsels they could find in most places, out of Church-lands (a) especially: (*tempore autem prædicto Normannorum, quo Dux Will/mus cum suis armatis copiis Angliam intravit, vastavit, penitus & subegit, omnia in prædam data sunt*, &c. quoth Gervase the Monk of Canterbury) and what with force on the one hand, and flattery on the other, obtained so many, as at length the pressure gave occasion to the Religious of those times for a general complaint thereof unto the Conquerour, with petition for redresse, and amongst the rest, the Monks both of St. Austins, and of the Cathedral at Canterbury, particularly seem to joyne in the Remonstrance; whereupon (for the for-

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mer) the Conquerour directs a writ, brief, or charter to Lanfrank the Archbishop, &c. for redresse of what wrong in that kind had betided the place, of such tenor as you shall find in the Appendix, Scriptura 13. And for the Cathedral, besides a particular charter granted by the Conquerour to the Monks there, *Ut prædicti monachi potestatem habeant terras suas dandi & tollendi ubicunque eis melius visum fuerit, quicunque eas teneat*: &c. they shew a general writ of his to Archbishop Lanfrank and others, for the restitution and reseizing of whatsoever had been taken from the Bishopricks and Abbeys all the Kingdome over, whereof it seems they had particular occasion to make use, both by their care to record it, (as an evidence much concerning them) in their Leigers, as also by the record they likewise there keep of the plea between their said Archbishop, and the foresaid Odo, at Pinenden, whereof, from the Records of the Church of Rochester, which it equally concerned, Mr. Selden in his Notes upon Eadmerus, pag. 19. hath given us a copy; a pregnant evidence for our present purpose in many respects. This last named Charter, because it may be the first that ere you saw of this nature in print, and may conduce to a right judgement of Spots Story, I shall advisedly recite at large in the Appendix, where you shall find it, Scriptura 14. But (no longer to digresse) be further advertised (good Reader) that whereas by Spots relation, the Conquerour was opposed by the Kentish men, in his march through West Kent towards Dover, and after composition with them at Swanescumb, was by them conducted to Rochester, and put in possession of the County together with

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(b) Gesta Gu= liel. Ducis, &c. pag. 204.

(c) Hist. Ec= cles. lib. 3. pag. 502.

(d) Herewith concurrith Malmesbury, fol. 116. b. where he saith, *Qui cum & belli*

the castle of Dover; the very truth is, by the more credible relation of (b) Gulielmus Pictavensis (a writer of the same time, and the Conquerours own Chaplain, followed by (c) Ordericus Vitalis) the Conquerour, after his victory neer Hastings, made not first to London, and then to Kent, but after settling his affairs about Hastings, presently took his journey towards Dover (d) by the way of Romney, where having avenged himself of the savage kind of Inhabitants, for the slaughter of certain of his men, by some mistake landing at that place, (of Pictavensis called *Romanærium* for *Romaneium*, as of Ordericus rightly named)

*Hastingensis
victoria, &
Castelli Do=
frensis deditio=
ne terrorem sui
nominis spar=
sisset, (Con=
quæstor) Lon=
donium petit,
&c.*

he thence advanced on to Dover; whither, though a numberlesse multitude of people had betaken themselves, as to a place, by reason of the castle, inexpugnable, yet dismayed with the Conquerours approach, the place with all readinesse submitted to him, who, after eight dayes fortification of it, marching from thence, at a place not far from Dover, the Kentish men of their own accord came in to him, sware him fealty, and gave hostages for performance. Marching then onward, and understanding where Stigand the Archbishop, with the Earls Edwin and Morcar, and other English Nobles (who conspired to set up Edgar Etheling, King) were assembled, he made towards them with a strong power, and sate down not far from London; whence certain companies issuing out against him, he, with 500 of his Horsmen soon repelled them, forcing their retreat back into the citie, not without the slaughter of divers by the way. This action was followed with the firing of all buildings whatsoever behither the river (of Thames.) Passing over which,

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the Conquerour removed to Wallingford, whither Archbishop Stigand, and other of the English Nobility followed him, and deserting young Edgar, made their peace with the Conquerour, receiving him as their Sovereigne: whose example the Londoners soon following, rendred themselves also to the Conquerour, and (as the Kentish men had done) delivered him hostages; such, both for number and quality, as he required. Thus Gulielmus Pictavensis followed (as I said) by Ordericus Vitalis, a writer of, as it were, the same time. By which relation it is evident, that the Conqueror intending for Kent, did not set out (as Spot insinuates) from London or those parts, but on the contrary ere he went to London, made himself sure of Kent, by taking Dover castle, (the Lock and Key, as one (e) calls it, of all the Kingdome) and from thence, after the Kentish mens voluntary submission to him, marcheth towards London. Now, from the silent passing over most of these particulars in other writers, of and about this Authours time, all save onely Ordericus Vitalis, let none call the truth of them in question, since their undertakings were for compiling a more general Story, than that of the Conquerour alone, who therefore were more succinct and summary in their relations, advisedly (by their own confession) premitting many particular passages. Ingulphus, after a summary relation of the Conquerours acts at his first coming in, excuseth his brevity thus: *Summatim namque ac carptim victoriosissimi Regis gesta narro, quia secum sequi annuatim, passimque scribere gressus suos non sufficio.* Whereas, on the contrary, this Authour (Pictavensis) undertaking onely the acts and life of the

(e) Matth.
Paris, Hist. in
Hen. 3.

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Conquerour, (whose Chaplain he was) sat himself to exspatiate in all memorable occurrences. Besides, (which I cannot but observe, as tending much to the credit both of our Authour and his relation) although Gemeticensis (a writer of the same time) balk the most of these passages; yet excusing himself also for his studied brevity, he refers the Reader to our Authour, for

(f) Lib 7. c. 41.

fuller intelligence, making mention of his Story (like as Ordericus Vitalis also doth) with great applause, in these words: (f) *His per anticipationem breviter intematis, ad finem gestorum Willelmi Regis Anglorum, & Ducis Normannorum, de quibus fastidio Lectorum compendiose consulentes, quædam perstrinximus, veniamus. Si quis vero plenius illa nosse desiderat, librum Willelmi Pictavensis, Luxoviorum Archidiaconi, eadem gesta sicut copiose, ita eloquenti sermone affatim continentem, legat.* Of whom Ordericus Vitalis (g) further thus: *Ipse siquidem prædicti Regis capellanus longo tempore extitit, & ea quæ oculis suis viderit, & quibus interfuerit, longo relatu vel copioso indubitanter enucleare studeat.*

(g) Hist. Eccl. lib. 3. prope fin.

Thus far then in way of refutation of Spots Story in grosse, or in the general; a meer Monkish figment, I conceive, politikely devised, and with a design to bring a perpetual obligation on the Kentish men to his own Abbey, as owing (forsooth) the continuance of their ancient liberties partly to a quondam Abbot of the place: even much such another, as that of the Devils attempt upon S. Pancras chappel to overturn it (whereof in the Antiquities of Canterbury, pag. 61) smelling too much of the Legend, and invented doubtlesse for the greater glory of the Abbey.

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(i) Lamb. Peramb pag. 30. Author Antiquit. Britan. in vita Stigandi Archiep.

Now descend we to the result of the Story, and the inference upon that meeting, made by Spot and (h) his followers, which in short is, that hence, or hereupon Kent received her pristine priviledges, instancing (some of them) in "Gavelkynd" for one, and particularly that hence, as formerly Kent (participating in common with the whole Kingdome in that point) had no Villeins, so by that means from henceforth (by a singular privilege above other counties) it never had any. Indeed, (which I note as adminicular to this assertion) among the articles by which the Auditours of our Cathedral were to take accompts of the Bailives of that Churches manours out of Kent, recorded in an old Lieger there, these are some: 1. *De Censariis Nativorum quod possint exire tenuram Domini ad laborandum & operandum extra, & statim post opera redire.* 2. *De finibus Nativorum. pro filiabus suis maritandis infra tenuram Domini.* 3. *De finibus Nativorum. post mortem patrum suorum, quod possint habere terras quas patres habuerunt, tenendas ad voluntatem Domini, secundum consuetudinem maneriorum:* Whereas in the like articles for the manours in Kent, not one of these occur; but, as if improper for the manours of that county, are all quite omitted, to the manifest confirmation of Spots acquitting Kent of Villeins and Villenage. True, I confesse, nor can it be denied as to those dayes, the time I mean when those Articles were set on foot, which, judging of their age by their character, seemeth to be about Edw. 2. dayes: but that there were none at, or after the Conquest (the point in issue) is under favour an assertion little truer, if not fully as false, as that other of his concerning the composition with the Conquerour. For proof where-

+ p. 72. l. 4. retained.

73 <sig L>

Villani in Kent.

(i) Godwin, Catal. of BB. in the life of Hubert.

of, to say nothing of Hubert (the Archbishop of Canterbury in King Johns time) his acquitting both his own and the Monks possessions, amongst other burdens, from that of (i) Villenage, because possibly this privilege might concern their possessions elsewhere, and not in Kent: I appeal to a writ of King Edw. 2. *anno regni sui septimo*, to the Assessors of a Tenth and Fifteenth in the county of Kent, in the behalf of the Abbat of Spots own Abbey (St. Austins) and his Villeins, whereof you may find a copy in the Appendix here, Scriptur. 15. followed with another of a very rare deed or charter of about H. 3. time, taken from an ancient Manuscript Chartulary of the very same Abbey, now remaining with Sir Thomas Cotton, which I must confesse to owe to the courtesie of my late learned friend Sir Simonds D'ewes, clearly shewing Villenage to have obtained and taken place in Kent, and even in our Gavelkynd; a Tenant to that Abbey of certain land in Gavelkynd doing homage to the Abbat there for the same, expressly as for Villenage, and covenanting to perform as much service to his Lord, as to the same Villenage appertained, as by the deed (which whether I should more value for it self, or for the hands sake that reach'd it to me, is with me some question) more fully may appear, Scriptur. 16. Add hereunto, that the Laws of Hen. 1. cap. 76. make mention of *Villani* in Kent: *Differentia tamen Weregildi multa est in Cantia Villanorum & Baronum*. So that chapter is concluded. To ascend yet higher, in Domesday-book, and in the Kentish Survey there, *Villani* frequently occur, by which, if, after the common opinion of modern and some elder Lawyers, Bond-men (such as of

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(k) Cap. 2. Sect. 28. pag. 169.

latter times and at this day we call Villeins) are not to be understood, but rather (after the (k) *Miroir*) 'Cultivators of fief demorants en villages uplande; car de vill est dit villein,' &c. or, in Fitzherberts expression: 'Base tenant, qui fesoit villein service, mes ne fuit pas villein.' i. e. A base Tenant, that doth Villein service, but nevertheless is no Villein; then, to put the matter out of all doubt, know that besides *Villani*, you may with all find, and that in divers several manours too in that Kentish Survey (particularly in the Bishop and Church of Rochesters manours of Southfleet, Stone, Falkham, Woldham, Trottesclyve, Snodeland, Halling, Friendsbery, &c.) expresse mention of *Servi*, which of all hands is confessed to denote men of servile condition, bond-men, or bond-slaves, 'Villeins'. And take along with you this note by the way, that the pretended composition in Spot, by which he will have Kent for the future conserved in her immunity from Villenage, did for many years antedate the time of this Survey; that, pretending to the Conquerours first coming in, this, not beginning, at the soonest, untill about fourteen years after. I might follow this with some pregnant passages to this purpose, such namely as that in the old

Servi in Kent.

(l) In Armar. Eccles. Cant.

(l) Custumal of Ickham manour in East Kent: *Et isti Cotarii nusquam capient auram nisi apud Ickham vel Brembling*: such (secondly) as that in a like ancient

(m) In Archiv. Archiep. Cant.

(m) Custumal of Tenham manour: *Quælibet Coteria tenet unum messuagium, tres acras, & debet metere 8 acras, &c. Et facient quicquid serviens de manerio præce=*

(n) Penes Re= gistrum Consi= storii Cantuar.

perit: such (thirdly and chiefly) as that in the (n) will of one Sir William Septvans Knight, sometime owner of Milton near Canterbury, dated anno 1407: *Item*

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Nativi.

lego Adam Standerd, Thomæ Hamonde, Roberto Stan= derde, Roberto Chirche, & Johanni Richesforde servis & nativis meis, pro bono servitio mihi ab eisdem facto, plenam libertatem, & volo quod quilibet eorundem habeat cartam manumissionis sigillo meo signatam, in testimo= nio huiusmodi meæ ultimæ voluntatis. I might add, that, what in confirmation of the probability of Spots Story is added, viz. that hereupon the King so sto= mached the Archbishop, as to put him by his place and office in his Coronation, hath no support or warrant from any Story of those times, all which, with Gerva= sius Dorobernensis, a Monk of his own Church, agree in the yeilding and rendring other reasons hereof, chiefly his being interdicted his Episcopal Function, for invading the See of Canterbury, Robert the Arch= bishop being yet alive, and undeprived, and holding it and Winchester both together: which is the more probable, because for the same reason four years be= fore, Wolstane the elect of Worcester refused to be consecrated Bishop by him, and was sacred by Aldred, the Archbishop of York, as the Monks of Worcester and Westminster have it in the year 1062. But to keep to our Villenage, which apparently is traceable in Kent sithence the Norman Conquest. Nor indeed seemeth it to have been otherwise here (in this parti= cular of Bond-men, or Villeins) in the times before the Conquest; witnesse (besides the mention of such in the (o) Saxon Laws of Ethelbert, Lothaire, and Eadric, all Kentish Kings) an old Saxon tripartite deed or char= ter purporting a contract of marriage, which, because it may serve to exemplifie the manner of espousals in those elder times, and is a great illustration to a model

(o) Ms. in Text. Roffens.

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or constitution of that nature exhibited of late by Sir Hen. Spelman, Concil. Tom. 1. pag. 425. and Mr. Whelock, in his late Edition of the Saxon Laws, pag. 60. I shall tender it to common perusal, from that part of it left and laid up at Christchurch, transcribing it in the Appendix, Scriptur. 17. Before I proceed, having made mention of that constitution, touching the man= ner and rights of espousals, let me (so fairly occasioned, with excuse for the digression) help to rectifie the edi= tion with some animadversions, which to me it seem= eth much to want, in the Saxon especially. First then I conceive, the first word of the second chapter in the Saxon copy, viz. (þ') as belonging to the precedent chapter or article, ought to be taken thence, and placed as the very last word of that precedent article, and so we are to read it, 7 aborgian his frind þ', .i. according to the Latine copy, & *plegient* (rather, *fide jubeant*) *hoc amici sui*. In the next, or second, article, I conceive the two last words there, ðon syððan, belong to the next, the third article, which consequently is to begin there. As imperfect is that article in the end as in the beginning, wanting to perfect it, the whole first line of the next (the fourth) article, viz. gif heo leng sy ðonne he; all which, I say, belong to the precedent

article, the fourth being to begin at gif hit swa gefor= word bið, which I conceive not well turned (as in the new Version there) by *si quidem eveniat*, being rather, under favour, thus to be rendred: *si sic conveniat*, and thus indeed runs the old version in the precedent page; and so (to passe by some intervening literal mistakes) is that in the close of the sixth article, 7 fo to ðam borge se ðe ðæs weddes saldend sy, by *satisfactionem*=

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que accipiant de celebrandis nuptiis. The old version here is *Et excipiat inde plegium qui jus habet in vadio*. I once pitched upon this version: *Satisfactionemque inde accipiant qui sponsalia ordinaverint, i. e. Paranympsi*. But leaving that, to return to our purpose. By what is premised, I conceive we have ground enough to conclude against what Spot singularly delivers touching the Conquerour and Kentish mens meeting, with the manner, product, and result of it; and consequently, what is built upon it, our counties reteining her Gavelkynd-customes and priviledges by means thereof.

But after this pulling down with one hand, to help build up another while with t'other, and not to leave the cause of our enjoyment of those Liberties (that especially of Partition, the more eminent property in Gavelkynd) thus uncertain, let us enquire into the carriage of affairs of this nature about the times of the Conquest, when they say we obtained to preserve and continue this (amongst the rest) by composition with the Conquerour, whilst the rest of the Kingdom was deprived of it. I say deprived, because as (p) *Privatio præsupponit habitum*, so those who are of this opinion take it for granted, that before the Conquest, by virtue of a national custome first induced by the Saxons, and by them traduced from the Germans, intended by Tacitus in his *Hæredes successoresque sui cuique liberi*, &c. and afterwards incorporated into our Laws by (q) King Canutus, inheritances descended and were partible after the nature and manner of our Gavelkynd, at this day. So of late (amongst others) Sir Hen. Spelman, in his Glossary, verb. 'Gaveletum'; Daniel in his History, fol. 38. Verstegan in his Antiquities pag. 57.

(p) L. decem in fi. de stipul. l. manumissio= n<is>, de justit. & jur.

(q) LL. Canuti, par. 2. cap. 68, & 75.

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Archbishop Parker in his 'Antiquitates Britannicæ,' pag. 108. and Mr. Lambard, in his Glossary, verb. 'Terra ex scripto,' though afterwards in his Perambulation, pag. 545. he is found to crosse himself herein, by saying that this custom was brought hither out of Normandy by Odo the Conquerours brother. Now 'tis true, and not to be denied, that by these Laws of Canutus inheritances were partible; but how? It may be equally, (like our Gavelkynd) but it not so expressed, nor do the words inforce it. It's ordered there indeed, that a partition of the estate be made, in the one, between or among the wife, children, and next of kin, by the Lord; in the other, by the heirs among themselves; in both, not swiþe emne, or swiþe efen, i. e. equally, but swiþe rihte; in the former more explicitly thus: *ælcum be thær mæþe*, &c. i. e. (according to the old version in Brampton) *unicuique secundum modum qui ad eum pertinet*. Here is now no equal division spoken of, no equalling the younger with the elder brethren, or the

(r) Archaion,
fol. 136. a.

(s) Davies
Reports, Le
Irish custome
de Gavelkind,
fol. 49.

(t) See Cow=
ells Interp.
verb. 'Rationa=
bili parte bono=
rum,' & Swin=
burne of Te=
stam. par. 3.
cap. 16, & 18.

(u) Bracton,
fol. 60. b. Seld.
Tit. of Hon.
cap. 5. sect. 21.
p. 724. Stat.
Will. Reg.
Scotor. 1.
cap. 22, & 30.

(x) Custumar.
Normann.
cap. 20, 21.

(y) 27. Di=
stinct. Utinam.

(z) Daniel, in
Will. 1.

like. But the estate is to be shifted *swipe rihte*, i. e. 'ac= cording to right,' justly, or if you will (after the old ver= sion of the latter Law in Brampton, being the same ver= batim with that in Mr. Lambard (r) elsewhere) *recte*, everyone to have his due, haply after a Geometrical, not Arithmetical proportion. Again, not by equal proportion, in point of goods at least, for each was to partake therof, (as in the Gavelkynd partition (s) in Ire= land, each one a part according to their quality, degree, or desert) *pro rata*, happily their 'reasonable part,' whence indeed some do fetch and ground a writ we have a= mong us, called 'Rationabili parte bonorum' (concerning which there is a question in our books, whether it lie

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by the common Law, or by the custome onely of some (t) Countries, and whose footsteps may be traced in venerable Bedes English Saxon Ecclesiastical History, lib. 5. cap. 13.) but of this matter more anon, at the close or foot of this Proposition. Or again, *swipe rihte*, i. e. *juxta arbitrium boni viri*, as the Civilians in like case use to speak, or *pro arbitrio Domini*, as it is in the former of those Laws, *be his dihte*, i. e. *judicio suo*, whose place, by provision of succeeding times, both here and in Scotland, was supplied by the (u) Ordi= nary, first joyntly with the deceaseds friends, after= wards without them and alone, as haply more to be confided in, because by common intendment, as more knowing, so more careful to deal uprightly; though it be utterly unknown or uncertain when this trust began by written Law to be committed to the Ordinary; if I may guesse, about what time that provision was made for the like in (x) Normandy, whereof in Matth. Paris History, anno 1190. pag. 161. edit. ult. Or else (to proceed) *swipe rihte*, according to right, i. e. Custome, or right, as it is ordered and directed or tempered by the usages of several places, for (y) *Quælibet provin= cia abundat suo sensu*. Apposite and pertinent to this purpose is that observation of a late compendious (z) Historian of our own, upon occasion of the Con= fessours collection and compilement of, as it were, a 'Codex Legum,' (whither we may refer the original of 'Magna Charta') a Standard-law to be currant over all the Kingdome: 'Before these Collections' (saith he) 'of the Confessours, there was no universal law of the King= dome, but every several Province held their several Cu= stomes, all the Inhabitants from Humber to Scotland used

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the Danique Law, Merchenland, the middle part of the Country, and the state of the West Saxons had their se= veral Constitutions, as being several Dominions, and though for some few years there seemed to be a reduction of the Heptarchy into a Monarchy, yet held it not so long to= gether (as we may see in the succession of a broken go= vernment) as to settle one form of order currant over all, but that every Province, according to their particular Founders, had their Customes apart, and held nothing in common, (besides Religion, and the Constitutions thereof) but with the universality of *Meum & tuum*, ordered ac= cording to the rights of Nations, and that *Jus innatum*, the common Law of all the world, which we see to be as universal as are the cohabitations and societies of men,

and serves the turn to hold them together in all Countries, howsoever they may differ in their forms.' So that though we shall admit these with the rest of Cnutes laws to be national, as by their Preface (that, I mean, of the second part, containing his secular or politike Constitutions) they are apparently no other, (Dis is ðonne seo woruldcunde gerednes ðe ic wille mid minan witanan ræde, þ' man heald ofer eall Englalund:) yet I take it these Laws (68. and 75.) conclude not for a national, general, or universal descent of Inheritances, by an equal or Arithmetical division amongst all the children or heirs, nor indeed for more than this, that a partition was to be made of the same, in point of proportion, more or lesse, according to what, *pro more patriæ vel loci*, and (in point of goods) *juxta arbitrium Domini*, was just and fit, there being no precedent general Law, or Canon here (now extant at least) to regulate, or give directions in case.

81 <sig M>

(a) Hist.
Croyl. fol.
519. a.

But if not nationally, (for, to give one instance in stead of many, Thoroldus, in a Charter of his to Croyland Abbey, recorded by (a) Ingulphus, makes mention of his Lord and kinsman, Earl Algar, the eldest son and heir of Leofric, Earl of Leicester, and his Countesse Godiva, Thorolds sister, in the year 1051.) yet I am contented to admit and agree, that provincially, and particularly here in Kent, we had such a Custome both before and at the Conquest: neither am I against their opinion, who affirm the like course and custome currant in those times throughout the Kingdome, as not being desirous to insist much upon this example in Thoroldus charter, or any such like, to the contrary, for the present, though I doubt whether it can concludently be argued from (the grounds and authorities they seem to go upon) those Laws of Canutus. Neverthelesse be it so: for though some will say, the Conquerour found it not here, but either by himself, or his brother Odo, brought it hither out of Normandy, and by the pattern and practice of his own Countrey planted it here, (how can this stand with Spots Story by the way?) yet I am not of their mind. For had it been from thence transplanted hither, probably it would not have been confin'd to Kent, a corner onely of the Kingdome; but have spread it self rather over the whole, by the Conquerours means, whose inclination and endeavours to propagate and implant here the Customes of his own Countrey, are too eminent and notorious to be doubted of. 'Tis nothing probable then, (what some have deemed) that we borrowed this custom from Normandy, or that Odo was wrought upon by any pattern of that Countrey to set it up

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(b) Perambul.
pag. 538.

amongst us, but rather found it here at his coming. Supposing therefore such an universal custome here in England before and at the Conquest, it will concern us next to make enquiry, how it came to passe, that when all the Realme beside, hath in a manner discontinued it, Kent onely reteins it, in that general manner at least, whereby in processe of time it is become (as the Year-book quoted of (b) Mr. Lambard phraseth it) as it were a common Law there. The an=

swer must be but conjectural, since Records herein fail us of all light, as well as Histories, all but Spots, who for the reasons pre-alleged shall be none of my Resolver. Will you have the common answer? Why then they say the Conquerour abrogated this custome in all parts of the Kingdome save onely in Kent, which obtained to continue it by composition with him when they met at Swanescomb. But having formerly said (I hope) enough in answer hereunto, I will seek further, and try if some other more probable cause may not be found for it.

The Conquerour then (I will suppose) consented to the continuance of this custome generally throughout the Kingdome, in all, I mean, but Knight-service land, the descent whereof to the eldest son alone, (partly for his own, and the Realms better (c) defence and strengthening, and partly for the upholding and maintenance of (d) gentile families) I suppose none doubts to be lesse ancient than the Conquest, for so much of it (at least) as is of ancient Tenure, (as Mr.

(c) Coke upon Littleton, fol. 14. a.

(d) *Hodie nobilitas subinde allodiales sapras divisio inter liberos*

obnoxias, in feuda redigere solet; scil. ut primogenito consulat, & potentiae nervis in unum glomeratis, suus familiae splendor multitudine liberorum in posteritate non gravetur. Nic. Burgund. de Consuetud. Flandriae, Tract. 7. num. 7.

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Lambard desires to qualifie it:) Nay, and seems to give expresse allowance to it, without distinction of lands, by that 36th of those Laws in Ingulphus copy, which after the Conquest, he granted to the people of England, and were indeed (as the title of them intimates) the Laws of the Confessour, his predecessour; or rather, say (e) some, of the Confessours predecessour, Canutus: *Si quis intestatus obierit, liberi ejus hereditatem aequaliter dividant.* So runs the Law according to (f) Mr. Seldens version from the original French or Norman. Some haply may take this as intended onely as a rule for goods, not for lands too.

(e) Camb. Britan. Seld. Pol. lib. 2. tit. 14. pag. 166.

(g) Cowell Interpreter. verb. 'Heir', and 'Hereditament'. As also Institut. lib. 2. tit. 14. pag. 166.

But to that it may be replied, that the word (*hereditatem*) there (if of that acception then, as since and at this day) will not admit of that construction; since, by the common opinion both of elder and more (g) modern Lawyers, nothing passeth with us here in England, *jure haereditario*, but onely Fee, and that Hereditaments are such things as do naturally, and of course descend to the heir, and neither to the Executour or Administrator, as chattels do, whence that of Littleton, Sect. 1. *Feodum idem est quod haereditas*, answering to that of (h) Bracton, long before him: *Feodum est id quod quis tenet ex quacunque causa sibi & haeredibus suis.* See to this purpose Glanvill, lib. 13. cap. 27.

(h) Lib. 4. fol. 263. b.

Objection.

But here we meet with an objection. By this argument (will some say) you restrain and tie up the Constitution to lands onely, excluding goods, or chattels, as our Lawyers call them, from what ground, see in Sir Hen. Spelmans Glossary, verb. 'Capitale', to which add Freherus his Notes upon the Decalogue, published anno 1610. Precept the last. To construe it, (I

Solution.

+ p. 83. l. ult. construe it thus.

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must confesse) or of either singly, or alone, were, in my judgement, too much to restrain and streighten it, and in effect to conclude it a lame and imperfect Con=

Objection.

Solution.

(i) See Gesta Guliel. Ducis, &c. p. 200. b.

(k) Lib. Feu= dor. 1. tit. 8. parag. 1. & ibi Hotomannus.

(l) Versio Fragmenti Saxon. in Text. Roffens.

(m) LL. Alure= di, cap. 47. apud Jorna= lens. LL. Ca= nut. cap. 104. ibid. LL. Edo. in Lamb. fol. 136. a.

(n) LL. Ethel= redi, cap. 2. in Jornal.

(o) Judic. Ci= vit. Lond. ibid. cap. 1. LL. Canuti, c. 32. ibid. & Glos= sar. ad calcem LL. Hen. 1. verbo 'Bocland'.

stitution, ordering the intestate dead mans estate, and the disposal thereof, but to halves, as we say; where= fore I conceive, that to take the word ('Inheritance') here to comprehend both, (as I suppose æhte doth in that 68. of Canutus Laws, whereto this here, if it were not taken thence, may seem to have some reference) is not more reasonable, than to understand it either of chattels, or lands singly, seems to me otherwise.

Why but then (say they) you admit of a power of devising Inheritance by will, and consequently make Fee and Free-hold deviseable, and that by Law, argu= ing from those words: *Si quis intestatus obierit*, &c. True; distinguishing times: for (I take it) nothing was more usual in those (i) times, (I mean before the Norman Conquest, and this, if you mark it, is origi= nally a Law of the Confessours, or rather of Canutus, his predecessour) than to devise and give lands away by will, though therein they receded from (their first copy) the German custome, of *Nullum testamentum*; a provision afterwards received into the body of the Feudal Law, which thus hath it: (k) *Nulla ordinatione defuncti in feudo manente vel valente*. It was then, I say, a usual thing, with their Lords consent at least, to dispose of their land by will, especially their 'Bocland', thence haply, amongst other titles given it (as being sometimes termed and turned (l) *Alodium*, otherwhile (m) *terra hereditaria*, often (n) *terra libera*) not sel= dome called (o) *terra testamentalis*, that is (as an old Leiger-book in Guildhall London expounds it) *terra*

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quam homo potuit in lecto suo languens legare: with this limitation notwithstanding, that such 'Bocland' were not by precaution in the original gift or grant, liable to that or the like restriction, in point of alienation, oc= curring in the 37th of King Alfreds laws, which never= thelesse extendeth but to strangers, a man being there forbidden to alienate his land of that nature of his mæge borh, i. e. *extra cognationem vel progeniem*, or, in the Civil law phrase, *extra familiam*, from his own kinred or family, whence perchance it came after= wards to passe, that in such *terra gentilitia*, the heirs concurrence was required and used in the alienation. Instances of this kind (of disposing land by will, I mean) might be given in abundance, but a few may serve the turn. To passe over, as obvious, because publike, King Alfreds will, at the end of his acts and life by Asserius, though I might here perhaps not imperti= nently take up that of *Regis ad exemplum*, &c. to let that passe, I say, as also for the like reason, to omit Byrhricks will of Mephram in Kent, extant in the Per= ambulation, pag 492. whereunto (if need were) I could add many more examples, as well out of St. Albans private History, now of late made publike by my de= ceased friend Dr. Watts, as from the Records of the Church of Canterbury, whereof, besides the copies of some whole wills, I have by me several extracts: To let all these passe, I say, I shall onely instance in a will or two, one of a very eminent personage, an Etheling, (p) Prince Ethelstan by name, the son of King Ethel= red, which I shall set before you in the Appendix, Scri= ptura 18, as Scriptura 22, the other; with some im= perfections and misprisions here and there, I confesse,

(p) Of whom see Speed, Hist. in the life of Ethelred the 32. Monarch.

but through the Transcribers fault that entered them in the Leiger, and by reason of his ignorance (it should seem) of the Saxon tongue and character, which I dare not undertake to rectifie. Thus for practice. As for law: besides that power in all men in those times to devise land in general, by their wills, without any violence deduced and concluded from that 68 of Canutus laws, providing how a mans whole estate (the Lords Heriot onely excepted) shall be disposed of, in case he die intestate, we have a more expresse law for it afterwards, the 76th I mean, for such land at least as is there termed *land gewered be scyre gewitnesse*, i. e. (as Mr. Lambard construes it) *terra omni lite soluta*, or (as it is turned in Jornalensis, and the 35th of the Confessours laws 'de Heretochiis' in Mr. Lambard, fol. 136. a.) *terra acquietata comitatus testimonio*. Let me illustrate it by a passage in a Charter (q) of King Edmund to Aelfhere his Thane in the year 941. of certain lands and possessions there called Mulanton, running thus: *Prout pater ipsius Ælfheri priorum temporibus nostrorum, sub contestamine totius popularis Senatus, sua pecunia, ab illo & ab alio, prout tunc temporis mos erat, adquisivit*. In effect it was, as I conceive, if not the same with 'Bocland', (called *terra testamentalis*, not onely because deviseable, but also in regard of the publike testimony of the Shire, required and used in the passing of it otherwise than by will) such land (like that mentioned of Mr. Selden, Tit. of Hon. par. 2. cap. 5. pag. 631. and there said to be holden, *quiete & absque omni calumnia*; or like that passed and conveyed, as in Sir Henry Spelmans Councils, pag. 319. and 333.) as was unquestionably a mans own, as upon the purchase or

(q) In Armar.
Eccles. Cant.

grant of it confirmed and assured to him in the legal way of those times, such haply (like those of latter times passed by Fine) the conveyance whereof was recorded and inrolled, or entred in the Shire-book, in publike Shire-mote after proclamation there made, for any to come in that could lay challenge, or pretend right unto it; whence not improbably our manner of recording conveyances, sometimes (as in Canterbury) in the Hundred, sometime in the Burgemote, otherwhile in both, whereof I am not unfurnished of instances. Thus for that kind of land. Now for 'Bocland', and how the Law stood there: (r) Sir Henry Spelman, I confesse, is cleer of opinion against all power of alienation in the owner, and that of necessity it must be left to descend to the heir, and thence is called *terra hæreditaria*, grounding upon that 37th of King Alureds laws, which he there recites. Under favour, that Law cleerly makes for the contrary, allowing unto the Possessor a power of alienation, saving where his hands are tied from it by an expresse provision and prohibition to the contrary, from those (the Ancestour, or who else) it came unto him from; a caution in my apprehension of the same nature with an exception, which (as (s) Civilians use to say) *firmit regulam in non exceptis*. And as for its name of *terra hæreditaria*, and the argument upon it, it is easily answered, as thus: so called it was to distinguish it from 'Folcland',

Vid. Bracton,
lib. 2. cap. 16.
num. 12. fol.
38. a.

(r) Glossar.
verbo 'Bocland'.

(s) gl. Ex his
in addit. in
parag. item
placet. Instit.
de donatio. &
parag. ut au=

tem lex. in
Auth. de non
alien.

otherwise called 'Gafolland', wherein the Tenant being but as it were a Lessee, Usufructuary, or Fermour, and having no propriety, upon his death, or other expiration of his term it reverted to the Lord, and descended not upon the heir, as 'Bocland' did, at least

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(t) Glossar.
verb. 'Focland',
& verb. 'Alodium'.

ought to do, being (because his own in propriety) hereditary, if not alienated by him in his life time, as it might be, in regard it was as well *terra libera*, as *haereditaria*, and so called, which 'Folcland' never was, however Sir Henry Spelman, in a place (t) so assert, likening it to 'Allodium', which indeed was 'liberum', and consequently capable of alienation, either by gift or sale, to whomsoever the owner pleased; a property appropriate to 'Bocland', thence otherwise called, especially abroad, 'Allodium', whereof more hereafter. But further to clear the point of 'Boclands' being alienable, and in the power of the owner to dispose of at pleasure, have here a pregnant passage for our present purpose, borrowed from a Charter (u) of

(u) In Archiv.
Eccles. Cant.

Archbishop Wlfrid (who died about the year 830.) of the gift of certain houses to his Successours in the See of Canterbury, thus speaking: Gif ðonne huelc mon ðæt uord cwæðe ðæt ne me siae min wic ðon alefedran (x) ðon oþrum higum to brucenne ne minum ærfewearðum, ðonne wite he ðæt hit naes nefre cristes cirican land ne nenges monnes bocland aer min, 7 ðonne se monne ieond ðence 7 asmeaie be oðerra monna boclandum ie in friþstolum ie butan, huader hio megen hiora agen sellan oððe on hiora lifgan sue him leof siae oððe for huðu min scyle beon un ie I denre ðon oðrum monnum hiora. That is, in our modern English: 'If any man shall say that this Mansion is not more in my power, or' (the power of) 'my heirs to use, than of the rest of the Society,' (or Covent) 'then let him know, that it never was Christ-church land, nor any mans Bocland before it was mine: and then let him further think and consider by other mens Bocland, as well in privileged places, as without, whether they may grant away their own' (land,

(x) *Quære:*
for the writing
is not clear.

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or possessions) 'or give it for' (or, in) 'their lives times as pleaseth them, or wherefore mine should be of different kind to those of other men.' Thus the Charter, as I understand it. 'Bocland' then, I conceive, we may conclude alienable by the owner of it, both by act or grant in his life time, and at his death by will, in the times (I mean) before the Conquest. But afterwards that custom of devising it by will ceased, as did withall the descent of land generally, by equal division amongst all the sons. For, as the English Laws and Customes in general, from that time suffered a daily eclipse and declination by degrees, so this in particular (saying where they were more tenacious of it than elsewhere, and in such places, whereof (y) London seemeth to be one, as by special privilege were suffered to keep it up) languished, and was at length supplanted by that other kind of descent, which now regularly takes place throughout the most part of the Kingdome. Inasomuch as where this partible descent cannot, to uphold it self, justly plead antiquity and ancient custome, it quite fails, and falls to the ground. And to this passe

(y) See Stowes
Survey, p. 535.

(I take it) was it come in Glanvill and Bractons dayes, who therefore harmoniously deliver this as a requisite and essential property in land of such descent, that it be not onely by nature partible (as it is by being Socage, if we may interpret Bractons *si hæreditas partibilis sit*, by Glanvills *si fuerit Socagium*;) but withall, that by custome and of old it hath actually been parted. Now the Kentish men, it seems, the Commons there, I mean, like the Londoners, more careful in those dayes how to maintain their issue for the present, than their houses for the future, (a contrary respect to theirs

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(z) Lamb.
Peramb. pag.
546. from Lit=
tleton.

who have of late, by Act of Parliament, rid their lands of this Custome, as to that property of Partition) were more tenacious, tender and retentive of the present Custome, and more careful to continue it, than generally those of most other Shires were: not because (as some (z) give the reason) the younger be as good Gentlemen as the elder brethren, &c. (an argument proper perchance for the partible land in Wales) but because it was land, which by the nature of it, appertained not to the Gentry, but to the Yeomanry, whose name or house they cared not so much to uphold, by keeping the Inheritance to the elder brother. And thus at length, though 'tis like enough from small beginnings, (as many times great streams have but narrow fountains) it became so spread and diffused over all the County, that what was not Knight-service, but Socage-land, or of Socage Tenure, was in time (in Mr. Lambards phrase) apparelled with the name, and (as may be added) qualified with the properties of Gavelkynd. And hence also it comes to passe, both that we very rarely, or never meet with any land there at this day, (other than Knight-service land) that is not of Gavelkynd nature, and of a partible descent, and that withall both our printed and manuscript Custumals, whether general or particular, use never a word of Socage Tenure, but of Gavelkynders, Tenants in Gavelkynd, Tenements of Gavelkynd, and such like, as Mr. Lambard observeth, pag. 544. And notwithstanding the ancient printed Custumal in Tottell claimeth freedom onely to the bodies of the Gavelkynders, which may be the truer reading, yet Mr. Lambards may, especially at this day, passe well enough, by whose copy it

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is claimed as due to all the Kentish men in general, as, for the generality of the Commons, by common indentment, such at this day. But of these things hitherto. Yet ere I proceed to the next Proposition, let me discharge my self of a late promise for inquiry into the following Emergent:

See the Preface to the Reader.

Whether the Writ, 'De Rationabili parte bonorum,' lie at the Common Law, or by Custome.

This Writ is grounded and dependeth on a tripartite division of a mans personal estate, whether dying testate or intestate, and leaving behind him wife and children; as in case he leave onely a wife, and no children, or children onely and no wife, upon a bipartite. In the former of which cases, one third part of the goods belongeth to the widow, another to the

Hotchpot.

children, and the third (called the Deaths-part) to the use of the Defunct, to be disposed either by himself, as he shall see good by his will, or for him, if he die intestate, by the Ordinary *in pios usus*. In the latter case, one moyety falleth to the widow, or to the children, (as the case shall be) and the other to the use of the dead, as before. In both cases, to the children of the deceased, each of them a rateable part, provided that such child be not his fathers heir, or were not otherwise advanced by him in his life time, unlesse haply (for hereof there is some question) waving that his former portion, he shall choose rather (as in the case of lands) to take the benefit of this partition by the way of 'Hotchpot', which is all one with the Civilians *Collatio bonorum*, or the Lumbards *Missio in confusum*.

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See Dr. Cowell, and Sir Henry Spelman, in 'Hotchpot'.

Now that there was any certain, or definite part or portion of the deceaseds goods or estate, (whether real or personal) any *Quota pars*, or *Legitima*, as the Civilians term it, by any custome here nationally observed, due to the widow or children in the Saxon times, doth not (that I can find) appear by any Law or other monument of theirs now extant. The plainest and most visible footsteps of that tripartite division or partition by this Writ intended, appear in that remarkable place of venerable Bedes Ecclesiastical History, lib. 5. cap. 13. where we read of one, who, Testator-like, disposing of his substance or estate, *Omnem, quam possederat substantiam, in tres divisit portiones. E quibus unam conjugii, alteram filiis tradidit, tertiam sibi ipsi retentans, statim pauperibus distribuit*. The Saxon reading hath it more for our purpose thus: Ealle his æhto on ðreo to dælde, ænne dæl he his wife sealde, oþerne his bearnum, ðone ðriddan ðe him gelamp, he instæpe ðearfum gedælde. Where mark, the third part is there said to belong to himself: ðone ðriddan ðe him gelamp, &c. plainly insinuating that the other two as rightly appertained to his wife and children, each of them a third. But withall observe, that this is the act of an house-keeper in the Province or Region (as there called) of Northumberland: *Partefamilias in regione Northanhymbrorum*, &c. so is he described; and such a testimony indeed it is as makes much (I confesse) for the antiquity of that Custome (of a tripartite division) yet surviving and currant in those Northern quarters of the Kingdome, but whether, in right construction, extensive any further, or

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concluding for a national custome in that particular, especially since traceable in few other parts or counties of the Realme, by any later or elder footsteps, I think may well be doubted. To proceed then, (for I intend to state and handle the point rather as an Historian, relating the matter of fact, than as a Disputant, arguing the case:) as for that Law or constitution of (a) King Edmund, which some insist upon for the widows right to a moyety of the estate, if she have no issue, otherwise, in case of issue, and remaining sole, to the whole, that cleerly takes places onely *vigore contractus*, or by force of a precedent contract; the Law

(a) Vid. Spelman. Concil. tom. 1. p. 425.

in that particular being ushered in with this ground, or supposition: gif hit swa geforword bið, &c. i. e. if it shall be so mutually agreed or covenanted (before or upon the marriage.) Nor doth that Law of King Canutus, par. 2. cap. 68. conclude for more than this, namely, a partition of the estate amongst the wife, children, and nighest kinred, to be made *judicio Domini*, by the Lord (of the Soils) discretion, swiþe rihte, i. e. rightly, or according to right, and be þær mæpe ðe him to gebyrige, i. e. after the measure, rate, or proportion that to them belongeth, not determining or making any mention, what that right, that measure, or proportion is in certain, (not the widow and children each of them a third; for then where were the kinsfolks share?) but leaving it indefinite and undetermined, as what haply being ordered by the Lords discretion, and that swayed and regulated by (that *optima legum interprete*) Custome, might vary with the place. Nor was any such partition currant here, in case there were a will, for what saith the Law? gif hwa cwyrde=

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lease of ðissum life gewite, &c. i. e. If any one depart this life intestate, &c. implying *liberam testandi facultatem*, a free liberty to dispose otherwise by will: as doth also that Law of his Successour, the (b) Conquerour, ratified and re-inforced by his Successour, the Conquerour, providing that the children of persons intestate shall equally divide the heritage. In which respect, and because by taking no notice of the widow, (as neither doth that other Law of Canutus, par. 2. cap. 75.) it tacitely seemeth to exclude her, I know not well what (much pertinent to the point in hand) can be concluded from that Law. And as not from this, so neither, I conceive, from that Law of King Hen. 1. cap. 1. because it concerns and speaks onely of the Kings own Barons and Tenants: [*Si quis Baronum vel hominum meorum infirmabitur, sicut ipse dabit vel dare (c) disponet pecuniam suam ita datam esse concedo, quod si ipse præventus vel armis vel infirmitate pecuniam non dederit nec dare disposuerit, uxor sua, sive liberi, aut parentes, aut legitimi homines ejus eam pro anima ejus dividant sicut eis melius visum fuerit*] And is seemingly no national provision, no rule intended for the generality of the Subjects, the Communalty: or if it were, yet with such expresse full and free liberty (inconsistent with this Writ) given by it to the party to dispose of his estate by will at his pleasure, as tacitely was granted both by that fore-cited 68. Law of King Canutus, and that other of his Successour the Conquerour, whereof also before. So that admitting, or supposing a will, the subsequent division or distribution (prescribed by that Law of Hen. 1.) took no place, as by consequence neither did that reasonable or rateable

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part intended by this Writ. Passing therefore hence, let us next (as next in order of time) consult (that Oracle of the Law) Judge Glanvill, living and writing in Hen. 2. dayes. He indeed, lib. 7. cap. 5. is expresse for this kind of tripartite division: *Cum quis (saith he) in infirmitate positus testamentum facere voluerit, si debitis non sit involutus, tunc omnes res ejus mobiles in tres par=*

(b) *Si quis intestatus obierit, liberi ejus hæreditatem æqualiter dividant.* Vid. Cl. Seldeni Not. ad Eadmer. pag. 184. c. 36.

(c) al. *jusserit.*

tes dividetur æquales. Quarum una debetur heredi, secunda uxori, tertia vero ipsi reservatur: de qua tertia liberam habet disponendi facultatem: verum si sine uxore decesserit, medietas ipsi reservatur. And to the same purpose again, eod. lib. cap. 8. *Si post debitorum acquisitionem aliquid residuum fuerit, tunc id quidem in tres partes dividetur modo prædicto* (he refers to the fore-cited fifth chapter) *Et de tertia parte suum ut dictum est faciat testamentum.* To which kind of tripartite division, he plainly seemeth to refer, and have respect afterwards, lib. 12. cap. 20. where he layes it down *in terminis*, as a thing *recepti juris*, warranted by the Customs of the Realme, that is the Common Law, saying: *De catallis autem* (these are the words of the Writ) *quæ fuerunt præfati R. præcipio quod ea omnia simul & in pace esse facias, ita quod inde nil amoveatur nec ad divisam suam faciendam, nec ad aliam rem faciendam, donec debita sua ex integro (d) reddatur. Et de residuo post fiat rationabilis divisa secundum consuetudinem terræ meæ.* Thus Glanvill, with whom unanously concurr (e) Bracton and Fleta. Hence now many learned men conclude this tripartite division, and the Writ waiting thereupon, to be rather by or at the Common Law, than (as is thought by others, and those learned men also) by Custome, and that hereof

(d) l. reddatur.

(e) Vid. Bract. & Flet. p. 125.

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+ 'Magna Charta,' cap. 18. expressly taketh notice, in the 'Savio', or Limitation at the end, thus Englished: 'Saving to his wife and children their reasonable parts.' The Opponents, and such as take the contrary part, endeavour to elude this as a matter rather of Counsel than command. So (for example) Dr. Cowell, Instit. li. 2. tit. 13. parag. 2. followed by Sir Edw. Coke, in the second part of his Institutes, pag. 33. who to assert his opinion in the negative, (his denial of the widow and childrens right to a 'Reasonable Part' by the Common Law) thus there adds: 'The nature of a saving regularly is, to save a former right, and not to give, or create a new, and therefore, where such a Custome is, that the Wife and Children shall have the Writ, *De rationabili parte bonorum*, this Statute saveth it. And this Writ doth not lie without a particular Custome, for the Writ in the Register is grounded upon a Custome, which (as hath been said) is saved by this Act.' But where going on he further adds, that Bracton was of the same opinion, quoting for it, (as (f) Swinbourne before him) that place of Bracton, fol. 61. a. [*Neque uxorem, neque liberos amplius capere de bonis defuncti patris vel viri mobilibus, quam fuerit eis specialiter relictum, nisi hoc sit de speciali gratia testatoris, utpote si bene meriti in ejus vita fuerint, &c.*] with submission, they are both of them mistaken: that which Bracton there delivers, being a plain exception, deviation and diversion from the general rule by him (as by Fleta after him, *totidem verbis*) just before laid down, and taking place onely in Cities, Burrows and the like, by particular custome of the place, as (amongst others, *ut quidam dicunt*, say they) in London, and that upon this double consideration, namely, first, the

(f) Of Testaments, par. 3. parag. 16. fol. 112. b. and 133. a. where he is out in saying, that Glanvill took his ground from 'Magna Charta,' which is impossible; Glanvill being dead long before: an error (it seems) occasioned by that marginal quotation, not Glanvills own, but his that set him forth, or some others.

+ p. 96. l. 2. Salvo.

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advancement of trading and traffique (the life of all Common-wealths, especially of Ilands) which would be much encouraged by this liberty left to the Merchant or Trades-man, to dispose of his labours and gettings, where and how he saw best; and secondly, the countenance of vertue, and discountenance of (her opposite) vice, when by a necessity laid upon the wife and children, to comply with the husband and father in such wayes, both of thrift and duty, as might win and wear his love, and consequently, make him willing to requite their merit, the vertuous should be rewarded, the vicious discarded: *Vix enim* (say they, Bracton and Fleta both) *inveniretur aliquis civis, qui in vita magnum quæstum faceret, si in morte sua cogeretur invitus bona sua relinquere pueris indoctis, & luxuriosis, & uxoribus male meritis: & ideo necessarium est valde, quod illis in hac parte libera facultas tribuatur. Per hoc enim tollet maleficium, animabit ad virtutem, & tam uxoribus quam liberis bene faciendi dabit occasionem, quod quidem non fieret, si se scirent indubitanter certam partem obtinere etiam sine testatoris voluntate.* And this (I take it) is the thing (the good of the Commonwealth, by the maintenance of traffique, much encouraged by the liberty of a free Devise) by Glanvill, though somewhat darkly, pointed at, lib. II. cap. II. where (acquainting us, that an Assise of Mortdancester lies not for houses or tenements, [which are wont to passe *inter catalla* in Burrows, as Bracton and Fleta inform us] because of a greater commodity redounding to the Kingdome by another kind of Assise, an established course I suppose he means, warranting the liberty of a free Devise of such things, *tanquam catalla*) he

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saith: *Item ratione Burgagii cessare solet assisa per aliam assisam ex causa majoris utilitatis in regno constitutam.* But notwithstanding it were thus in London in those times, (when Bracton and Fleta wrote) yet afterwards it seems that custome (of a free and arbitrary Devise) ceased, and (haply upon those counter-grounds, or contrary considerations, brought and laid down against it by the same Swinbourne, fol. 113. a.) gave place to this kind of tripartite division: witness (besides Mr. Lambard, Perambul. pag. 561.) what in a book lately published, intitled the City-law, and said to be translated from an ancient French Manuscript, pag. 7. is delivered in these words: 'And it is to be understood, that when a Citizen of the same City (London) hath a wife and children, and dies; all the goods and chattels of the said party deceased, after his debts be paid, shall be divided into three parts; whereof one shall remain to the dead, and shall be distributed for his souls benefit; and the other part shall be to his wife, and the third part to his children, to be equally shared between them; notwithstanding any will made to the contrary;' &c. But (to proceed) although Glanvill, Bracton, and Fleta, one and all, seem to conclude for this rule or order of Partition, to obtain and take place by the Common Law; yet, as this course did not long survive them, but, except where particular Custome (such as that whereon the Writs in the Register are grounded) kept it up, at length grew into dis-use, in the case both of testate and intestate persons (witness on the one hand, the liberty time

out of mind generally used at pleasure to dispose of personal estate made by will; and on the other, the Ordinaries well-known power of distribution of Inte=

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(g) *Et si quis liber homo in testatus deceserit, per manus parentum propinquiorum & amicorum suorum, & per visum Ecclesiæ distribuantur, salvis unicuique debitis quæ defunctus debuit:* which in effect is the same with that of Bracton, and Fleta: *ad Ecclesiam & amicos pertinebit executio.*

states goods, which is not without warrant from that clause at th'end of 'Magna Charta's' 18th chap. whereof in Matthew Paris, and (g) elsewhere:) so with all these passages in Glanvill, Bracton and Fleta, are so inconsistent with what, in the case of testate persons, themselves with almost the same breath, deliver, that I know not how possibly to reconcile them. Whereof the former thus: *Potest enim quilibet homo liber majoribus debitis non involutus, de rebus suis in infirmitate sua rationabilem divisam facere sub hac forma secundum cujusdam patriæ consuetudinem, quod Dominum suum primo de meliore & principaliore re quam habet recognoscat, deinde Ecclesiam, postea vero alias personas pro voluntate sua. Quicquid autem diversarum patriarum consuetudines super hoc teneant, secundum jura regni non tenetur quis in testamento suo alicui personæ præcipue nisi pro voluntate sua aliquid relinquere, libera enim dicitur esse cujuscunque ultima voluntas, secundum has leges sicut & secundum alias leges.* The other two, to one effect thus: *Cuilibet autem sit licitum facere testamentum de rebus suis mobilibus & se moventibus, & quatenus superfuerit deducto ære alieno, scilicet debitis aliorum, &c.* Thus, in mine opinion, do the same men more than seem to fight with, and contradict themselves, and how to set them agreed is past my skill. But indeed *vix tanti est*, 'tis not much material, since if we shall admit (what some eagerly contend for) this rule and order of partition to have sometime been by Law currant throughout the Realme, yet by general disusage and discontinuance, it is now, and that not lately, antiquated and vanished out of ure, both in this (of Kent) and other Counties, surviving onely (for ought I hear) in the

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Province of York, and some few Cities; and that it should ever be revived, at least in the case of testate persons, until first some way may, if possibly, be found, how to dissolve this knot, and remove this rub of flat repugnance and disagreement of those ancient Authors (the vouched Patrons for it) with themselves in the point; I for my part, saving better judgement, see but little reason, and further than thus dare not in a case so controverted and canvased by learned and judicious Lawyers, interpose any judgement of my own.

PROPOSITION IV.

Whether Gavelkynd be a Tenure or a Custom.

It will not be amisse (I hope) to usher in the answer to this *Quære*, with some digression concerning Tenures. Facing then about, and looking back upon the times before the Conquest, inquire we out the Tenures (if I may so call them) then in use, and what other succeeded in their places afterwards at and since the Conquest. Here I expect it should be granted (for 'tis avouched I am sure by several (h) men of credit) that before the Conquest we

(h) See Mr. Seldens Titles, 1. Edit. pag.

228, 273, 301.
Illustrat. upon
Polyolb. p. 208
Sir Hen. Spel=
mans Glossa=
ry, verb. 'Feu=
dum'.

were not in this Kingdome acquainted with what since
and to this day we call 'Feoda', Foreiners 'Feuda', i. e.
'Fiefs', or 'Fees', either in that general sence I mean
wherein they are discoursed of and handled abroad in
the Book thence intituled 'De Feudis,' at home in that

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called 'Littletons Tenures,' or in that particularly under=
stood of us, when we treat or speak of Knights-Fee,
which could not then be known here, when Knights
themselves were not in being, as (saith a Record in the
Cathedral of Canterbury, whereof more (i) anon)
they were not till the Conquerours time Or if in effect
they were known to us, yet in terms certainly they
were not: for the name of Fee, or 'Feudum', in this
sence is no where to be found in any our Records or
Monuments of those dayes now extant, and of credit,
if my self and others have not been more unhappy to
misse it, than indiligent to seek it. 'Tis true, it occurs
in the fifth and sixth of the Laws ascribed to the Con=
fessour, set forth by Mr. Lambard, in the *Varia lectio*
there in the margent; but besides that the Text in
each place reads it *Fundo*, those Laws, I take it, for the
most part, especially as to their phrase, carry not that
antiquity; but, like those of like kind in Scotland,
ascribed to King Malcolm the (k) second, and King Alu=
reds will at the end of the Story of his life penned by
Asserius, where the word several times occurs, savour
of a later dresse. The like no doubt may as truly be
said of that, *Qui in feodo suo*, in the old Latine Version
of King Edgars Laws, following those in the original
Saxon set forth in the late Edition of the Councils by
Sir Henry Spelman, pag. 446. And may we not upon
this (amongst other grounds) question those Charters
in (l) Ingulphus, thus far, I mean, as to doubt, whe=
ther many, if not the most of them, speak not another
than that tongue in which they were originally pen=
ned, as being by the Authour, (though English born,
yet afterward Normaniz'd, by conversing there some

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time, as a Retainer and Secretary to Duke William, af=
terward Conquerour, and King of England) whose
Story is penned in Latine, the better to suit with it,
taught to speak the Latine of his time, and late Masters
native Countrey? upon this ground, I say, that a=
mongst many other phrases scattered here and there,
not in use with the Saxons, nor ever heard of here in
England till about Ingulphus own time, (such as *Ave=
ria, Ballivus, Bedellus, Communa pasturæ, Justiciarius,*
Forisfactura, Tenura, Weif, Stray, with many more such
like, which I forbear to name in this place) occurs
Feudum. For example, in the Charter of Witlaf, the
Mercian King, dated anno 833. we have it thus: & *xl.*
acras de eodem feodo in campo de Deping. The like in a
Charter of Bertulph, another Mercian King also, dated
anno 860. and in some other of later date from suc=
ceeding Kings, we have — *de eodem feodo de Gerun=
thorpe*, and the like: whereas it may very justly be
doubted, whether either the Laws, Stories, or other,
either written or printed monuments of credit of any
Nation or Countrey, can shew the word ('Feodum', or
'Feudum') in use amongst them (but in stead thereof 'Be=

(i) And in the
Appendix,
Scriptura 21.

(k) Vid. Spelm.
Glossar. verb.
'Feudnm', pag.
258. col. 2. &
verb. 'Baro' pag.
81. col. 1.

(l) Histor.
Croyland.

(m) Pag. 116.
(n) Pag. 111.

neficiūm', 'Feudum's' elder brother, or the like) until about that age, until (I mean) after the beginning of the tenth Century from our Saviours incarnation. And hence give me leave, with Buchelius, in his Illustrations upon Heda's History of the Bishops of Utrecht, to suspect that list or memorial, (n) *De vassis sive fide addictis Ecclesiæ & Episcopo Trajectensi*, (as there it stands intituled) of Heda ascribed to Adelboldus the 19th Bishop of that See, who after he had sat 18 years, died in the year 1028. as indeed a piece unadvisedly referred to that time and place, and in all probability belonging to some Successour of his. But be that as it will, I see nothing however that may render us unsatisfied of the truth of their assertion, who say that the Conquerour brought, or introduced first into this Kingdome 'Feudum', 'Feodum', or (as in English) 'Fee', taken as it signifies Feudal services, especially military (*prædium militare*) the sense in which, as it regularly occurs in the (o) Feudal books abroad, so constantly in Domesday-book here at home, for distinguishing the land from other there said to be holden *per gablum, ad firmam, in Alodio*, and other like Tenures there occurring: the Introducer borrowing (saith one (p) of my Authours) the term, (he might have added the Customes) from his own native country, Normandy, which he concludes from a passage of himself there quoted out of Domesday-book, thus speaking: — *In eodem feudo de W. Comite Radulfo de Limes' 50. carucat. terræ sicut fit in Normannia*: thus subjoining: *Feudum & Normanniam jungit, ac si rei novæ notitia e Normannia disquirenda esset*. But with submission to better judgements, I question whether those words: *sicut fit in Normannia*, may not relate to *Carucatæ terræ*, being an expression not used of (q) the Saxons for a Plough-land, (but *Aratrum, Sulinga, Hida, Familia, Mansio, Manens, Casata*, and the like terms of quantity) rather than to *Feudum*, from which too it is further distanced in the quotation than from the other. But to let that passe: to the Conquerour (it seems) it is, that the name and customes of our English Fees, or (as we now vulgarly call them) (r) Tenures, such at least as are military, owe their introduction, whatsoever the (s) *Mirroi*r (a book whose antiquity is too much cried up of some) hath to the contrary, as if *in terminis* known here in England in King Alfreds dayes, by whom (as the Authour there pretends) it was ordained that Knights-Fee should descend and fall to the eldest, and Socage among all the sons: whereas in very deed we knew neither one nor t'other in those dayes, they with the rest since and at this day called 'Fee-simple', 'Fee-taile', 'Fee-ferme', 'Frank-fee', as also 'Grand' and 'Petite Serjeanty', 'Escuage', 'Burgage', 'Villinage', and the rest, in the book of Tenures and elsewhere obvious, being all of the Norman plantation, and we by them, at least since their Conquest of us, brought acquainted with them, not knowing what Fee (in that notion) meant before, nor being to this day agreed among our selves, as neither are the Feudists and other writers on that argument in other parts, upon

(o) Hotom. de Feud. lib. 2. pag. 309. paragraph. ult. tit. 51.

(p) Spelman, ubi supra.

(q) *Annunte Rege, omnes Carrucatas, quas Angli Hidas vocant, funiculo mensus est*: Order. Vital. Hist. Eccles. ad ann. 1089.

(r) Bacons Elements, tract. 2. p. 30.

(s) Chap 1. Sect. 3. p. 16.

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tion, whatsoever the (s) *Mirroi*r (a book whose antiquity is too much cried up of some) hath to the contrary, as if *in terminis* known here in England in King Alfreds dayes, by whom (as the Authour there pretends) it was ordained that Knights-Fee should descend and fall to the eldest, and Socage among all the sons: whereas in very deed we knew neither one nor t'other in those dayes, they with the rest since and at this day called 'Fee-simple', 'Fee-taile', 'Fee-ferme', 'Frank-fee', as also 'Grand' and 'Petite Serjeanty', 'Escuage', 'Burgage', 'Villinage', and the rest, in the book of Tenures and elsewhere obvious, being all of the Norman plantation, and we by them, at least since their Conquest of us, brought acquainted with them, not knowing what Fee (in that notion) meant before, nor being to this day agreed among our selves, as neither are the Feudists and other writers on that argument in other parts, upon

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on the etymologie and derivation, either of that or the word whereunto it is opposed, 'Allodium'; wherein indeed Authours of several sorts, Lawyers I mean, Etymologists and Antiquaries so much differ and disagree, as that the further we wade in the research of their opinions in that kind, the more uncertain still we come off, and the further we are from (the end of our inquiry) satisfaction. However, I will on this occasion adventure to offer my sence, which, if well considered, may perhaps help to end the difference.

'Feudum' derived,

Not to repeat that variety of other mens opinions in the point, of which some, and those the most, and with most general applause and acceptation, fetch the former ('Feudum') from 'Fides'; others from 'Faida', or 'Feida' (*bellum*) a third from 'Fœdus': a fourth from the

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(t) De Weichbild. Saxon. cap. 49. num 8.

German 'Fueden', *quasi a fungendo, i. pascendo*, or (as (t) Gryphiander hath it) from the Saxon 'Foden', i. e. *nutrire*: to let these derivations all passe without any further repetition, as obvious enough in the writings of the Feudists and elsewhere, especially (with some additions of his own) in Martinius Lexicon-Philologicum: as likewise not to repeat the like variety amongst them, (as obvious as the other) concerning the latter, ('Allodium') which some will have to be a derivative from 'a', the privative particle, and 'Laudium', or 'Laudatio', as a possession acknowledging no Authour, no Lord of the Soil, but God alone; others from that privative particle, and 'Lodes', quasi *sine Lode*, that is, *sine vassallo*, as a mad man is called *amens*, to say, *sine mente*, as whose possessour is no Vassal, whilest a third sort fetch it from 'Alsleud', as we should say, possessions common (i. e. such as may freely be given or sold) to all or any of the people, the many: like in this (say some) to what of old we here in England called 'Folcland', by which (but how properly, since 'Folcland' is parallel'd with what sithence we call (u) 'Copy-hold', may well be doubted) they are found to illustrate it, contrary to a fourth derivation of others, who hold it inseparable from the family, and thence of the Germans called 'Ein Anlod.' A fifth sort there is, that draw it from the foresaid privative particle 'a', and 'Leod' (in French 'Leud') a Vassal, as it were, without vassallage, or without burthen, which we English men (saith my Authour rightly) at this day call 'Loade': not further, I say, to trouble the Reader with either any longer repetition of these and the like (for there are some other) various opinions of this kind, or any Catalogue of the several

(u) Cowells Interpreter, & West, Symbolicorum. 1. sect. 603.

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Authours of them, I will, as I promised, offer my conjecture at each words etymologie, with submission of it to better judgements.

In short then I say, that each of the two words in its original, which is German, is a compound consisting of two syllables, of which two, the latter (to begin with that) I conceive to be the same in both, and is no other than what is borrowed towards the composition of many several words of the same original, used and continued both in those, especially the Teutonic parts, and also here in this Iland, from the time of the Saxons settling here, down unto this day, though with

some little variation of the Dialect, occasioned by tract of time bringing its corruptions, and the intermixture of other languages: and that is with us 'hade', 'head', 'hode', with the Tentonics 'heyd', and 'heit', sometime 'hat', betokening in each place (as 'dome', and 'ship', anciently written 'scip', in the terminations of many of our words:) a quality, kind, condition, state, sort, nature, property, and the like. Hence the military, masculine, feminine, childish, paternal, maternal, fraternal, sisterly, desolate, presbyterial, neighbourly, quality, nature, kind, condition, &c. of a Knight, a Man, a Woman, a Child, a Father, a Mother, a Brother, a Sister, a Widow, a Priest, a Neighbour, &c. is termed 'Knight-hode', 'Manhode', 'Womanhode', 'Childhode', 'Fatherhode', 'Motherhode', 'Brotherhode', 'Sisterhode', 'Widowhode', 'Priesthode', 'Neighbourhode', &c. The quality, nature, existence, of the Deity is stiled 'Godhead' with us, with our Ancestours, the English Saxons (who wrote and had that 'hade', which we since write and have 'hode' and 'hood') 'Godhade'. 'Head' in Maidenhead owes it self to the same original deno=

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'Feud' (in
Deadly Feud)
derived.

ting out the virgin-condition, or maiden-quality of the party. 'Hood' in Livelyhood is also sprung from the same root, whereby a mans state of subsistence is signified: and the like may be said of 'hood', in Falshood, Likelyhood, and a many words more of like termination, as expressing and setting forth in the one, the false, in the other, the probable, likely, condition of the thing predicated. This may also help us in the etymologie of what we use to call 'Feud', or 'Deadly feud,' our Ancestours, the Saxons *fæhð*, the Germans 'Fhede', 'Feide', and 'Faide', which in truth is but a compound of their 'Fah', i. e. *Hostis, Inimicus*, as we say at this day a 'Foe', and 'hode', 'hade', 'head', 'heyd', &c. .i. *conditio, status, qualitas*, &c. together importing the condition of enmity in the person who bears it. I could here enlarge with instances of very many Teutonic words thus terminating, I mean, in their Dialect with 'heyd', 'heit', and the like, and by such their terminations predicating, as is said before, a quality, condition, &c. such as 'Allenheyd', 'Felheyd', 'Fijnigheyd', 'Hebbelickheyd', 'Heyligheyd', 'Maeghdelickheyd', and numbers more obvious in every page of Kilianus Dictionarium Teutonico-Latinum, and elsewhere; but I fear to be tedious.

(x) Saxon
Gospels, Matt.
25. 18, 27 also
chap 28. 12, 15.
& Verstegan,
pag. 218.

Seeing now what the latter syllable in 'Feudum' and 'Allodium', in their several originals, signifieth; and having taken the words thus asunder, let us next consider of the other part of the composition, their former syllables, which in 'Feudum' (the former) is 'Feh', 'Feo', or 'Feoh', signifying as (x) *Pecunia* in the general, so more peculiarly a 'Salary', 'Stipend', 'Wages', intended of us when we say: 'Officers live by their Fees;' whilest in the other, 'Allodium', the former syllable rightly writ=

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(y) Vide tit.
Feud. 1. t. 1.

ten, is 'All', 'Al', or (as with the Saxons) *eal*. Put we now the syllables together again, and then the former will come forth 'Feo-hode', 'Feh-hode', or the like; the latter, 'All-hode', and that most appositely, if applied to the Feudists 'Feudum' and 'Allodium', considered in their originations and primitive acceptions. The former of which when first (y) instituted, was but personal, not,

De his qui feudum dare possunt. Spelm. Gloss. verb. 'Felonia', p. 253. Cowells Interpret. verb. 'Fee'.
 (z) Biblioth. Cluniac. pag. 1390. & Cujac. de Feud. lib. 3. tit. 1.
 (a) Verb. 'Feolonia'.
 (b) *Vulteius de Feud. lib. 1. cap. 1. num. 14.*
 (c) Kilian. Diction. verb. 'Leen', & Dr. Zouch, Description. jur. temporalis, sect. 7.

(d) Vid. Hotoeman. de Feud. lib. 2. tit. 3. parag. 4.

(e) Vi. Spelm. Glossar. verb. 'Fideles'.

(f) De Gest. Pontif. lib. 1.
 (g) Hist. Novor. l. 1. p. 18. Vid. Dr. Zouch, Descript. jur. temporal. sect. 5.

as afterward, perpetual, patrimonial, hereditary, or holden (in Glanvill and Bractons phrase) *ad remanentiam*, but as a Clergy-man holds his Benefice, (hence in some ancient (z) Charters called 'Feodum') onely for life; the Tenant being but a meer Stipendiary, a Termer, at best but a Freeholder for life, *Usufructuarius*, and indeed some were not so much, but held only (as our learned (a) Glossarist hath it) *ad voluntatem Domini*, as (b) others, *precario*, not unlike our Tenants at will since and at this day: the land was onely lent, as the German term for it (c) ('Lehen') seems to intimate. In processe of time, degenerating and receding from their first institution, they became perpetual and hereditary, yet holden, as formerly, with a condition of service on the Tenants part, and *stipendii loco & nomine* on the Lords; by way (as it were) of Salary, Pension, or Stipend from the Lord, to gratifie and recompence his man withall for such his service, to which he was obliged under peril of forfeiture by the withdrawing thereof. I dare not add in consideration of Fealty or Homage, (in those times) since, though that acknowledgement in the Feudal Law, of some Fee tenable without an oath of (d) Fealty be indeed justly taxed for a paradox of such who will have Fee to come of 'Fides', (whence haply our legal maxime, that all Te-

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nures regularly are liable to Fealty:) yet might Fee, by this derivation of it, stand with Fealty, and the Tenants of it be called (e) 'Fideles feudales' without a so-called *loecisme*; a good argument for the derivation of it thus, rather than from 'Fides', as of more scope, and more consistent with Fee of all sorts than that other derivation doth allow. Fees, I say, were holden but in service, *nomine quasi alieno*, the *Dominium*, that at least of Lawyers called *directum*, (though the *utile* were transferred on the Tenant:) the propriety, I mean, remaining and abiding still in the Lord, together with a power of restraining his Tenant from alienation, and consequently such land was put partially, conditionally, not totally and absolutely, granted out. Contrariwise, that which was termed, in opposition to it, 'Alodium', as it was hereditary, perpetual, and patrimonial, so was it sans all condition, free, and in the power of the possessour to dispose of it *ad libitum*, how he pleased, either by gift or sale, without asking any man leave: and as it was hereditary, perpetual, patrimonial, and free land, so was it withall possessed totally and wholly, not as our land generally in this Kingdome in Subjects hands at this day said to be holden *in Dominico suo ut de feodo*, as our Lawyers phrase it, but rather *in Dominico suo ut de jure*, (the owner having *Dominium* both *directum* and *utile*;) or in the Feudists phrase, and after their unanimous, harmonious definition of it, *pleno jure; integre; ex toto; or ex solido*, as (f) Malmesbury hath that which (g) Eadmerus expressed by *in Alodium*, quit of all services, like Frankmoigne, whereunto Mr. Selden there in that respect resembles it. I may call it 'absolutely', 'immediately', or (if

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you will) 'independently', without acknowledgement of any superiour Lord, not unlike the Prince of Haynault,

(h) Spelm.
Glossar. verb.
'Allodium'.

(i) As in Hun=
dii Metropol.
Salisburg. Bi=
bliothec. Clu=
niac. & Præ=
monstrat. Hist.
Ultraject. &
Miræi Cod.
Donatio, &c.

holding onely (saith my (h) Authour *de Deo & Sole*, or, as other absolute Princes, *Gratia Dei*, in a word, in totality: whence the terms of *prædia immunia*, *terra propria*, *fundus proprii juris*, *patrimonium*, in (i) Char=
ters and elsewhere given to such possessions. Probably, land of this nature was the same with our 'Bocland', which I sometime find in the Latine rendring of some Saxon pieces turned by it: (hence a hint to judge of the one by the other:) for what in the 11th Chapter of the first part of King Cnutes Laws is read 'Bocland': Gif hwa þonne þegen sy, þe on his boclande cyrcean hæbbe, &c. and in the old Latine version of it in the Kings Ms. and Jornalensis, is turned *hæreditas: Si quis Tainus in hæreditate sua terram* (it should be *Ecclesiam*) *habeat*, &c. in another like old version in the book of Rochester called 'Textus Roffensis', is rendred *Allodium: Si liberalis homo quem Angli Thegen vocant, habet in Alodio suo Ecclesiam*, &c. By *Allodium* also is turned in the same Record ('Textus Roffensis') what occurs in the Saxon fragment exhibited by Mr. Lambard, *Perambulatus* in Mepham, pag. 500. under the term of *agenes land: Et si villanus ita crevisset sua probitate, quod pleniter haberet quinque hidas de suo proprio Alodio*, &c. 'Allodium', it seems thence, being properly such land as is fully a mans own. Shortly then, 'Feudum', 'Fee', or land holden in Fee, is no more (considered in its first and primary acception, to which they must have regard that will hope to judge aright of the ground for the first imposition of the name:) than what was holden in 'Fee-hode', by contraction 'Feud', or 'Feod', i. e. in a

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stipendiary, conditional, mercenary, mediate way and nature, and with the acknowledgement of a superiour Lord, and a condition of returning him some service for it, upon the withdrawing whereof the land was revertible unto the Lord: in which respect, as the grant thereof is improperly called a Donation, being but (k) *Feodalis dimissio*, i. e. a Demise in Fee, so the Deed or Conveyance by which it was demised, is as improperly termed a Charter of Donation, being no more than a Charter or Deed of Feoffment. Such, I say, is 'Feudum'. 'Allodium' is contrarywise what is holden in 'All-hode', in totality, in a total, full, absolute, immediate manner and condition, without acknowledgement of any superiour Lord, and free from any tie or compact for the returning any service at all for it unto any. Thus far (and I hope not too far, nor impertinently) for clearing the etymon of 'Feudum' and 'Allodium', as the argument, so the torture of many learned pens, amongst whose derivations of one and t'other, I humbly crave this of mine (such as it is) may be admitted for future Indagatours, and all others of unforestalled judgments freely to consider of.

And now to spin on our former thred, and to re-assume our argument of the Introduction of our Fees or Tenures by the Conquerour, w/ch that etymon coming in the way caused me a while to set aside: I here professe to concurr with them, who upon the question put, resolve it in the affirmative, whereof our learned (l) Glossarist, for one, thus: *Feodorum servitutes in Britanniam nostram primus invexit Gulielmus senior, Conquestor nuncupatus*, &c. and a little after: *Deinceps*

(k) Vid. Fleta,
lib. 3. cap. 2.
parag. 4.

(l) Verbo
'Feudum'.

(m) Lambard, in verb. expli= cat. verb. 'Terra ex scripto.'

ævo ne auditis quidem: no other Tenures, or, in the Scottish expression, 'Haldings of land,' being formerly here in use but these two, 'Bocland', and 'Folcland'; 'The one' (saith my (m) Authour) 'a possession by writing, the other without. That by writing' (so he adds) 'was a freehold, and by charter; hereditary, with all immunities, and for the free and nobler sort. That without writing was to hold at the will of the Lord, bound to rents and services, and was for the rurall people.' It may be added, that the former took name from the lands 'booking', or entring (with the limits of it) in a Codicil, (as then called) a little book, or (as we since call it) a Charter, which if the land were given to a Lay-man, was in way of Seizin delivered to the party that was to have the land, (hence haply that ceremony we retain of delivering a Conveyance as the parties Act and Deed) or, (if to a Monastery) laid and left most commonly upon the Altar: *Ego autem licentia & consensu illius, testimonioque Episcoporum & Optimatum suorum, omnes terras meas, & libros terrarum propria manu mea posui super altare Christi in Dorobernia*, &c. as it is in the close of a (n) Memorial of the gift of Monkton and other manours to the Church of Canterbury, in the year 961, by Queen Ediva, or Edith, whose picture, in thankful remembrance, was until of late reserved in that Churches Treasury. Hence was such a Charter vulgarly known in those times by the name of (o) a 'Landboc', in the Latine of the times *Telligraphum*, sometime *Codicillus*, and the like. Observe yet further, *terram hæreditario jure conscribere, & liberam proclamare*, (the Latine phrase for creating 'Bocland') was a prerogative royal, or a Royalty, and out of the power of any

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(n) In Armar. ejusd. ecclesie.

(o) See Scriptur. 20. in the Appendix. & Spelm. Glos= sary.

Vide Spelm. pag. 319, 333. & Bed. Hist. Eccles. Anglo-Saxon. lib. 3. c. 24. & Chronolog. Sax. anno 854.

(p) Spelm. Concil. p. 507.

(q) Anno 9. Hen. 3. c. 36. & anno 7. Ed. 1. Vide Customar. Norman. cap. 32.

Subject, whence that passage often occurring in Subjects grants of lands in perpetuity to the forenamed Cathedral, and other places, viz. and such a one King, hit *geboked on ece yrfe*, i. e. *hæreditario jure conscriptus*, as also that: *liberam omnino proclamavit*, and such like. King Ethelreds priviledge (as called) confirming to that Cathedral (amongst other things) their whole possessions, is hence by (p) one of the Subscribers called, *cyninges bocunge*. But notwithstanding this Enfranchisement, the land was very seldome alienated by the possessour in Frankalmoigne, without (what the Law of (q) Mortmaine afterward required) a current, or at least a subsequent confirmation from the King, whereof examples are obvious in the List of that Churches lands and benefactors, published in the Antiquities of Canterbury, pag. 210. as also of the concurrence of the Magnates, or Nobles, in such 'Bocland'-grants, principally in that of Mallings. You shall have the very words, because remarkable: *Anno Domini DCCCxxxviii. Ecgbertus & Athelwlfus Rex filius ejus dederunt Ecclesie Christi in Dorobernia Mallings in Suthsexan, quod viz. manerium prius eidem Ecclesie dedit Baldredus Rex, sed quia non fuit de consensu magnatum regni, donum id non potuit valere. Et ideo*, &c. 'Bocland' thus flowing originally from the Crown, upon all forfeitures, and particularly that of

(r) LL. Ethelr.
par. c. 2. & LL.
Canut. par. 2.
cap. 75.

the estate of the possessour, for deserting the warrs, as if there were no mean between the King and him, the King alone was to take the (r) forfeit. But of 'Bocland' more anon.

Some other kinds of land ('tis true) there were in those dayes, but all (I take it) reducible to the prece=

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Gafolland.

dent Dichotomy, such as, 1 'Gafolland': *butan ðæm ceorle þe on gafollande sit*, as it is in the truce or agree=

Neatland.
Inland.

ment between Alfred and Guthrun KK. in the Archaion, cap. 2. 2 'Neatland'. 3 'Inland': *ægþer of ðegnes inland*,

Utland.

so runs the first chapter of King Edgars Laws there. 4 'Utland': *to wulfège þ' inland*, and *Ælfege þ' utland*, as we have it in the will of Byrhtic in our Kentish Perambulation, pag. 495. Of which four, the two former, I conceive, were but the same with 'Folc=land'; both one and t'other importing land letten or demised, as 'Folcland' was, to rural people, *more Em=phiteutico*, for profit: the one from 'Gable', or 'Gafol', i. e.

(s) Such (hap=ly) as that in a very ancient Deed in Christ Church, called 'Terra rustico=rum.' It occurs in a Charter of Amfridus de Dene, of lands in Fairfield, made about Hen. 3. time. To which may be added what occurs in a Charter of Hubert the Archbishop to the Priory of St. Gregories by Canterbu=ry, viz. *De de=cimis Militum & Rusticorum*, &c.

Cens, or Rent, being termed 'Gafolland'; the other called 'Neatland', either from *nyttian*, to improve, *fructifie*, whence *nydling* for a Fœenerator, a Usurer, *nytnesse*, profit, *nytta*, profitable, *unnytta*, unprofit=able, unthrifty, or else which I rather think) from *ge=neat*, *Villanus*, *Colonus*, as the old Version of the 19th & 21th of K. Ina's Laws renders the word, w/ch comes all to one with *Ceorliscus* spoken of in that second Chapter of the 'Fœodus Aluredi, & Guthruni, Regum,' and there described by his quality to be one that occu=pieth (s) 'Gafolland'. As for the remaining two, 'Inland', 'Utland', the former was *terra dominicalis*, land holden in Demesne, in the owners own hands, (and for the most part designed *in mensam Domini*, whence other=wise stiled in succeeding times 'Bord-land', like the Ci=vilians and Canonists *bona ad mensam*) and in this respect may not unfitly be referred to 'Bocland', regularly of like property. The latter contrariwise, like 'Gafol=land', and 'Neatland', was land letten out, and, in oppo=sition to Demesne land, termed *in servitio*, or *tenemen=*

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talis, that is, granted out in service by the Lord to his Tenants, to be holden of himself, and so we may pa=rallel it, as with 'Gafolland' and 'Neatland', so with 'Folc=land', being of the same nature: like the Frenchmans 'Fief servant,' i. *terra serviens*, in respect whereof the Tenants were bound to be Retainers, Attendants and Followers to their Lords, Suitors to their Courts, and were thence called (in the term of Hen. 1. Laws, taken up afterwards of (t) Bracton) *Folgarii*, concerning which see further in Sir Hen. Spelmans Glossary, verb. 'Folgare, & Folgarii,' as also in the Laws of King Knute, par. 2. cap. 19.

(<t>) LL. Hen. 1.
cap. 8. Bracton,
l<i>b. 3. tract. 2.
cap. 10.

Besides these sorts of land, after ages (since the Conquest) produced many other, such as, 'Work-land', 'Cot-land', 'Aver-land', 'Drof-land', 'Swilling-land', 'Mol-land', 'Ber-land', 'Smiths-land', 'Ware land', 'Terra Susanna', 'For-land', 'Bord-land', and such like. Of each of which (for some satisfaction to the inquisitive) in a word or two.

Work-land.

The first ('Work-land') is land of a servile nature and condition, *terra servilis*, as I find it called, as also (what

indeed the word soundeth) *terra operaria*, because haply at the creation of the manour, and distribution of it into parcels, charged with servile works, such as plowing and harrowing the Lords arable ground, mowing, tassing and carrying in his hay, sowing, weeding, reaping, and inning his corn, making and mending his fences, thatching his barns, and such like: charged (I say) with servile works, and not with Cens or Rent, or if also with rent, yet of the twain more especially with works, and therefore contradistinct, and opposite to 'Gavelland', which was land liable to Cens or Rent, or

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if also to works, yet chiefly to rent; both one and t'other being denominated from what was the more eminent service arising from them. Hereof some footsteps visible in the 66. of King Ina's Laws.

- Cot-land. The second ('Cot-land') that belonging unto, and occupied by the *Cotarii*, *Cotseti*, or *Cotmanni*, a sort of base Tenants, so called from certain Cotes, or Cottages, small sheds like sheep-cotes, with some little modicum or parcel of land adjoining, originally assigned out unto them in respect and recompence of their undergoing such like servile works, or baser services for their Lords, as before expressed.
- Aver land. The third ('Aver-land') much the same with that before called 'Work-land', coming of the French 'Ouvrer', to work, or labour, but chiefly differing from that in this particular, that the services thereof consisted especially in carriages, as of the Lords corn into the Barn, to Markets, Fairs, and elsewhere, or of his domestick utensils or household-provision from one place to another, which service was of diverse kinds, sometimes by horse, thence called 'Horse-average', otherwhile by foot, thence termed 'Foot-average'; one while within the precinct of the manour, thence named 'In-average', another while without, and then called 'Out-average'; the Tenant in the mean while being known by the name of *Avermannus*.
- Horse-average
Foot-average.
In-average.
Out-average.
- Drof-land. The fourth ('Drof-land') that holden by the service of driving, as well of Distresses taken for the Lords use, as of the Lords cattel from place to place, as to and from Markets, Fairs, and the like: more particularly here in Kent of driving the Lords hogs or swine to and from the Weald of Kent, and the Denss there, thence
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- Drofdens. called of old 'Drofdens.', namely from the droves of hogs sent thither, and there fed and fatted with mast, or pawnage; the Driver whereof was vulgarly called *Drofmannsn*.
- + Swilling-land. The fifth ('Swilling-land') that let out or occupied by 'Swillings', 'Swollings', or 'Sullings', that is, Ploughlands, coming of the Saxon sul, a Plough, (in which notion the word may extend to all arable land) the quantity whereof was various and uncertain, containing more or lesse according to the nature of the land, a Plough being able to master a greater or lesser quantity, thereafter as it is in quality. This (of 'Swillings') I find to be a word proper to the Kentish, even from the Conquerours time, (to look no higher) whose Survey (commonly called Domesday-book) shews 'Suling' (and the like) to have been a term in those dayes peculiar to

Hide-land,
Yoke-land,
Aker-land,
Rod-land.

this County, whereby to expresse the quantity of their land, whilst Hide, and the like was of like use els= where. To this head may be referred 'Hide-land', 'Yoke-land', 'Aker-land', 'Rod-land', and the like, being quantities or portions of land let out and occupied by the Hide, Yoke, Aker, Rod, &c. and denominated accordingly.

Mol-land. The sixth ('Mol-land') was the same with 'Up-land', of the Saxons called 'Dunland', standing in opposition to Meadow-land, Mershland, or Low-land; the Tenant whereof was wont to be called *Molmannus*: the word (as I conceive) being derivable from the Latine *Moles*, a heap, of which see further in the Surveyours Dialogue. Hence probably the name of that place in Ash (the seat and patrimony at this day, and from good antiquity, of the Harflets, formerly of the Septvans,

+ p. 117. l. 4. Drofmannus.

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Ber-land. families both in their time adorned with Knight-hood called 'Molland', being of an advantagious situation for the overlooking of a large level of a rich Mershland.

The seventh ('Ber-land') that which was held by the service of bearing, or carrying the Lords or his Stewards provisions of victual or the like, in their remove from place to place, such Tenant being thence called *Bermannus*.

Smiths-land. The eighth ('Smiths-land') that, in respect whereof the Tenant was bouud, as to undergo the Smiths or Farriers office and work, in and about shooing his Lords horses and carriages, so also to find and furnish him with materials (of iron) for that purpose.

Ware-land. The ninth ('Ware-land') the same that otherwise called in the Latine of the times, *Terra warectata*, or *Terra jacens ad warectam*, that is land lying, or suffered to lie fallow, coming from the French 'Garé', (their 'g' here, as in many other words, being turned into our 'w') whence with them 'Terre garée,' for old fallow-ground.

Terra susanna. The tenth ('Terra susanna') land, not much unlike unto, if not the same with the former, being superannated land, or land with over much tillage worn and beaten out of state, and therefore of necessity lying over year, and being converted from tillage to pasture, until it may recover state, and be fit for tillage again, the term or denomination coming from the French 'Susanné', signifying stale, grown old, past the best, or overworn with years.

For-land. The eleventh ('For-land') the same (I take it) that we otherwise use to call 'Fore-aker', whereof see more in Sir Henry Spelmans Glossary, verb. 'Forera'.

Bord-land. The twelfth and last ('Bord-land') that holden and

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occupied by the *Bordarii*, or *Bordmanni*, the same (I take it) with the French 'Bordiers', i. e. Villeins or Cotagers, such as hold by a servile, base, and drudging Tenure, of them called 'Bordage'. You may read both of the one and the other in the old grand Customier of Normandy, cap. 53. Within the signification of the word ('Bordland') are comprehended also (as is already + hinted in this chapter) lands holden in Demesme (of the Saxons termed *Inland*) and designed to the fur=

Vide Fletam,
lib. 5. cap. 5.
parag. 18.
Foster-land.

Scrud-land.
Sextary-land.

Almesland.

Over-land.

nishing of the Lords boord or table, and the maintenance of him and his family in victual. For which see Bracton, lib. 4. tract. 3. cap. 9. num. 5. Which kind of land the Saxons used to call 'Foster-land', quasi fostering land, that is land *ad victum*, a term obvious and very frequent with the religious men of those dayes, who as they had their special Fermes and portions of land assigned them *ad victum*, so had they other as peculiar to their clothing or apparelling, land *ad vestitum*, which, from the Saxon *scrud*, *vestis*, or *vestimentum*, they called 'Scrud-land'. They had withall their 'Sextary-land', which was such as appertained to the office, and was intrusted to the care, of the Sacrist or Sexton, and was designed chiefly to the upholding & maintenance of their Church or Temple, both in the Fabrick and Ornaments. Besides all these, they had their 'Almeslaud', which was that appropriate to their Alms-hous, a parcel or place of the Monastery set apart for harbour and relief to such poor people (for the most part) as were allied, or otherwise related to the Monks.

+ p. 119. l. 8. Demesne.
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ver: whence that known place name lying by London, amongst the Thames-side, called St. Mary Overies: compounded of the aforesaid 'Over', and 'Ree', betokening a River, or Current of water. Land of this name we have at or neer Ash in Kent, amongst the Stour-side, running to Sandwich Town and Haven.

Monday-land.

I might to these add 'Monday-land', and the like, which with it fellows, borrowed denomination from this or that week day, and that in respect of the Tenants obligation to such or such servile works or services, upon such or such dayes of the week, in respect of that land. But I purpose to digresse no longer, having for brevity sake, wittingly omitted the quotation of the places where these several names occur, which otherwise I should willingly have added, and shall onely in the Appendix, Scriptura 23. present the Reader with a copy of a Saxon charter making mention of those two, 'Fosterland' and 'Scrudland', as somewhat more remarkable than the rest.

(u) In lib.
Hosp. S. Laurentii
prope
Cantuar.

Now returning to our 'Bocland', you must know, that notwithstanding that introduction of new Tenures by the Conquerour, we did not streightway forgo our 'Bocland', that kind of Tenure I mean, but retained it both name and thing, witness first what occurs in (u) a Deed sans date of certain messuages, by Roger, son of John, Alderman of Radingate in Canterbury, granted in Frankalmoigne to St. Laurence Hospital neer the city, founded by Hugh, of that name the second, Abbat of St. Augustines there in the year 1137. viz. *Duo messuagia quæ sita sunt in terra d-e> Bocland, de qua nulli respondeo*, &c. where we have not onely 'Bocland' mentioned, but the nature of it also in part set forth. Wit-

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(x) In Archiv.
Eccles. Cant.

nesse also another passage to the same effect in a like ancient (x) charter to the Church of Canterbury, for

(y) Vide Cl.
Seldeni Notas
ad Eadmer.
pag. 170.

the grant of a parcel of land lying without the wals of the city, between Queningate and Burgate, running thus: *Volo autem ut monachi teneant terram illam omnino liberam, sicut ego & antecessores mei, & nemini inde respondeant.* Witnesse lastly, Domesday-book it self, where though haply not the name of it, (as neither of 'Folcland', Saxon terms both) yet the thing, to my apprehension, is very obvious and often occurring, under the name and notion sometime of 'Tainland', otherwhile (and I think more often) of 'Allodium'. Hence the phrase (for the former) of (y) *clamare ad Tainland*; of *tenerere in Alodio*, for the other: both taken up (as I conceive) in opposition to Fee; but the former so termed, because indeed 'Bocland', or 'Alodium', was properly tenable by 'Thanes', (hence in the eleventh chapter of King Cnutes Laws, par. 1. 'Thegn' and 'Bocland' in the original Saxon, as 'Thegen' and 'Alodium' in the Latine version in 'Textus Roffensis', meet as relatives:) not but that it was sometime held by 'Ceorles', as who were not incapable of holding it, (witness the old version of the Saxon Fragment in Mr. Lambard, whereof before:) but when so, as improperly there, and as much out of place as Knights Fee (proper to Knights and the nobler sort of people) were in this Kingdome since and at this day in Socagers hands, or in the hands of Sockmen, whose proper tenure was that of 'Gafolland': *butan ðæm Ceorle þe on gafolland sit, as you have it before.*

I have often much wondred with my self, whence it should come to passe, that diverse of our Canter=

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'Bocland' in
Canterbury.

bury houses and ground at this day pay no Quit-rent at all, which others in the same place, though holden in Free Burgage are known to do. But considering afterwards with my self, that 'Bocland' often occurs in 'Landbocs' (as they were called) of the place in the Saxons time, I at length concluded, at least conceived, such houses and ground to be the remains of our ancient 'Bocland', which seemeth to be still surviving in them, as if holden *in Allodium, pleno jure*, without all manner of chargeable service, and no other (probably) than part of those eighty acres of land (or the like) in Canterbury Survey in Domesday-book thus expressed: *Habet etiam* ('tis spoken of Ranulfus de Columbers) *quater viginti acras terræ super hæc quas tenebant Burgenses in Alodio* (so I read it, rather than *Alodia*) *de Rege*, or, as a very ancient book sometimes of St. Augustines Abbey, now with the Kings Remembrancer in the Exchequer reads it: *Item dicunt Burgenses quod idem Ranulfus tenet quatuor viginti agros de Allodiis eorum, &c.* The same Domesday-book (to prosecute this discourse of 'Allodium' a little further) makes mention particularly of some *Allodiarum* by name in that Kentish Survey, and there also we may read to this purpose: *Has foris facturas habet Rex super omnes Alodiaros totius Comitatus Chent, & super homines ipsorum.* And: *In Cantia quando moritur Alodiarus, Rex inde habet Relevationem terræ, excepta terra S. Trinitatis, & S. Augustini, & S. Martini, & exceptis his, Godric de Burnes, & Godric de Carlesone, & ÆInold Cilt, & Esber Biga, Siret de Cilleham,* (these last three are mentioned also in the Survey there of Canterbury, amongst those whose lands were

Allodiarum.

'Sac' and 'Soc'-free, i. e. quit against the King of 'Sac' and

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'Soc':) & *Turgis*, & *Norman*, & *Azor*. *Super istos habet Rex forisfacturam de capitibus eorum tantummodo, & de terris eorum habent Relevamen qui habent suam So-*

+ *cam & Sacam*. I rather read it *habent*, than *habet Relevamen*, because by charters both of the Cathedral and St. Augustines Abbey, of those succeeding times, I find the Monks in each place priviledged with the liberties of Sac and Soc, &c. over their 'Allodiarii', as termed in the charters of the latter place, over their 'Thegnes', or 'Theines', as in the former, in what form of words see in the charter of each place, for illustration sake, copied in the Appendix here, Scriptur. 19. and 20. And least these various terms ('Allodiarii' and 'Thegnes') rendring them of a seeming difference, should occasion any suspicion of their being not the same, for your satisfaction to the contrary, take this note along with you, that those who in the Latine charters of St. Austins, are termed 'Allodiarii', in the very same charters exhibited in English, (like as in those at Christchurch) are stiled 'Thegnes'. But what (may it be ask'd) were they then which in some very ancient Records of that Cathedral are named 'Threnges'? Indeed I have met with a Record there, (and you may meet with it here in the Appendix, Scriptur. 21. a choice one in my account, as the book it self was it seems in his, who in the margent of the first page of it long since left this note: *Custodiatur bene iste libellus, quia etsi appareat non valere, bene tamen valet, & est libellus satis pretiosus monachis Ecclesiae Christi*;) which makes no slight mention of such 'Threnges' belonging to the Monks there, in these very words: *Quia vero non erant adhuc tempore Regis Will/mi milites in Anglia, sed Threnges, praecepit Rex, ut*

Thegnes.
Theines.

Threnges.

+ p. 123. l. 6. those and succeeding.

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de eis milites fierent, ad terram defendendam. Fecit autem Lanfrancus Threngos suos milites, Monachi vero non fecerunt, sed de portione sua ducentas libratas terrae dederunt Archiepiscopo, ut per milites suos terras eorum defenderet, & ut omnia negotia eorum apud curiam Romanam suis expensis expediret, unde adhuc in tota terramachorum nullus miles est, sed in terra Archiepiscopi, &c.

To this purpose Gervasius Dorobernensis, then a Monk of the place, speaking of the Archbishops dividing the revenue between himself and the Monks: *Sibi etiam reservaverunt Comites, Barones & Milites; Monachis vero assignaverunt rusticos & agricultores*. These 'Threnges' doubtlesse were the same, which in Domesday-book are somewhere called 'Drenches', and if so, your best satisfaction what they were, will be from the words explication in Sir Hen. Spelmans Glossary. But, me thinks, laying these Records concerning them together, and then comparing them with the fore-cited ancient charters of liberties granted to the Monks of Christchurch and St. Augustines on the one hand, and Domesday-book on the other, 'Drenches', 'Threnges', 'Thegnes', one and all, may not unfittly be rendered in that books phrase, 'Allodiarii': being such *Liberales*, (as the Saxon 'Thegnes' is not unusually turned in

Drenches.

the old Latine translations, as 'Thegenscipe' by *Liberalitas* such *Ministri, Fideles, Servientes, Nobiles*, as being by these places dignified with some portions of their 'Allodium', or 'Bocland', did *militiam ex arbitrio tractare, nullius Domini imperio evocati, nulloque feodali gravamine coerciti*, (as our learned Glossarist concerning 'Allodiarum') being permitted to continue in their pristine estate, acquitted from military service and tenure, when

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as others were from 'Threnges' turned into 'Milites', and their land consequently subjected to military fee and tenure. Whether the name of 'Drenches' were taken up from such a cause as our learned Glossarist, from a Record by him there cited, is assigned for it, some reason there is to doubt from the mention of (the terms Synonymy) 'Threnges', in that Record of Christchurch, as known in that notion here before the conquest, whereas the other sayes they took name first after it: If before it, (as the Christchurch Record) then I see, me thinks, some cause to suspect the term corrupted from 'Thegnes', i. 'Thanes', which cleerly that Cathedral had before the conquest. On the other side, if the Record (in the Glossary) be right, and that withall 'Threnges', 'Drenches', 'Thegnes' and 'Allodiarum' be (as all the fore-cited authorities laid together, they seem to be) Synonyma's, terms identical, then were our Kentish 'Allodiarum', such as had not revolted from the Crown, by opposing the Conquerour, whether by their aid or counsel, but had peaceably submitted to him and his Empire, whilst consequently others of the county opposing, withstanding, and resisting him and his coming in, had *ipso facto* forfeited their possessions: and if so, then Spots history, whereof so much before, may well deserve yet another dash, or, if you will, another spot. But thus far of 'Allodium', as also of what induced it, 'Bocland', which, as to the name, almost quite ceased with the Saxons, though, as to the thing it survived some time after, under the notion of 'Allodium', into which it was translated of the Normans here, and of them so altered also in the very thing, that it became thus far subject unto Tenure, as in the opinion of lear-

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(z) Mr. Sel-dens Titles of Hon. first Edit. pag. 390.
(a) Id. Jan. Angl. pag. 61. Coke Instit. p. 1. fol. 1. & 5. Cowells Interpret. in verb. 'Fee'.
(b) Cowell, ubi supra.

ned (z) men, it was land (as we say) holden, and so accounted, whence in time that common and received (a) axiome amongst us, that in the Law of England (since the conquest at least) we have not properly 'Allodium', that is, not any Subjects land that is not holden: in which respect, as one (b) saith, he that can say most for his estate, saith thus: I am seized of this or that land or tenement in my Demain as of fee, *Seisitus inde in dominico meo ut de feodo*, &c. And 'tis most true at this day, but under favour, it was otherwise since the conquest, witness (besides Domesday-book, where the opposite to Fee, 'Allodium', is very obvious) those charters afore-cited, the one of St. Laurence, the other of Christchurch, (and such like) mentioning land holden by the Authours or Owners, for which they were responsible to none, as also the Pinenden plea for the Archbishops lands of Canterbury, and the grant *in Alodium* mentioned in Eadmerus, evidencing cleerly the contrary, and asserting (some of them) the conti-

nuance of such creations from the King, to whom, after 'Textus Roffensis', it peculiarly belongs to grant out, or passe land in that kind: *Carta Alodii ad æternam hæreditatem*, being there reckoned and ranked *inter consuetudines Regum inter Anglos*.

Folcland. Now as our 'Bocland' did not presently expire with the Saxons, its first Authours, upon their vanquishing and supplanting by the Normans, so neither did our 'Folcland', but survived and continued after the conquest, and remains unto this day, though not in the very name, yet in the thing and substance. For, as aforetime the Saxons had their 'Ceorles', 'Gebures', 'Folcmen', &c. as afterwards the Normans their *Villani*, *Bordmanni*,

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Servitus rusticana. *Cotarii*, &c. so what the former held was called 'Folcland', 'Gafolland', &c. and was opposed to 'Bocland'; what the latter, Villenage, and (in some sence) Socage, opposed to Chivalry, Knight-service, &c. and in all likelihood intended by that *Rusticana servitus* occurring in a charter of Walchelinus Maminot, granting the tithery of Bertrey to the Church of Rochester: *Quod si aliquid de prædicto Dominio in rusticanam servitum translatum est*, &c. as it is in Mr. Seldens History of Tithes, cap. 11. pag. 313.

(b) Vide Adve<r>sar. in Mat. Paris. Hist. & D Roger. Twysden. Præfat. in LL. Hen. 1. As for the original of Socage, there (b) are that refer us (for the finding of it) to a notable passage in Gervasius Tilburiensis his book intituled 'Dialogus Scaccarii,' who lived and wrote in Hen. 2. dayes, which (to bring the Reader better acquainted with the state of affairs in the disposal of our Countrey-mens Free-hold in those elder times, when as the English State was new moulded) I here offer to his view: *Post Conquisitionem*, &c. i. 'After the (c) Conquest of the Kingdome, and the deserved subversion of the Rebels, when the King himself with his Nobles surveyed his new Countrey, a diligent inquiry was made, who they were, which taking part in the war against the King, had saved themselves by flight: to all these, like as to the heirs of such as had fallen in the war, all hope of any lands, (d) possessions and (e) rents, which formerly they enjoyed, was cut off. For they accounted it no small favour to escape with life under enemies. But those who when summoned, came not to the war, or being occupied in household or other necessary affairs, were absent, when in processe of time by their constant (f) serviceableness, they had ingratiated themselves with their Lords, without hope of succession, their

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(g) Or, In way. (h) Or, Descent. children onely, and that but at the Lords will, began to possesse. Afterwards, when becoming odious to their Lords, they were every where expelled their possessions, nor was there any that would restore what was taken away, a common complaint of the Natives came to the King, that being thus hated of all, and bereaved of their estates, they should be enforced to betake themselves to forein parts. At length, after consultation upon these matters, it was decreed, that what by their deservings, and upon a lawful agreement, they could obtain of their Lords, should be their own by inviolable right. But they should challenge nothing to themselves (g) by name of (h) succession, from the times of the Nations subduing. Which thing truly, how discreetly it was considered of, is manifest, especially

(i) Or, Observe.

(k) Some cause (haply) of the paucity of Charters of Feoffments so ancient as those times, extant when Bracton wrote, as he observes, fol. 382.

(l) Bracton, fol. 168. a. 170. a. 208. b.

'Socage', how vulgarly derived.

(m) Lib. 2. cap. 35 num. 1. fol. 77. b.

when as thus by all means, for their own good, they were bound from thenceforth to apply themselves by constant (i) serviceableness to purchase their Lords favour. Inso- much as who of the conquered people possessed lands, or such like, obtained them not, as seeming to be due by right of succession, but in recompence of his deservings, or by some intervening agreement.' Hence we see how precari- ously matters stood with the generality of our poor cuntry-men (in point of estate) in those dayes, and with what observance and obsequious respect they were fain to carry themselves towards their conquering Disseisors, to purchase many times but a Modicum of what had lately been their own, and when they had it, see withall upon what kittle, tottering, uncertain terms they held (k) it. The relation comes from a very good hand, and is so authentike, as (for ought I know) it may be credited for it self. But if any man expect fur- ther confirmation, I suppose it may be found in Bracton,

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lib. 1. cap. 11. num. 1. where he hath this passage, and is in part seconded in it by Fleta, lib. 1. cap. 8. *Fuerunt etiam* (saith he) *in Conquestu liberi homines, qui libere tenuerunt tenementa sua per libera servitia, vel per libe- ras consuetudines, & cum per potentiores ejecti essent, postmodum reversi receperunt eadem tenementa sua tene- da in villenagio*, &c. The same (l) Authour, fol. 26. and elsewhere tells us of a sort of Tenants, *ad similitu- dinem Villanorum Sockmannorum per conventionem de gratia Dominorum, licet hoc esset ab initio villenagium*, &c. a passage, if not *totidem verbis*, yet in substance of- ten repeated of him, in my judgement intimating thereby that practice of the Tenants currying favour and complying with their Lords, whereof in Tilburi- ensis, and their obtaining thereby to better their estates, and by degrees to creep out of Villenage into a kind of Socage, a Tenure (thus) grown to that latitude and so comprehensive, as it helps to make that Dichotomy, into which all the Kingdome lands in the hands of common persons, in point of Tenure are resolved, Chivalry being the other. Now being of such note, a little further enquiry after the antiquity of the thing, and etymologie of the name, to clear the truth in both, will not do amisse (as I conceive) in this discourse of Te- nures.

By the common and received opinion of our Law- yers, derived I suppose, and first suckt from (that great Ornament of their Profession) (m) Bracton, the term is said to come (to use the Authours own words) *a Socko, & inde tenentes qui tenent in Sockagio, Sock- manni dici poterant, eo quod deputati sunt, ut videtur, tantummodo ad culturam*, &c. This (of Bracton) is

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strongly backt by Littleton, in his book of Tenures, where treating of Socage, he saith, that the reason why such Tenure is called, and hath the name of Tenure in Socage, is this: because (saith he) *Socagium idem est quod servitium Socæ, & Soca idem est quod caruca*, &c. 'A Soke or a Plough.' 'In ancient time' (so he adds for fur- ther confirmation) 'before the limitation of time of me- mory, a great part of the Tenants which held of their Lords by Socage, ought to come with their ploughs, every

of the said Tenants for certain dayes in the year, to plow and sow the Demesne of the Lord. And for that such works were done for the livelyhood and sustenance of their Lord, they were quit against their Lord of all manner of services,' &c. 'And because that such services were done with their ploughs, this Tenure was called Tenure in Socage,' &c. Thus Littleton, followed by the generality of our common Lawyers and others since, not without a kind of popular error, as under favour I conceive, and with submission to better judgements, shall endeavour to evince, without check (I hope) for presuming to control so great, so many, and those eminent Lawyers, whereas here I oppose them not in point of Law, but only in matter of fact.

The first exception then that I take against this opinion, is its inconsistency with many several species of Socage-land, or land said to be of Socage kind or tenure; such as 'Petite Sergeanty', 'Escuage certain', 'Frank-almoigne', 'Fee-ferm', 'Burgage', 'By Divine service', and the like, which have no manner of relation to the Plough, or matters of Husbandry, as originally they say Socage had, and therefore still retains the name, though the cause whereupon it first grew be taken

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away, by changing the service into money. So Littleton. An exception (this) warded off by the Patrons of the present derivation, with a distinction of a double kind of Socage, the one, that so called *a causa*, the other (n) *ab effectu*, and to this latter sort (Socage in effect) are these of them referred, as one would say, Socage at large, because partaking of the like effects and incidents with Socage. But this distinction carries with it no great antiquity, being questionlesse sought out since Bractons time, as necessary to uphold that of his and his followers derivation of Socage from the Plough, otherwise so inconsistent with these Tenures. Not but that I hold them to be Socage, with the common opinion, but from another cause, as I conceive, whereof anon.

In the mean time, I have a second exception against the derivation, which is this: that though that of the Plough may be the chief service, wherein Socage is conversant, yet are the Sycle and the Syth, the Fork and the Flail, and many such like, attendants also upon it, and concomitant services with it in Socage-land: to derive then Socage *ab aratro*, that being but one species of Socage-services, is as improper under favour, as at this day to define 'Feudum' (comprehending whatsoever fee is constituted for any lawful and honest service, although not military) by what the Feudists call 'Clientela militaris,' because a chief part of feudal service is military, and that of old Fees, for the most part, were granted out *militiæ causa*, an error into which (o) Vulteius challengeth Hotoman to have fallen, in his definition of 'Feudum' thence, which my Author calls a definition of a 'genus', by a 'species', concluding it not logical.

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A third exception taken to it may be this, that if Socage-land be so ancient (under that notion) as King Alfreds time, as (p) some will have it, who tels us that in those dayes Socage-fee was divided between the

(n) Coke Institutes, par. 1. sect. 117. and 120.

(o) De Feudis, pp. 22, 23.

(p) Mirroir, cap. 1. sect. 3. followed by

by Coke, Instit.
par. 1. fol. 14. a.

(q) Vide Foed.
Ed. &c. cap 6.
Lamb. expli=
cat. verb. in
ve<r>b. 'Ara=
tionis ele=
emosyna,' &
Spel. Concil.
pag. 130.

(r) See the
Grand Custu=
mier of Nor=
mandy, ca. 26.
and 53. with
the glosse
there; and
Mr. Seldens
Tit. Edit. 1.
p. 291.

(s) Vide Spelm.
Gloss. verb.
'Carucagium'.

heirs males, why then was it not rather from the Saxon sulh, signifying (what 'Soc' never did with them) a Plough, (whence sulh-ælmesse, for Plough-almes, being a pension of a penny imposed upon every Plough, in the name of (q) Almes called 'Sulh-age', or 'Sul land', to say Plough-service-land? or how could it in those times be called Socage in the sence by this derivation intended, when the word 'Soc', if it signifie a Plough (as it doth a Plough-share) being in that sence a French word, cannot in any reason be thought to have taken place here, I mean in the Saxons times, and so long before the French, by their Conquest, and intermixture with us following thereupon, had prevailed to suppress and extirpate the English language? But if it cannot pretend to so much antiquity, as being a term, as well in the original, as in the sence, Norman, or French, then probably they would not have imposed it without some pattern, some precedent, of their own Countrey, as used there in like case: but doubtlesse this was wanting, their (r) term for land of this condition being 'Tenement Villein', 'Villein Fief', 'Fief Roturier', 'Heritage Roturier', and the like. Besides, had the term been of their imposing, with intent to have it signifie Tillage-service, 'Charue' being the usual word with them for a Plough, fetch't from *Caruca*, (whence their *Carucata terræ* for a Plough land, not heard of here with us until their coming hither:) more likely it had been called (s) 'Carucage', or the like, as a certain

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Carucage.

(t) Lib. 1. c. 8.
though after=
wards, lib. 3.
c. 16. he con=
cur with Bra=
cton.

Tribute by our Hen. 3. imposed by the Plough, was therefore called 'Caruage', 'Carucage', and the like.

My next and last exception is from Fleta's derivation of 'Socmanni', (t) where speaking of the Kings manours, he saith: *In hujusmodi vero maneriis erant olim liberi homines libere tenentes, quorum quidam cum per potentiores e tenementis suis ejecti fuerant, eadem postmodum in Villenagium tenenda resumpserunt: & quia hujusmodi tenentes cultores Regis esse dinoscuntur, eis provisiva fuit quies ne sectas facerent ad Comitatus vel Hundredos, vel ad alias quas inquisitiones, assisas vel juratas, nisi in manerio tantum, dum tamen pro terra, quorum congregationem tunc Socam appellarunt; & hinc est quod Socmanni hodie dicuntur esse. A Soca enim derivantur, &c.* Where, though he say that the *Socmanni* were *Cultores Regis*, yet he sayes not that thence they were called *Socmanni*; but that their Congregation, (their Assembly or Company) was called *Soca*, and hence it is (saith he) that they are termed *Socmanni*, for they are derived from *Soca*, &c. Thus he. Now if from 'Soca' (an Assembly of Husbandmen) then not from 'Soc', 'Sock', or 'Soke', (a Plough.)

'Socage', a new derivation of it proposed.

To come now to that which I conceive to be the right and genuine derivation of the term ('Socage'.) To expresse a Liberty, Immunity, Franchise, Jurisdiction, Protection, Priviledge, &c. our Saxon Ancestours were known to have and use a word somewhat variously written of them, viz. 'Soc', 'Socne', 'Soken', and the like. Hence (to proceed to instances) Sanctuary, the priviledge sometime so called, was of them termed *cyricena socne*, otherwise (u) *cyricena frype*. With them also (x) *frip-socne* signified a jurisdiction to keep

(u) Vide LL.
Aluredi, c. 2. 5.

(x) Spelm.
Glossar. in
voce.

(y) Idem, in voce.
 (z) LL. Ethelstan. apud Exon & Greatesleyam. MS. in Jornalen.
 (a) Spelm. Glossar. in voce.
 (b) Idem, in voce.

Faldwrth.

(c) Cap. 9. (where I read *Placitorum* for *Prælatorum*) and elsewhere.

Sokerevi.

the peace. (y) *firdsocne*, an immunity from service in war, or from warfare. (z) *hlaforðsocne*, the Lords protection to his man or Tenant. (a) *hamsocne*, being of a double sence, signified both a priviledge or protection against assaults upon a man in his own house, or under his own roof, and a liberty or franchise to hold plea thereof, with power of animadversion by mulct, or fine. (b) *faldsocne* imported a liberty or priviledge of Faldage, debarred and denied unto Tenants in times past, and by the Lord, for the inriching his own Demesne lands, reserved to himself. Hence their word, 'Faldwrth', for him that enjoyed such a liberty. Shall I now give you one example from the Normans? *Nulam enim Socnam habet impune peccandi*, say the Laws of Hen. 1. cap. 24. speaking of Barons having 'Soch'. And (to enlarge yet a little further touching 'Soc', &c.) as it signified a Liberty, Immunity, Franchise, Priviledge, Jurisdiction, &c. so withall a Territory, Precinct, or Circuit, wherein such a Jurisdiction, and such Priviledges were to be exercised, and that as well in a simple, as a compounded notion. Hence (for the former) *Socha* of this and that place so obvious in Domesday-book, whereof some instances in Ingulphus, by name, *Soka de Donnedike*, *Soca de Beltisford*, *Soca de Tad*, *Soca de Acumesbury*. In this sence it frequently occurs in Hen. 1. Laws, where you may also often meet with (c) *Soca Placitorum quam quidam habent in suo de suis*, and other such like passages. In the same sence the Register hath it, fol. 1. a. as also Bracton, lib. 5. tract. 1. cap. 2. num. 3. In the Statute 'de Gaveleto,' made anno 10. Edw. 2. (where the Custodes, the Guardians of the Soke, are termed *Sokerevi*, of Dr. Cowell turned by

(d) Survey of London, pag. 115, 925.

(e) Coke Institutes par. 4. pag 252.

Rent-gatherers) and in the Statute also 32. Hen. 8. cap. 29. it is used accordingly. Thus of 'Soke', or 'Soken' simply. In composition it occurs often with 'Port'. As for example, the 'Knights gild', sometime in or near East-Smithfield London, erected first by King Edgar, and confirmed with some enlargement afterward by succeeding Kings, (being a portion of ground enfranchised with special liberties, to be enjoyed within that extent of it set forth by (d) Stow) was anciently called a 'Soke', and afterwards, (because lying by Eald-gate, now Algate, 'Port' being added, or rather preposed to it) 'Portsoken', being for extent and otherwise, I take it, the same, which at this day is known there by the name of 'Portsoken-Ward'. Here now we find it restrained to a part onely of a City, a particular Ward, but in some ancient Charters of Liberties granted to several Cities, and other like places of this Kingdome, and particularly to London, you may find it spreading it self to the utmost skirts and liberties of the City without the wals, as in H. 3. (e) Charter to that City, ann. 11. of his reign: *Et quod infra muros civitatis, neque in Portsoken, nemo capiat hospitium per vim, sed per liberationem Mareschalli*, &c. The like occurs in several Charters to the city of Canterbury, whereof one ('tis Henry the seconds) thus: *Concessi etiam eis quietantiam muri infra urbem, & in Portsoka, & quod nullus, &c.* Another (of Henry the thirds) thus: *Concessimus etiam*

quod nullus de civitate vel Portsoka sua captus vel reatus de aliquo crimine vel forisfacto pro quo debeat imprisonari, imprisonetur alibi quam in prisona ejusdem civitatis, &c. A little after: Et quod nullus externus faciat Forstallum in Civitate prædicta, vel in Portsoka sua

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ad nocumentum Civium, &c. I spare to add more instances, it being plain enough by these, that the liberty of the place in the full extent of it is intended by 'Portsoka': you may call it not improperly, the Extent of the Franchise. The fore-cited Statute 32. Hen 8 cap. 29. by occasion there given to mention the Soke of Oswaldbeck in Nottinghamshire, useth the terms of 'Lordship' and 'Soke' indifferently, to expresse the territory wherein the custome there mentioned took place, whereby it seems our term ('Soke') also signified a Lordship, the word extending thither, I conceive from the extent of the priviledge so called throughout the whole compasse of the Lordship, viz that whoever is dignified with it, and its constant concomitant 'Soc', as regularly all Lords of manours are, hath that dominion over all men and matters of his Territory or Lordship, as freely to hold pleas, and have and take cognizance of the one, and between the other, in such matters, I mean, as (in the language of Hen. 1. (f) Laws) exceed not his 'Soch', his cognizance, as being haply 'Regalia', certain arduous or capital matters reserved to the King and his Justices. Hence, to have 'Socne', or to be so priviledged, after a book of Christchurch Canterbury, is 'aver fraunche court de ses homes,' answerable to that of Fleta, lib. 1. cap. 47. *Soke* (saith he) *significat libertatem curiæ tenentium, quam Socam appellamus*, as also to what I read in an old MS. amongst other etymologies of this kind: *Nota quod Sok est quædam libertas, per quam Domini tenebunt Curias suas, & habebunt sectam homagiorum.* A great (g) Lawyer of our times gives it this definition: 'Soc' (saith he) 'is a power or jurisdiction to have a free Court, to hold plea of contracts,

(f) Cap. 22. where for *accedit*, I read *excedit*, according as the 24th chapter hath it.

(g) Sir Edw. Coke, Instit. par. 2. p. 230.

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covenants, and trespasses of his men and tenants.' Within a little after he proceeds to derive it, in a different way (though not without some company) to what is here afore-proposed; how rightly *judicent alii*. Shortly, 'Soc', 'Soke', 'Socne', and the like, (not to mention its derivation in Clement Reyners (h) Onomasticon, and some others) betokened we see, both a Liberty, Priviledge, Franchise, &c. and a Precinct, or Territory, wherein such a Liberty, &c. was exercised, if you will, a 'Sokmanry'.

(h) Before his Apostolatus Benedictinorum in Anglia.

And resolving our Socage (the Tenure so called) to be deriveable from 'Soke', considered under one of these acceptions, I stood irresolute a while to which of the twain I should refer it. Once I intended to pitch upon the latter: and then me thought, as the territory, precinct, extent, circuit, &c. of a Lordship or Manour was called 'Soca', and 'Socmanria', so probably the men of that Territory, Precinct, &c. in respect of their relation to that Soke, and their dependance upon it, and the Lord thereof by Tenure, were termed 'Socmanni', that is, men appertaining to the Soke, or Lordship, *quasi Socæ ascriptitii; homines Socæ*: and consequently,

(j) Sir Edw.
Coke, Institut.
par. 1. fol. 86. a.

as in that respect the Men were called 'Socmanni', so their services, (those duties in works, provisions, moneys, or otherwise, which by their Tenure they were to return to the Lord of the Soke) were called 'Socage'; tract of time having added to 'Soke' or 'Soc', (what a (i) famous Lawyer of these times calls a legal termination) 'agium', in composition (saith he) signifying service or duty, as 'Homagium', the service of the man; 'Escuagium', *Servitium Scuti*, &c. And so the parts being put together, ('Soc' and 'agium') it comes forth 'Socagium' in Latine,

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'Socage' in English. Thus, I say, was it sometime in my thoughts to have derived 'Socage', and indeed not altogether improperly in a large sence; all sorts of Tenants of or to a 'Soke', (the *Cætus Tenentium aut Vassallorum manerii*, the 'Homage', as sometime called) being from their relations to the Soke or Lordship, and the Lord thereof, not unfitly called 'Socmanni', and their service & tenure consequently 'Socagium'. But at length, upon second thoughts, I concluded this somewhat too large and vast a derivation, as being comprehensive of all sorts of Tenants, 'Villeins' and all, which, with the (k) Authour of the Terms of Law, I conceive to be improperly called 'Sokemen', or their tenure 'Socage'. Besides, when I first pitch'd upon that derivation, I conceived the tenants whole service to be (if I may so call it), 'Socal', respecting onely the Soke, not foreign, whereas afterward I found that Socage-service was not so to be restrained, it being ordinary with Tenants in Socage to do service *extra*, or *foris*, *Socam*, as to ride with their Lord from manour to manour, (like the 'Rod-Knights' in (l) Bracton) to carry and pay rent to the Lord, and to deliver him corn and other provisions at his Granary or elsewhere out of the Tenants proper Soke, and the like: in which respect also with what incongruity are pure Villeins called 'Sokemen'? since they are so far from being tied to the Soke, that they may be commanded out, and employed abroad wheresoever the Lord shall please, as well without as within the Soke. Changing therefore my opinion, as to that derivation, and looking further back to that other (the former) sence of 'Soke' (a Liberty, Priviledge, Immunity, Franchise, &c.) I resolved finally to derive and fetch it from thence; and thus I make it good.

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Amongst other sorts of land, our books are full of that called *Terra servilis*, Villein-land, land holden in Villenage, servile land, such namely (for fuller explanation of it) as that holden at the Lords will, both for time and services; in both respects uncertainly; for time, it being in the Lords power (of old (m) at least it was so) *tempestive*, or *intempestive*, to revoke, and resume the same out of the Villeins hands into his own, and for services, the tenant being altogether ignorant, and not knowing over night what service may be required of him the next morning. He might also have greater or lesser taxations laid upon him, at his Lords will: nor might he marry his daughter without a Fine to his Lord, for his leave and licence, & *ita semper tenebitur ad incerta*, saith my Authour. Now to defend land against the Lord from Villenage, and to

(k) In the
word 'Ville=
nage'.

(l) Fol. 35. b.
& fol. 79. b.

(m) Vide Bra=
cton, fol. 263.
a & fol. <2>87. a.
208. b.

come off acquitted of this servitude and servile condition, it was and is necessary of the tenants part to shew a tenure of his land, by opposite and contrary services to those in Villenage, that is, *per certa servitia*, by certain, expresse, definite, services: and, as otherwise it may be concluded, that his tenure is Villenage, so hereby, if the service be not Regal, or Military, it is as clearly Socage. For, that *certa servitia*, are a Superseideas to Villenage, and do make it to become Socage, proofs are obvious. To this purpose consult we Bracton, lib. 2. cap. 16. num. 9. as also eod. cap. num. 6. where he is expresse for the tenants acquital from all other services, (some being expressed in the Charter made him by his Lord) than what are specified therein: *Alia omnia servitia & consuetudines quæ expressa non sunt tacite videntur esse remissa: and satis acquietat*

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ex quo specialiter non onerat. See him again, eod. lib. cap. 36. num. 8. at these words: *Cum teneatur Sockmannus defendere tenementum suum erga Dominum suum per certum redditum in pecunia numerata, vel per quid tale, quod tantundem valeat, quæ consistunt in pondere, numero, vel mensura, in solido vel in liquido, sicut frumento, vino, oleo, secundum quod redditus diversimode accipiuntur, &c.* Have recourse also to the same Authour, lib. 4. tract. 1. cap. 23. num. 5. at these words: *Dum tamen servitia certa sunt; si autem incerta fuerint, qualecunque fuerit tenementum, tunc erit Villenagium, &c.* Add, as agreeable hereunto, that of Sir Edw. Coke, in his Commentary upon Littleton, Sect. 120. 'To Tenure in Socage' (saith he) 'certa servitia do ever belong.' Hence it is, that the Authour of the Terms of Law, expounding Socage, or tenure in Socage much after the same manner with Bracton, ubi supra, (to wit lib. 2. cap. 16. num. 9.) saith, that 'to hold in Socage, is to hold of any Lord lands or tenements, yeilding to him a certain rent by the year for all manner of services.' You see it proved then, that *certa servitia*, certain services, so they be not military, make a Socage tenure. The ground whereof is obvious, viz. that by such tenure (*per certa servitia*) the tenant hath a 'Soke', a priviledge, an immunity, a 'Quietus est', as from Villenage in general, so from all villein, military, or other services than those by contract, or custome (n) charged upon him: a 'Soke', I say, whereunto 'agium' being added, signifying the service or duty to be returned for that priviledge, it comes forth 'Socagium' in Latine, 'Socage' in English, as, by putting 'man' to 'Soke', the Tenant is signified, and called 'Sokeman'. But if 'Soke' here carry with it such a

(n) Vide LL. Edw. Confess. apud Cl. Seld. Not. ad Eadmer. cap. 33. pag. 184.

Objection.

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sence, (of Immunity, Discharge, Priviledge, &c.) how comes it then to pase (may some perchance demand) that 'liberum' is often found to accompany 'Socagium', as 'liber' also doth 'Socmannus'? For answer, I conceive, to distinguish Free Socage from Base. Not but that Base Socage had its priviledge as well as the other, as being holden by services set and certain, or determinate; but in regard those services regularly consisted in servile works incident to Villenage, the tenure gat the name of 'Villanum Socagium', to distinguish it from 'Liberum Socagium', acquitted of those servile works, and consist=

Solution.

(o) Bracton, lib. 2. cap. 35. num. 1. The rent hence called 'Quit-rent'.

(p) Fol. 7. a. fol. 170. a. fol. 272 a. fol. 209. a. Fleta, lib. 1. cap. 8.

ing (o) *in denariis*. From hence also (such a 'Soke', such a Priviledge) it is, that the 'Villanum Socagium' in the Kings Demesne is turned of (p) Bracton and others, by 'Villenagium privilegiatum'. By the way, hence judge whether I am not right in my derivation of Socage from 'Soc', 'Soke', &c. a Priviledge, &c. when here you see 'Villanum Socagium' of Bracton and others, rendered by 'Villenagium privilegiatum', i. e. priviledged Villenage.

'Tis time now that we inquire how this derivation will suit with those before remembred tenures, 'By divine service', 'in Frankalmoigne', 'Fee-Ferme', 'Petite Sergeanty', 'Escuage certain', 'Burgage', and the like. Where to I answer, Very well. For, as they were all, through a tacite discharge from corporal service in warfare, excused from military Fee, or Tenure, so on the other side, by reason of an expresse tenure *per certa servitia*, or *per certum redditum*, common to them all but Frankalmoigne, they were rendred quit and free of Villenage, and consequently became of Socage tenure. As for 'Frankalmoigne', as it may challenge an interest in

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the composition of Socage from 'Soc' or 'Soke', and 'agium', to wit, in the former syllable, so on the contrary side, hath it as little to do with the latter, because such tenure is quit of all service whatsoever, as well spiritual, (unlesse (q) uncertain) as temporal. But because as it hath not to do with military service on the one hand, so neither with Villenage on the other, and hath its priviledge expressed in that epithete of *Libera*, it is referred to Socage, as in some sort such.

(q) Coke upon Littleton, in 'Frankalmoigne'.

This then is that (this tenure *per certa servitia*) that makes tenure 'By divine service,' of no relation to the plough, to become Socage. This makes also 'Fee-ferme', a meer censual service, (much in the nature of that which among (r) Civilians is called 'Ager vectigalis') as being liable onely to so much yearly rent, without any other service regularly, unlesse Fealty, suit of Court, or the like, according as the Feoffment may run, and having nothing to do with the plough, to become Socage. This makes 'Escuage certain', another tenure of no relation at all to the plough, but *quatenus* Escuage, as it is simply Escuage, *eo ipso*, of (s) Knight-service, because by being certain it draws him not forth to any corporal service in war, to be also termed Socage, whilst contrarywise what is properly called Escuage, that namely which is uncertain, and so called, because (besides its subjection to Homage, Fealty, Ward, and Marriage) it is uncertain how often a man shall be called to follow his Lord into the wars, and again what his charge will be in each journey, from being liable, I say to this uncertainty of duty, is (t) Knight-service. Hence (fourthly) it is that 'Burgage' (a tenure no way smelling of the plough, or tillage, being cur-

+ (r) Lib si. 1. ff. ag. vectigal.

(s) Bract. fol. 37. a. & 79. b.

(t) Dr. Cowell, Interp. verb. 'Escuage'.

+ p. 142. in marg. L. 1. ff. si ag.

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rant and conversant onely in cities and towns) because holden for a certain annual rent, becomes with the rest Socage. Hence also our Kentish Gavelkynd, considered in its name or term, (betokening censual land) of no

affinity with the plough, or plough-service, because, I say, holden *per certa servitia*, comes to be called Socage. The like might be said of 'Frank ferme', and of other the remaining species of Socage-land: one and all, as properly so called, as rightly, and with as much reason referred to that head of our English tenures, as that which for its plough, or tillage, service is said to be more peculiarly so called, standing not in need of that distinction which the common opinion useth to bring them within the compass of it, called *ab effectu*, because of like effects and incidents belonging to them with Socage tenure; a distinction by this derivation rendered frivolous and needlesse, and under favour therefore as fit to be laid aside, as their (u) assertion is to be retracted, who, to vindicate the retaining of the name of Socage, as of use onely to distinguish that from a tenure by Knight-service, affirm that the cause whereupon the name of Socage first grew, viz. Plough-service, is taken away, by the change of such service into money, whereas presupposing our present derivation of Socage to be admitted, both name and cause still continue. Thus much for Socage, a term that to me first occurs in Glanvill, never as yet in any elder Record. In a Roll of (x) Accompts of the Archbishop of Canterburys mannours, for the sixth year of Archbishop Baldwyn (Glanvills Coætanean and Companion in his voyage and expedition, with King Richard the first, to the holy land) which by computa-

(u) Coke Institutes par. 1. fol. 86. b. Bacons Elements, tract. 2. p 36.

(x) In Archiv. Archiep. Cant.

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tion was the year of our Lord 1190. it occurs by the name of 'Soggagium' thus: *Super Soggagium London remanent xx. d.* and this in Croydon manour there, amongst the expences and deductions following the receipts of that year. Which I mention, not as conceiving it no elder than Hen. 2. dayes; yes I rather hold 'Socmannus', 'Socmanria', and 'Socagium' to be relatives, and consequently that where the one occurs, the rest are implied: but 'Socmannus' is obvious in Domesday-book, and lesse ancient therefore I perswade my self 'Socage' and 'Socmanry' are not.

Virg. 5. Aeneid.

Nunc age, carpe viam, susceptum perforce munus.

Now therefore to come to our *Quære*, (whether Gavelkynd be a Tenure or a Custome) and give it an answer: I confesse there are that in some sort hold the negative, as who will have it to be a Custome accompanying the land where it obtaineth, rather than a Tenure whereby the land is holden, holding the whilest the Tenure to be Socage: And of this opinion (y) Mr. Lambard doth more than seem to be. Now between Tenure and Custome in this case with us, the difference, as I collect, stands thus: admit it onely a Tenure, and then the nature of the land is not concerned in point of descent; so that in some cases (as the escheat of it by Death or 'Cessavit', to the Lord that holds over by Knight-service, or to the Crown by forfeiture in treason and the like) it ceaseth to be any longer of Gavelkynd-nature, in point of descent, and goes not, as before to all, but onely to the eldest of the sons, according to the course of the Common Law:

(y) Perambul. pag. 535, 536, 537.

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Fleta is ex=
p<r>esse for this,
lib. 6 cap. 17.
pa<r>ag. <1>.
<w>he<r>e
h<e> s<a>ith,
Sicut
in tenura de
G<ave>k<y>nde,
ve<l> alibi, <u>bi
ter<r>a partibilis
est, &c.
See Reg<i>st.
or<i>g. fol. 78. b.

(z) Sp<e>lm.
G<l>oss. verb.
'H<o>magium'.

Objection.

Solution.

(a) Hereof see
Bracton, fol.
fol 313. a.

(b) Whereof
also i<n> him,
fol. 276. b.

whereas if it be a Custome following the nature of the land, then it is, say they, inseparable from that land where it obtaineth, insomuch as notwithstanding this escheat, or whatever other alteration of the tenure, it remains, as before, partible among all the sons, or other heirs where sons are wanting. But to the point. To prove Gavelkynd to be a tenure, I shall not need, I think, to multiply authorities, the generality of those ancient deeds that I have seen for the granting lands in Gavelkynd (whereof some are exhibited in the Appendix) are wont to have their 'Tenendums' (the usual and more proper place for the creation of a tenure in any kind of grant) thus phrased: *Tenendum* either *ad* or *in Gavelikendam*, or the like. The office recited of Mr. Lambard, in his Peramb. pag. 540. found after the death of Walter Culpepper is alike phrased: *Tenuit in Gavelkind* being a much repeated passage in it. The Statute 18. Hen. 6. cap. 3. in terms calleth it a tenure, taking knowledge, 'that there were not at that day within the Shire above 40. persons at the most, which had lands to the yearly value of xx. pounds without the tenure of Gavelkynd, and that the greater party of this County, or well nigh all, was then within that Tenure.' And this alone (which I shall add) may evince and clear it to be a tenure, that since the Statute of 'Quia emptores terrarum,' anno 18. Edw. 1. prohibiting the subject to let land to be holden of himself, as there are not to be found any more grants of land (z) *pro homagio & servitio*, so neither in Gavelkynd. For brevity sake, I will urge no more authorities of this kind. Being thus then apparently a tenure, how cometh it to passe that we so usually call it the 'Custome of Gavelkynd,' seldome

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either making or finding mention of 'Gavelkynd', but with that adjunct, and under that notion of 'Custome'? Indeed the property of equal partition is and hath so long been of that eminencie in our Kentish Gavelkynd, and it so much celebrated for that property, that as if it were the sole and onely property of it, all the other, in respect wherof this land may as well be called Gavelkynd as for this, are as it were forgotten, and that onely carries away the name from its fellows: where as that of Partition (as hath been said before) is but one among the many other properties and customes in our Kentish Gavelkynd, such as 'Dower of the Moyety;' (a) 'Losse of Dower by marriage before or after assignement;' (b) 'Not to forfeit lands for Felony;' 'Power of alienation at fifteen years of age,' and the rest obvious in the Kentish Custumal. And because this, of Partition, amongst the rest, properly depends of Custome, as thwarting the course of the Common Law in like case, hence the *Quære* grew at first, whether Gavelkynd were a Custome or a Tenure. Indeed a very improper and incongruous *Quære*, and occasioned by the want of that distinction of the 'Genus' from the 'Species', which through inadvertencie are here confounded, 'Gavelkynd' being the 'Genus', & 'Partition' the 'Species'. So that if we shall but *reddere singula singulis*, this doubt will quickly have an end: 'Gavelkynd' generally spoken of and in grosse, is the Tenure; particularly, and with reference to this Partition, it is a Custome accompanying the land of that Tenure. Or, if you rather will,

Gavelkynd-partition, whether inherent in the land, or not.

'Gavelkynd' is the Tenure; 'Partition', and the other properties, the Nature.

Which Solution gives occasion of another *Quære*,

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and that indeed a main one: 'Whether' (namely) 'this Custome of Partition in Gavelkynd-land, be so inherent in the land, and so inseparable from it, that notwithstanding the Tenure of the land be altered, yet the land shall still retain this property?' No more (I take it) than the rest of the fellow-properties as much depending upon Custome as that, and for which the land may deserve the name of Gavelkynd, as well as for that, and therefore some perhaps will say it shall retain them all indifferently. I shall not here engage as an opponent, onely invited by this fair occasion, crave leave to propound Academically, what in like case I find delivered by others, conducing (in my judgement) to facilitate the resolution, leaving it to such as have more will to debate, and better skill to decide, the question than my self, to give a fuller and more peremptory resolution in the point. I may (I take it) not improperly state the question thus: Whether the person in this case shall follow the condition of the land, or on the contrary, the land that of the person. The former (it seems) takes place in Paris, the French Metropolis, by the custome of the place: whence that of Choppinus, treating of those Customes, pag. 316. *Parisiensi autem municipio (saith he) quod gentilitia pariter fulget Nobilitate clarorum virorum, usus familiæ herciscundæ minus est obnoxius invidiæ. Ubi scilicet, non personarum, sed fundorum conditio nobilis, plebeivæ, partes assignat.* To which he adds a little after: *Haud ideo tamen dividendarum hæreditatum ratio immutata est Parisiis: cum nobiles fundos, plebeii nobiliter, & ignobiles æquojure generosi invicem partiantur.* To the same purpose (c) our Authour elsewhere tells us, that *prisco quodam Gallici*

(c) De morib. Parisior. p. 57.

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fori usu, plebeius fundus haud ideo pristinam exuebat conditionem; quod a recto ipsius Domino ære comparatus esset: Ni ejus nomine comparator in clientelam se, una cum superiore fundo suo, ad patronum contulisset; which his margin elsewhere (d) records thus: 'Anciennement les rotures acquises par le seigneur direct, se partageoient roturierement, si non que le dit acquereur les comprint en l'adveu de son fief, le rendant au superieur.' Thus went (it seems) the more ancient Custome in those parts. But *tempora mutantur.* The case of latter times is altered there, as the same Authour gives us to understand in both the last fore cited places: *At posterioris ævi Jurisprudencia, mutatis calculis, novam invexit servientis fundi unionem tacitam, & consolidationem cum altero dominante, ac parem adeo utriusque qualitatem prænobilem: Nisi illius emptor subinde contestationem interposuisset contrariæ voluntatis.* Thus in the former place. In the latter thus: *Nostræ tamen ætatis moribus, diversum obtinuit, censuales nempe & obnoxios agros sola per rectum Dominum acquisitione, prorsus uniri, in unumque redigi cum prædio dominante: nisi protinus emptor contrariæ voluntatis testationem interposuisset.* The effect of both is this, that Censual lands by purchase coming unto the direct Lord (the Lord of the Fee, or Over

(d) De Do-man. Franc. p. 40.

Lord) are, *ipso jure*, Feudal, and shall accordingly descend, as thereby re-united to the Fee, unlesse the buyer, at the time of purchase, do protest to the contrary. Will you please to hear his reasons? *Unionis nempe vis illa eo producitur, ut ignobile prædium, militari junctum, nobilitetur: eque plebeio ac soli vectigalibus obnoxio, trans=eat in feudalis clientelæ sortem liberiozem.* Thus he, 'De moribus Parisior.' pag. 58. Much what one with that in

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the other place (De Domanio Franciæ, pag. 41.) *Quoniam tacita prædiorum unione, confusa erant jura servitutum, census & solarii vectigalis: Cum rei propriæ nulla superforet servitus, exindeque vectigalis fundi qualitas esset immutata.* Thus he, whom see also, if you please, De Domanio Gallico, pag. 168. num. 2. Also pag. 284. num. 1. To whom add Hotoman, De Feudis, lib. 1. tit. 5. parag. 2. in fine. You see by this how the present case stands in some parts abroad. Here at home, as it seems by the very Custumal of Kent, in two several cases therein specified, the descent of Gavelkynd-land is changeable, and the land becomes unpartible; first (namely) when by escheat, happening either by Death, or 'Cessavit'; next, when, by the tenants voluntary surrender, it comes into his Lords hands, who holds by Fee of 'Haubert', or by 'Grand Sergeanty', both which (e) Mr. Lambard takes to be Knight-service. To which may be added two other cases, which occur in an ancient Kentish Eire, in the Exchequer, ann. 29. Edw. 1. where enquiry being made, and the question propounded to the Kentish men, how many ways Gavelkynd-land might be altered, and delivered from the ordinary and customary descent, answer was given by four, instancing in the two former, and to them adding those other two, namely, 1. *Per licentiam Regis*, (by the Kings licence) and, 2. *Per chartam Archiepiscopi*, (by the Archishops (f) Charter.) Against this, and on the other side, (*inter alia*) may be opposed what is pleaded in the fore-remembered controversy between Burga de Bendings, and the Prior and Convent of Christchurch Canterbury, wherein the Prior, in barr of Burga's claim to the moyety of his and the

(e) Peramb. pag. 537.

(f) Of this some examples before, Propos. 2. towards the end.

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(g) See the Append. Scriptur. 5.

Monks manour in 'Franc bank', (g) pleads, *Quod Dominus Rex qui manerium illud dedit prædecessoribus suis, non tenuit illud nomine Gavelkinde.* Whence (admitting the plea for Law) naturally seemeth to result this double consecutory. 1. That the King may hold land in Gavelkynd. 2. That the King holding land in Gavelkynd, in case he shall grant it away to any religious house, *in puram & perpetuam eleemosynam*, (in Frankalmoigne) it remaineth notwithstanding partible, as before it came to the Crown, in their hands at least whom the religious men shall infeoffe with it. Much more doubtlesse might be said in the point, as well 'pro' as 'contra': but I shall leave it to be further argued by Lawyers, adding onely in a word, what upon the whole matter I conceive of the case. I would ask then, if our Kentish Gavelkynd-land be partible *quatenus* Gavelkynd? I expect no other than an affirmative answer. If so, and admitting withall that such property in Gavelkynd-land owes it self to a custome accompanying

(h) L. adigere. parag quam= vis. De jur. patron. c. cum cessante. extra. de appellat. l. tutores. parag. Curatores. de admin. tut.

land of that nature; yet I suppose it shall enjoy that property no longer than the land it self continues to be Gavelkynd, which some hold it is not, being once returned and come back again into the Lord hands, (the King especially being Lord) that granted it out in Gavelkynd, or of whom it was formerly held in Gavelkynd: because then, as (h) *cessante causa tollitur effectus*, so by reason of the unity of possession, the *Usus fructus* (I can= not well English it) being consolidated and made one with the property, that property of being censual land, which Gavelkynd denotes, and which cannot be inten= ded of any land holden in Demesne, and not in ser= vice, ceaseth, and is quite extinguished, there being

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(i) Bald. & a= lii citat. per Tholosan. Syn= tag. jur. univer. lib. 6 cap. 5. num. 11.

required to make the land 'censual', a censual Tenant, one that holdeth by censual services, such as here is none (especially in the Kings case) when once the land is come home again, reduced to its first principles, and re-united to (what, like 'Fief', is opposed to service-land) the Lords 'In-land', or Demesne-land, (as in the case of a common Lord) or to the Crown, (i) *a quo omnia feu= da moventur & oriuntur*, the Fountain whence all Te= nures are derived, (as in the Kings case) from whence by the letting it out in Gavelkynd, it was formerly se= vered. To this purpose see Petri Gregorii Tholosani Syntag. Jur. univers. lib. 6. cap. 5. num. 11. But of this also hitherto, for I hasten to an end.

PROPOSITION V.

Whether before the Statute of Wills (32. and 34. H. 8.) Gavelkynd-land in Kent were deviseable, or not.

In answer whereof, holding with those which resolve it in the negative, howbeit (for my part) not *studio partium*, but *veritatis amore*, I shall oppose to such as hold the contrary, what argu= ments are brought against them and their opinion, in a case of Mr. Halls of Kent, *verbatim*, as I find them published in print, which here follow, with their title:

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Reasons and authorities to prove that Gavelkind-lands in Kent, are not, nor were anciently de= viseable by Custome.

First it is a rule in Law, that an Assise of Mortdan= cester doth not lie of lands which are deviseable by Testament, &c. and this appears by divers books, as namely, 4. Edw. 2. Mortdanc. 39. 22. Assiz. 78. and Fitz. Nat. Brevium 196. 1. But it appears by Bracton, fol. 276. b. that an Assize of Mortdancerster will lie of Gavelkind lands in Kent, and so it appears by divers ancient Records, *quod vide in Itinere Johannis de Berewicke, &c. Anno 21. Edw. 1. Copia. fol. 1, 7, 22, 24. & in Itinere H. de Stanton. Anno 6. Edw. 2. Copia. fol. 1, 8, 9, 10, 13.* By which it ap= pears plainly, that an Assize of Mortdancerster lies of Gavelkind lands in Kent.

But an Assize of Mortdancerster doth not lie of lands within the city of Canterbury, because lands are there deviseable by Custome, as it appears *in dicto Itinere H. de Stanton, fol. 3, 4, 6.* And it is evident, that in

the city of Canterbury, (which was anciently part of the county of Kent) there was a special custome used to devise lands, lying within the liberties of the city, and to prove their wils in the Court of Burghmote in the same city. But there needed no such Custome, if all the Gavelkind lands in Kent had been devise= able, &c.

Also the most part of the ancient Wills of Gavel= kind lands in Kent, before the Statute of Uses did mention Feoffees of the lands devised, &c. as appears

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by the Register-books of Wills, at Canterbury, and at Rochester, whereby it doth appear, that the Devi= sors were 'Cestuy que uses,' and not owners of the land devised, and although some wills of land make no mention of Feoffees, yet there were Feoffees of the same land, as will appear by the deeds of Feoffment thereof, and twenty to one do mention Feoffees, &c.

Also Sir John Fineux chief Justice de R. B. Sir Robert Read chief Justice de C. B. and Sir John But= ler, Justice, &c. devise their lands in Kent before the Statute of Uses, and make mention of Feoffees, &c. which had there been a Custome to devise, no que= sition they had taken of it, &c.

Also many ancient deeds of Feoffment of lands in Kent referr to Wills, sc. *Dedi, concessi, &c. A. B. omnia terras & tenementa, &c. ad opus & usum perim= plendi ultimam voluntatem meam, &c.*

Also there are wills to be found of lands in diverse other Counties of this Realm, whereby lands were devised before the Statute of Uses, and no mention made of any Feoffees, as appears in the Register-books of the Prerogative Court, and in diverse other pla= ces, and yet without doubt they had Feoffees seised to their uses, &c. or else they could not there devise the same.

Also the houses and lands in Cities and Burroughs, which were deviseable by Custome, were reckoned *inter catalla sua*; but it were strange that all the So= cage Lands in Kent (which are conceived to be Ga= velkind) should be reckoned *inter catalla, &c.*

And in the Register, fol. 244. there are fourteen several Writs of 'Ex gravi querela,' and none of them

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make mention of any County, &c. nor of Gavelkind, but *secundum consuetudinem Civitatis, or secundum consuetudinem Burgi, &c.* And if Gavelkind Lands be deviseable by Custome, &c. the Devisee can have no Writ of 'Ex gravi querela,' because there is none be= fore whom the Action or writ should be brought, &c.

Also Mr. Lambard in his 'Perambulation', writing of the Customes of Kent, maketh no mention of any Custome to devise lands: nor the Treatise called 'Consuetudines Cantiaë' in the old 'Mag. Charta', fo. 147. which (without doubt) they would not have omit= ted, if there had been any such Custome, &c.

Also between the Statutes of 27. H. 8. of Uses, and the Statutes of 32. of H. 8. of Wills, there were very few Wills made of lands, as appeareth by the Regi= ster-books before mentioned, and the most of such Wills as were then made (being but few in number)

do make mention of Feoffees.

Also the common practice ever since the Statutes of Wills hath been such, that if a Will be made void for a third part, by a Tenure in Capite of part of the land &c. that third part shall descend to the Heir, and the Devisee shall not have it; and this appears by special Liveries in the Court of Wards proving the same; and by diverse witnesses that can prove the same to be so, &c.

And in Sanders case of Maidstone, in *Anno 9. Jacobi Regis*, all the lands were devised by Will, and after the Will was avoided for a third part, by reason of a Tenure in capite of a small part of the land, and the third part of all the residue of the lands, being Gavelkind, did escheat to the King for want of Heir,

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which land is ever since enjoyed under the Kings title by escheat. And John Wall upon a trial recovered against White the Devisee.

Whereby it is evident that Gavelkind Lands in Kent were never deviseable by Custome, and so it was agreed *per Curiam Pasch. 37. El.* in C. B. in Halton and Starthops case, upon evidence to a Jury of Kent, & it was then said, that it had been so resolved before, and there it was said *per curiam* that Fitz. Nat. Brev. 198. l. is to be understood where there is a special custome, that the Land is deviseable, &c.

And he that shall conclude upon that place of Fitz. Nat. Brev. 198. l. that all Gavelkind Land is deviseable, &c. may as well conclude, that all Lands in every City and Burrough in England is deviseable, which is not so, as appeareth by Mr. Littleton, who saith that in some Burroughs by custome a man may devise his Lands, &c.

And if Gavelkind Lands were deviseable by custome, &c. Then a man may devise them by word without writing, as it is agreed in 34. H. 8. Dyer. 53 for a man may devise his Goods and Chattels by a Will Nuncupative, so may he likewise devise his Lands deviseable by custome, because they were esteemed but *tanquam catalla*, &c. and it would be a mischievous thing, if all the Gavelkind in Kent should be deviseable by word onely.

To these arguments and objections against the custome, certain answers and exceptions by the learned Counsel of the adverse party have been framed and returned in behalf thereof, reducible to three heads: which (to avoid all just suspicion of partiality and

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prejudice wherewith some zealous advocates and contenders for the custome have been, and may again be, ready to asperse me) I shall here subjoyn; together with such answers and arguments (by way of reply) as I have received from the learned Counsel of the other side, in further and fuller refutation of theirs who endeavour to uphold the custome.

The learned Counsels arguments in behalf of the Custome.

First, they deny the old book of 4. Edw. 2. Fitzh.

Mortdancester 39. to be Law. But an Assise of Mortdancester lies of land deviseable, if it be true that his Ancestour died seised, unlesse it appears that the Defendaut claims by some other title. But if the Defendaut plead that the land is by custome deviseable, and was devised unto him, it is a good barr of the action.

Secondly, They rely much upon the book of Fitzherb. *Natura Brevium*, fol. 198. which sayes, that a Writ of 'Ex gravi querela' lies where a man is seised of lands or tenements in any City or Burrough, or in Gavelkynd, which lands are deviseable by will time out of mind, &c. whence they infer that all Gavelkynd-lands are deviseable by custome.

Thirdly, They cite the Treatise called 'Consuetudines Cantiae,' in the book called old 'Magna Charta', and Lambards *Perambulation of Kent*, fol. 198. that lands in Gavelkynd may be 'given or sold' without the Lords licence, and they interpret the word 'given', to be by will; and the word 'grant', to be by deed.

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The Reply to the fore-going Arguments, by such as stand in opposition to the Custome.

As to the first Objection against the Argument taken from the Assise of Mortdancester, they reply thus:

First, they maintain, that the Custome alone, without an actual Devise is pleadable in abatement to an Assise of Mortdancester, as well as the Custome with an actual Devise is pleadable in barr: for which there is not only that book of 4. Edw. 2. but also Bracton, lib. 1. fol. 272. *Ubi non jacet Assisa mortis antecessoris*, among his pleas in abatement of the Writ, (having before treated of pleas in barr to it.) *Cadit Assisa* (sayes he) *propter consuetudinem loci, ut in Civitibus, Burgis*, &c. and 22. Assis. pl. 78. where upon the like plea the Writ was abated: and Fitzherb. *Nat. Brev.* fol. 196. l. (whose authority they think strange to be denied in a matter of Law, wherein he was a Judge, and yet so strongly relied on in a matter of fact and custome, in a place whereto he was a stranger:) and so was it practised and allowed in *Itin. Johan. de Stanton*, 6. Edw. 2.

And the reason given by the book, why such a custome is pleadable in abatement to this Writ, is because the suggestion of the Writ may be true, that the Ancestour died seised, &c. and yet the heir have no title where the lands are deviseable. And it is the property of this Writ, that the dying seised must be traversed; and though the Tenant plead the Feoffment of the Ancestour, or other matter in barr, (that

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is not matter of Estoppel to the heir, as a Fine, Recovery, &c) yet must he traverse the dying seised, and the Jury shall be summoned and charged to inquire, if the Ancestour *die quo obiit seisitus fuit*, &c. and so are the books of 9. Assis. pl. 22. 27. Hen. 8. 12. Brooke *Mortdancester*. 1. Old *Nat. Brev.* fol. 117. and diverse others. Nor is there any opinion to be found in any book of Law against that book of Fitzherb. *Mort-*

dancestor, 39. until the 15th of King Charles, Lauder and Brookes case, Crooke, lib. 1. fol. 405. obiter, upon the trial of this custome.

2. Admit that at this day the Law is held to be otherwise, yet it appears by all the authorities aforesaid, that in those times the Law was taken to be, that the Mortdancestor did not lie where there was such a custome: but it was a good plea in abatement of the writ. And yet Assises of Mortdancestor were then frequently brought and maintained of lands in Kent, as appears by Bracton, and the books abovesaid.

3. Whether the custome alone be pleadable in abatement; or the custome with an actual devise be to be pleaded in barr, they say it cannot be shewn (if it can they challenge them to do it, who would maintain the custome) that it was ever pleaded one way or other, either in abatement, or in barr, to any one of all that multitude of Assises of Mortdancestor brought at large in that County, when in so small a City and County as Canterbury (where indeed there is such a custom) they shew it often pleaded to writs of Mortdancestor brought there before Roger de Stanton and other Justices in Eyre.

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Secondly, To the book of Fitzherb. Nat. Brev. fol. 198. upon the writ of 'Ex gravi querela' (from whence the ground of this question sprung) they answer, that the sence and meaning of that book (no lesse than the Grammar of it duly observed) is no more, then that the writ of 'Ex gravi querela' lies there where lands in any City or Town, or in Gavelkynd, are deviseable by custome. Not that all lands in Cities, and Burroughs, and in Gavelkynd, are deviseable by custome. So that the mistake ariseth by making that a categorical, which is but an hypothetical proposition: and serves rather to ground an argument against the custome. For if the writ of 'Ex gravi querela' does lie there, where there is such a custome; then (*a contrariis*) it may well be argued, that where a writ does not lie, there is no such custome: and it cannot be said to lie there (for Fitzherbert speaks of places:) where it was never brought.

They say further, that this writ of 'Ex gravi querela' is a formed writ in the Register, appointed by Law as the proper remedy of the Devisee, where such a custome is: and that therefore it hath been required by the Judges, as a necessary proof of such a custom, that it be shewen that this writ hath been used to be brought there, where such a custome is alleaged to be, 40. Assis. pl. 41. and the opinion of Knivet, 39. Assis. Brooke, Devise 43. In like manner, as to prove a custome of intailing Copy-hold-lands, it must be shewn that plaints in the nature of Formedons have used to be entred. (Heydons case in the third Report.) But they say that for proof of this custome in Kent, there is not onely (of 14. in the Register, which all con=

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clude, *secundum consuetudinem Burgi, or Civitatis*) not one precedent of any such writ for Kent: but that

it cannot be shewen that ever any writ of 'Ex gravi querela' was brought for any lands in the county at large, out of some City or Town. And it is a question to whom such writ at large shall be directed, there being no form at all in the Register of the direction of any such writ at large; the form there to a City or Burrough being either *Majori Civitatis*, or *Burgi*, &c.

They say it could not be, but that question must have arisen, (if not of the custome) whether a will or no will: for the trial of which there was scarce any other course (at least, none more ready) before the course of Ejectments grew to be the practice, then either for the Devisee to bring this writ of 'Ex gravi querela' against the heir being in possession, or for the heir being ousted by colour of a will to bring his Mortdancestor. And therefore they think it not credible that (if such a custome were, and so extensive as to the whole county of Kent) there should be no Record, (if there be, they again challenge the other side to shew it:) whether any Devisee either brought this writ, or pleaded this custome, (and pleaded it must be, as themselves acknowledge, and is resolved in *Launder and Brookes* case:) for any lands within the county of Kent out of some City or Burrough: when as they are confident to say, that there is not any custome used in Kent, and that extends through the whole county, but Records may be shewen where it hath at some time been judicially pleaded and allowed.

They add, that Customes, being special Laws, are

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suted to the place where they are used; and that this is a custome very proper and sutable in Cities and Burroughs, among Merchants and Tradesmen, that they might dispose of their houses together with their personal estates: and that the pleading of this custome in all Writs and Records is, that they are *legabilia, tanquam bona & catalla*. And therefore by the books of 40. Assis. pl. 41. and Cokes 1. Instit. 110. it is held that this custome cannot be alleaged in any upland Town. Then how improper is it that all the estates in so great a county should be of no other nature (in this respect) than goods and chattels, and liable to be disposed and carried away by words catcht from dying men? which (they say) may serve too for an argument against the pretended benefit and utility of this custome; especially when the multitude of controversies, arising upon wills, have made it a question, whether it had not been better the Statutes, of 32. and 34. Hen. 8. of wills, had never been made.

And therefore (they say) that in *Wyld's* case, in the 6th Report, which was resolved by all the Judges of England, it is said expressly (and no doubt upon good consideration) that at the Common Law, lands were not deviseable but by custome onely in Cities and Burroughs, 'Houses and such small things.' And in *Mathew Menes* case, in the 9th Report, where the will was of Gavelkind-lands in Kent, and a house holden *in Capite*, it is all along held, that the will there was enabled by the Statute, and puts a case of lands in London deviseable by custome, as a stronger case; which certainly it were not, if lands in Kent were so

deviseable.

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The third objection from the words ('doner ou vender') they say, deserves no answer more than this, that the same words are used, that the Infant may 'doner' or 'vender', give or sell, his estate at the age of fifteen, and that no man will say, that he may at that age make a will.

Thus have you the learned Counsels arguments (faithfully exhibited) both for and against the custom of devising Gavelkynd-land in Kent, before the Statutes of 32. and 34. Hen. 8. concerning the devising of lands by will. Treading (as I said) in the steps of those who oppose the custome, give me leave, by the way of Corollary, to add somewhat, haply not improper to be hinted and insisted on in this argument. Besides then the repugnancie in this custome, to the common opinion both of ancient and modern (a) Lawyers, it fights with the very nature of Fee, (comprehending, at least with us, Gavelkind, as holden by the Tenant *in Dominico suo ut de Feodo*) which, though Fees are with us, as in France & elsewhere, become (b) patrimonial, & so alienable by gift or sale followed with Seisin in the Alienators lifetime; yet by the Feudal (c) Law, are indisposeable by will, several reasons whereof are found rendred by the (d) Feudists. And it is inconsistent, & at variance with the common opinion of Lawyers, both at home and abroad, so withall, and above all, it makes Gavelkynd degenerate from it self, and its first original, which our (e) Lawyers and Antiquaries, by an

(a) Glanvill, lib. 7 cap. 1. & 5 Bracton, fol. 18. b. fol. 49. a. fol. 272. a. fol. 407. b. fol. 409. b. Brinton with others cited by Dr. Cowell Instit. lib. 2. tit. 20 num. 7. Coke upon Littleton, fol. 111. b. Linwoods + Provincial. de Testam. c. Statutum, parag. testamentis, vers. legari possunt.

(b) Bract. lib 2. cap. 19 lib. 4. tract. 3. cap. 9. num. 5. Cujac. de Feud. lib. 1. tit. 2. & lib. 4. tit. 19. (c) Lib. 1. tit. 8. de success. feud. & Vulteius lib 1. cap. 9. num. 70. (d) Hotoman. upon that place of the Feuds. (e) Lamb. Peramb. pag. 528. & Spelm. Glossar. verb. 'Gavelletum'.

+ p. 162. l. 24. And as it is.

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unanimous vote, referring to the Germans, vouch for it that, amongst other of their Customes published by Tacitus: *Hæredes successoresque sui cuique liberi, & nullum testamentum*: a passage, or authority, equally insisted on by the Feudists to warrant their (f) *Nulla ordinatione defuncti in feudo manente vel valente*, prohibiting the disposal of Fee by will, and of our municipal Lawyers and others, as for the like, so withall to illustrate the original of our (g) Gavelkind.

But that which in this case (as to matter of fact) very much, if not most of all, works with me, (what it may with others I know not) and induceth me to an utter dis-belief and rejection of this Custome, is certain passages & clauses in several wills extant & to be found in our Registers at Canterbury, and in that at Rochester, intervening and happening in the interim of those two Statutes; the one of Uses, made anno 27. the other, of Wills, inacted anno 32. Hen. 8. (a time most proper for the Custome, if any such in being, by its fruits, the immediate free devise of lands by will, at pleasure, without that mediate, collateral and by-way, that *periphrasis*, of Feoffments and their Uses, which now was out of doors; to assert and shew it self:) all which (in my opinion) do plainly tend to the dis-proof of this custome of devising lands in Kent by will, be=

(f) Feud. lib. 1. tit 8. de success. feud & Hotoman. *ibi*.

(g) Lamb. & Spelm. *ubi supra*.

fore that Statute of wills. As for example.

1. In the will of Thomas Bourne of Tenterden, dated 3. May 1538. in the Archdeacons Registry at Canterbury, lib. 21. quatern. 7. 'And where' (saith he) 'there is an Act lately made to avoid uses of wills, yet my mind is that Clement my son shall have my house and shop in Tenterden with th'appurtenances to him in fee. And

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that John Bourne my son shall have all my lands lying in the parish of Hawkherst to him and his heirs in fee. And I give to my said son John xl. s. upon condition that he will abide and stand to the dividing and order of my lands, as my mind is before expressed. And if he will not stand to, and abide the said order and division, but to shift his part throwly, then I will the said xl. s. shall remain and be had to Alice my wife. Also I give to Clement my son iii. l. upon condition that he do stand to and abide the division and order of my lands and tenements, according as my mind is before expressed. And if the said Clement do refuse my said order and division of my lands, and shift his part throwly, then I will the said iii. l. shall remain and be had to Alice my wife,' &c.

Argument.

Had there been a Custome for devising lands by will, what needed that notice to be taken here of the Act for avoiding uses of wills? And why is the Testator put to it thus, to work and wage his sons to consent to that partition and division of his lands, by a Legacie in money to be forfeited upon their refusal, and for choosing to shift or divide throughly, as a thing in their power by Law, which could not be, had there been any such Custome.

2. In Thomas Sayer, alias Lamberds will of Feversham, dated in May 1538. in the same Registry and Book, quatern. 9. some lands are devised away from the two female Inhertrices, to be sold: and a partition also made between them of other lands. Where=

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upon a Legacie in money is given to the heirs at Law, to wage them to consent and condescend to that devise and division, in these words:

'Item I will and bequeath to Isabel and Margaret my two daughters, to each of them 6. l. 13. s. 4. d. to be paid to them by Benet my wife in money, or money-worth, in four years next after my decease, upon condition that my said two daughters, their Heirs and their Assigns, to suffer this my present will and testament to take effect, according as I before have willed. And if my said two daughters, their Heirs and their Assigns do this refuse, that my said will can take none effect, according as I before have willed, then I will my said two daughters, nor their Assigns, shall take no benefit nor profit of none of my bequeaths to them before bequeathed,' &c.

Argument.

The same *Quære* here as before, viz. What needed this conditional Legacie in money, had it not been free to them and in their power and choice, whether his will (for the sale of some land, and for the divi=

sion of other) should take effect, or not?

3. In John Crowmers will of Fogylston Esquire, dated in February 1538. in the same Registry, book, and quatern. this clause to our purpose is remarkable.

'Item I will that each of my three daughters, Benet, Elizabeth and Grace, have 13. l. 6. s. 8. d. of such debt as their husbands do ow me: so that their husbands be content that such lands as I have purchased go according to my devise and will, or else not,' &c.

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Argument.

The like *Quærie* here as before. Where also note, that although he mention a devise of lands by will; yet no such will is either proved or registred, because (probably) null and void in Law. The like whereof may be supposed of Sparcklins will of Thanet, dated in March 1539. in the same book and Registry, quatern. 14. where his mansion place at Bronston is said to be bequeathed to his son John: whereas no such thing appeareth by the approved will; nor is any land at all devised by it. The like may be said of Cacherells will of Norborne, dated anno 1537. in the same Registry and book, quatern. 8. where some Legacies in money are charged upon a house there said to be given to the party charged and his wife, whereas no such gift appeareth by the will.

4. In Sarlys will, dated anno 30. Hen. 8. in the same Registry and book, quatern. 11. where he maketh mention of his three daughters, we have this clause:

'Item, I will that he' (my brother) 'shall have my part of my house at Wy, called Jancocks, during his life, if that may be suffered by the Law,' &c.

5. In the will of William Byx of Linsted, dated 1538. in the same Registry, lib. 22. quatern. 1. occurs this passage:

'I will and bequeath all the profits, commodities, fermes, rents, of all my lands whatsoever, &c. unto my brother germane, Laurence Byx, unto the times that my sons, Laurence and Nicholas come to the age of 22. years, &c. Also to my daughters marriage 10 l. to be raised out of

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those profits, &c. and paid by my brother Laurence. Provided alway, if the Law will not suffer nor admit my brother Laurence to enjoy and take up the fermes, &c. of my lands, then I will that each of my said sons, &c. shall pay the said 10. l. unto my said daughters marriage,' &c.

6. Thomas Hunt of Pluckly in his will, dated in the year (no moneth) 1540. (probably some time before the Statute of Wills that year made) in the same Registry, book and quatern. gives to his wife the issues of his lands for life, and after her death the lands themselves to his son John, charged with some Legacies in money to his younger brother Anthony and his children: but with this Proviso:

'If this my will' (saith he) 'stand not good and effectually in the Law, then I will that my said messuage and premises after the death of my said wife shall remain to my said two sons I. and A. and to their heirs for ever,' &c.

7. The like clause to this occurs in the will of John

Hubberd of Westerham, dated the 23th of July 1537. in the Bishop of Rochesters Registry: viz.

'Also if it do please God to visit my wife and all my children with death, then I will that Richard Hubbard, the son of William Hubbard of Lynsfield shall have my house and all my land, if that the Law will suffer it: paying therefore to every one of my sisters, Agnes, Katherine and Margaret, three pounds six shillings and eight pence, to be paid within the space of two years next after my decease.'

8. Nor is this passage lesse pregnant and pertinent to our purpose, taken from the will of John Stace of Leigh, dated the 18th of March 1538. in the same Registry.

'And also I will that if the Kings last Act in Parlia=

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ment will not stand with my wife to enjoy the one half of my lands, I will then that mine Executour shall pay yearly to Agnes my wife xl. s. during the term of her life, and that to be paid quarterly at the four usual terms by equal portions,' &c.

Argument.

In these five last wills mentioned (Sarlys, Byx, Hunt, Hubberd and Staces) what means that doubt and question in the Testators, whether their devises (of houses and lands) were good, or would hold and stand firm in Law, had there been such a Custome, and had not the Law been clear otherwise in this case, as well in Kent as elsewhere?

I observe also, that in the interim of 27. and 32. H. 8. some few (and indeed but very few) wills there are in the Registers at Canterbury, wherein lands are devised: some with Feoffment, and some without, at least without mention made of any. As for the former, those with Feoffment, I find the most of them dated, though in or after the year 27. yet before the sixth of May 28. year of that King, until when the Act was not to come in force. Besides, happily the Feoffment was made before the Statute, and so could not be revoked (as I conceive) without the Feoffees consent. As for the rest (those without mention of Feoffees) some of them were of our City (Canterbury) or the like places, where by particular Custome they might devise. Others (happily) had Feoffments, although not mentioned. If not, they were no other (I conceive) than wills *de facto*, or *de bene esse*, made: nor did or could otherwise,

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or further operate, inure, or take effect than the interested or concerned parties should give way: with whom in those elder times (times of more and greater regard and reverence to the will of the dead than the present) the dying parent, or kinsmans mind declared in his will, bare so great a sway, and did so much prevail, as to perswade with them to renounce an advantage to themselves, for the fulfilling of the deceaseds solemne and declared mind. Besides, it follows not, that because such wills and devises are found, therefore they passed and were allowed of as good and effectually: the contrary whereof is more than probable by the ifs and conditions found in other wills of those

times, arguing plainly the Testators distrust and doubt of the validity, and consequently of the success and effect of his devise, whereof examples are laid down before.

Before I close and wind up all, I have onely this to add, by way of offer, from the party opponent to this Custome, and his Council, (which, as a matter much considerable, I may not pretermitt:) that, whereas that abundance of wills wherein lands are devised without mention of Feoffees, found and produced from the Registries both of Canterbury and Rochester, is much insisted on in behalf of the Custome: if from the Registries of any other Diocesse out of Kent, (where such devises never did, nor could obtain, until the Statute of Wills) of equal circuit and extent to either of these, the very same thing may not as truly be observed, and a proportionable number and quantity of such kind of wills, (wills of land devised without mention of Feof=

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ees) cannot be produced, and consequently the argument and inference thence drawn (for the Custome) eluded and avoided, they will sit down convinced, and with their adversaries subscribe unto that argument. An offer (this) in my judgement so fair, ingenuous and plausible, as not to be rejected of any, but such as out of a cavilling spirit, are resolved to turn the deaf ear upon all fair and equal proposals: that I say not, such as, for maintenance sake, make it their study, *quocunque modo*, to maintain their spurious interest. But that I may not seem to be (what indeed I am far from being, any otherwise than in truths behalf) a partisan in this businesse, I shall forbear all further censure, and if I may but have the Readers leave to make my Epilogue, I shall, with thanks to him for that, and the favour of all his other patience, quit the stage of my discourse on this whole argument, and make my Exit.

Peroratio.

Many other things offer themselves to his discourse, that would treat of Gavelkind to the full; but they are (I take it) mostly points of Common Law, which because they are not only out of my profession, but besides my intention too, which was to handle it chiefly in the historical part, and that no further than might conduce to the discovery of the *Primordiæ*, or beginnings of it, I will not wade or engage any further in the argument, lest I be justly censured of a mind to thrust my sickle into another mans harvest: onely (fo<r> a close) craving leave to supply the common Kentish Custumal, at the end of Mr. Lambards Perambulation, with one clause, which, according to an ancient copy registred in a quondam book of St. Augustines Abbey

A clause wanting in the printed Kentish Custumal supplied.

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at Canterbury, now remaining with my very noble and learned friend Sir Roger Twysden, is to come in at pag. 574 lin. 2. after these words: 'Que de lay est tenu sans men.' viz. (as that old copy goes on there:) 'E si home ou femme seit feloun de sei mesmes qe il sey mesmes de gre se ocye, le Roy aura les chartez tuts & nient l'anne le wast, mes le heir seit tautost enherite sans contredit, kar tout seit il feloun de sey mesmes, il neyt my atteint de felonye. Et clayment auxi,' &c. as it follows in that printed Custumal. Which clause, as I conceive, may

be thus Englished: 'And if a man or woman shall be a Felon of him or her self, who shall kill him or her self of his or her own accord, the King shall have all the Chatels, and uot the year and the waste, but the Heir shall immediately inherit without contradiction: for albeit he or she be a Felon of him or her self, he or she is not attained of Felony.'

Now craving pardon for what liberty I have taken to deliver my sence, and give my conjecture, on several occasions here emergent, I shall here cut the thred of this Discourse, wishing that as I have not spared freely to speak my mind, so that every man that pleaseth, should assume the like liberty, not suspecting me so opinionate of mine own vote, as to wish, much lesse to beg, least of all to importune any unwilling mans concurrence, though haply unprovided of a better of his own, disclaiming that magisterial boldnesse of him arrogated, that said once upon a like occasion:

— *si quid novisti rectius istis
Candidus imperti, si non, his utere mecum.*

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And (to wind up all) wish every man, in what he stands in doubt of, to be his own Oedipus.

Ovid. de pont.
lib. 3. El. 9.

*Da veniam scriptis: quorum non gloria nobis
Causa; sed utilitas, officiumque fuit.*

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An APPENDIX
OF

Such Muniments (viz. Charters, and other Escripts) as are quoted in the precedent Discourse, with reference to this place for transcription.

Vide pag. 50.

Charta pervetusta de terra ad Censum concessa.

Scriptura 1.

Arnulfus Prior, & tota Congregatio Ecclesie Christi, omnibus fidelibus & amicis suis salutem. Sciatis nos, consentiente Archiepiscopo (a) Anselmo, concessisse Calvello & heredibus suis extra civitatem circa castellum, novem partes terrae, inter terram arabilem & prata, ea conventionem ut ipse Calvellus & heredes sui singulis annis dent

(a) This (it seems) was before he granted them *liberam dispositionem rerum suarum*, whereof in Eadmer. Hist. Novor. pag. 108.

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3. Forisfacturæ.

Celerario lli. sol. pro omni re, præter tres forisfacturas, id est, murdrum, & furtum, si ipse Calvellus vel hæredes sui fecerint, & præter si verecundium ipse sive heredes sui fecerint monachis Ecclesie vel servientibus eorum. Horum vero denarior. una medietas dabitur in media Quadragesima, & altero in festo S. Michaelis. Calvello autem mortuo, pro redemptione quam heredes facere solent, heredes sui xx. sol. dabunt, & Censum quem pater prius dederat, ipse deinceps similiter dabunt. Testes horum sunt Folbertus de Cill, Will. Folet, Rogerius

Redemptio.

filius Herengodi, Robertus de Mala villa.

[Note that this Charter hath a seal appendant on a la= bell proceeding from the side-margent, round, and about the bignesse of a five shillings peece of silver, the wax yellow, stamped; but on the one side with the form of a Church, much like that in the old seal of St. Augustines, in Sir Henry Spelmans Councells, pag. 122. The inscription in the ring of it this:

+ SIGILLVM ECCLESIAE CRISTI.]

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+ *Charta Prioris consilimis.*

Scriptura 2.
Vide pag. 50.

Wibertus Prior & Conuentus Ecclesiae Christi Cantuar. omnibus fidelibus suis, tam praesentibus quam futuris Salutem. Sciatis nos concessisse Goldwardo filio Feringi terram quae fuit Walteri de Sartrino seruitis nostri, Mariae uxoris suae, & item terram quae fuit Mariae filiae Richardi aurifabri, simul cum propria terra sua in qua Feringus pater suus manebat, pro iiii. s. & iiii d. & ob. quos nobis inde annuatim reddet ad duos terminos, ii. scil. solid. & iiii. denar. & ob. ad med. Quadrages. & ii. s. ad festum S. Michaelis. Tenebit itaque praedictus Goldwardus de nobis has terras bene & in pace & honorifice iure hereditario per suprascriptum censum, & licebit ei de ipsis tanquam de propriis libere facere quod voluerit, salvo iure & redditu nostro. Ita tamen quod si eas alicui dare voluerit vel vendere, nobis prius hoc indicabit, & nos ad emendum eas (b) proximiores esse debemus. Terra illa jacet iuxta mu-

(b) Simile habes in LL. Bu ger. apud Scatob. c. 100.

+ p. 175. l. 1. priori. ibid. in marg. Burgor. apud Scotos.

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rum Eleemosynariae nostrae. Testibus Bartholomaeo Dapifero, Willmo Camerario, Geldewino & Johanne, Cocis; & multis aliis.

Alia Charta de terra ad Gablum concessa.

Scriptura 3.
Vide pag. 50.

Robertus Monachus Ecclesiae S. Augustini, Custos & Procurator Hospitalis beati Laurentii, Omnibus Christi fidelibus Salutem. Sciatis me concessisse Hamoni textori & heredibus suis duas acras terrae contra Sanctum Sepulchrum, pro duob. solidis de Gablo, singulis annis, iure hereditario tenendas. Medietatem autem dabit in media Quadragesimae, & medietatem alteram in ad Vincula S. Petri, & tres gallinas in vigilia Natalis Domini. Valeat. Testibus Alurico presbytero, Lidulfo, Willmo textore, & fratribus illius loci.

Charta de terra ad Gavelikendam concessa.

Scriptura 4.
Vide pag. 38. & 55.

Sciant praesentes et futuri quod ego R.

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Gavelikend.

Dei gratia S. Augustini Cantuar. et ejusdem loci Conventus dedimus Jordano de Serres et heredibus suis ad Gavelikendam, xl. acras de marisco nostro pertinente ad manerium nostrum de Cistelet, cum pertinentiis suis, Tenend. de nobis jure hereditario in perpetuum. Reddendo inde nobis annuatim vii. solid. et vi. denarios sterlingorum ad Curiam de Cistelet, in duobus terminis anni, in Nativitate Domini iii. s. et ix. d. et in Nativitate Johan. Baptistæ iii. s. et ix. d. Et pro hac concessione dedit nobis prædictus Jordanus C. s. sterling. de Gersume. Ut igitur ista donatio stabilis et firma permaneat sigilli nostri munimine eam roboravimus. Hiis testibus Henrico de Cobbeham, Galfrido de Stokes, Stephano de Marisco, Philippo de Fierport, Godefrido del Hac, Bricio del Hac, Waltero filio Roberti, Gisleberto fratre Abbatis, Willmo Pincerna, Wido Janitore, W. Coco, Alex. Hostiario, et multis aliis.

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Apographum processus litis inter Burgam de Bending, & Priorem & Conventum Ecclesie Cantuar.

Scriptura 5.
Vide pag. 51.

De toto manerio de Welles coram W. de Ebor, R. de Turkeby, G. de Preston, & sociis suis itinerantibus apud Cantuar' 3. Id. Junii, Anno Domini 1241. R. H. filii R. Johannis 25.

Francus Bancus.

Burga quæ fuit uxor Petri de Bendings petit versus Priorem S. Trinitatis Cantuar. medietatem manerii de Welles sicut Francus Bancum suum, ad faciendum firmam xviii. dierum, et unde prædictus Petrus quondam vir suus eam dotavit, &c. Et Prior, scil. Rogerus de Lee venit et dicit, quod habet manerium illud ex dono prædecessorum Domini Regis, qui illud manerium aliquando tenuerunt. Et quod illud manerium dederunt Deo et ecclesie S. Trinitatis adeo libere sicut manerium illud tenuerunt in puram ac perpetuam eleemosynam: ita quod illud manerium nunquam

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Gavelkinde.

postea partitum fuit, nec est partibile. Et dicit quod Dominus Rex qui manerium illud dedit prædecessoribus suis, non tenuit illud nomine Gavelkinde. Et e contra Burga dicit, quod prædictum manerium est Gavelkinde, et partibile, ita quod quidam Robertus de Valoignes, Dominus de Sutton, qui duxerat in uxorem Matildam de Welles, cujus hereditas illud manerium fuit post mortem illius Matildis, habuit nomine Franci Banci, medietatem illius manerii, et Petrus vir illius Burgæ habuit medietatem

illam ex dono Hervei Bellet consanguinei ipsius Burgæ, postquam idem Petrus desponsavit ipsam Burgam, qui quidem Herveus redemit medietatem illam per denarios suos de prædicto Roberto, ad opus ipsius Petri ac Burgæ. Et quod ita sit offert Domino Regi xx s. per sic quod inquiretur per patriam. Et Prior dicit quod prædictum manerium non est Gaulikend, neque partibile, nec prædictus Robertus unquam habuit ibidem medietatem prædicti manerii ut de Franco Banco suo. Et quod ita sit ponit se super patriam. Et ideo fuit inde, &c. Ju=

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Juratores. ratores viz. R. de Setvann, I. de Esling, S. de Creie, G. de Dene, W. de Okrindenn, A. Perot, E. de Bocton, S. de Haute, B. de Balesmere, R. de Chilham, et Alanus de Leghes, Veredictum. dicunt super sacramentum suum, quod prædictum manerium fuit quondam manerium Domini Regis. Et quod datum fuit Deo et Ecclesiæ S. Trinitatis in liberam, puram et perpetuam eleemosynam. Ita quod manerium illud nunquam fuit Gaulikende, nec partitum, nec est partibile, nec prædictus Robertus nunquam habuit medietatem prædicti manerii nomine Franci Banci. Set dicunt quod post mortem prædictæ Matildis, tenuit prædictus Robertus totum manerium illud simul cum custodia prædicti Petri. Ita quod prædictus Herveus dedit quandam summam pecuniæ prædicto Roberto pro custodia illa. Et ideo consideratum est, &c. quod Prior teneat, & c. & sine die, & prædicta Burga in misericordia.

Scriptura 6. Vide pag. 38. & 55. *Carta de terra ad Gavelikende concessa.* Alanus Prior et Conventus ecclesiæ Christi

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Gavelikende. Cantuar. Omnibus Christi fidelibus ad quos literæ istæ pervenerint Salutem. Volumus ad omnium noticiam pervenire quod nos concessimus & assignavimus Theb. de Einesford & heredibus suis quater viginti acras de Dominio nostro in Northocholt, tenendas de nobis ad Gavelikende. Reddendo inde nobis xx. s. singulis annis, x. in med. Quadrag. & x. ad festum S. Michaelis. Hanc tamen hac conditione ei tenebimus si mansionim & domos suas super prædictam terram fecerit. Debet insuper tam ipse quam heredes sui sequi curiam nostram de Orpinton sicut ceteri homines de eadem villa.

Scriptura 7. Vide pag. 38. & 55. *Charta pirori consimilis.* Alanus Prior et Conventus ecclesiæ Christi Cantuar. Omnibus Christi fidelibus Salutem. Sciat quod nos concessimus & assignavimus Stephano de Kenardintone C. acras de marisco nostro inter wallas Monachorum

Pontis Roberti, et Oxeniam, ita quoddebet habere illas C. acras post alias C. acras

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Gavelichende. quas in eodem marisco dimisimus Stephano militi de S. Martino, usque ad C. illas acras quas dimisimus Solomoni de Geslings. Concessimus autem has prædictas C. acras eidem Stephano de Kenardintone & heredibus suis ad Gavelichinde. Reddendo inde nobis duas marcas argenti singulis annis, ad duos, viz. terminos, infra octavas Nativitatis S. Johannis Baptistæ unam marcam, infra octavas S. Michaelis alteram marcam, pro omni servitio, nisi quod debet wallare secundum quantitatem illius terræ intus & extra, tam contra salsam quam contra frescam, sicut ceteri, et Curiam nostram sequi. Jura etiam Cantuarien. ecclesiæ, et in hoc et in aliis, quantum ipse potest cum ratione tueri et defendere. Hæc autem omnia sacramento corporaliter in capitulo nostro præstito juravit se fideliter observaturum. Hiis testibus Godfrido coco, Stephano portario, Bartholomæo seneschallo, Willmo de Capes, Roberto Porter, et multis aliis.

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Alia Charta consimilis.

Scriptura 8.
Vide pag. 38.
& 55.

Gavelykende.

Relevium.

Present.

Omnibus ad quos præsens charta pervenerit Gaufridus Prior & Conventus ecclesiæ Christi Cantuar. Salutem. Noverit universitas vestra nos concessisse Joni & heredibus suis Berchariam nostram ducentarum ovium, scil. medietatem de Osmundeseye in terra & marisco cum una salina, Tenend. de nobis successive ad Gavelykende ita plene & integre sicut eam unquam Rogerus de Osmundeseye tenuit. Reddendo inde nobis annuatim lvi. s. de redditu ad duos terminos, scil. ad festum S. Johannis Baptistæ xxviii. s. & ad festum S. Michaelis similiter viginti octo. Post mortem vero prædicti Jonis dabunt nobis heredes sui successive de Relevio lvi. s. Dabunt etiam idem J. & heredes sui post ipsum nobis annuatim ad Natale Domini unum Mathlardum, et unam Annatem, & quatuor cercellas, & ad Pascha unum caseum, & unum agnum de Present. Super hoc sciendum, quod prædictus J. et heredes sui Curiam nostram de Leysdun

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sequentur, & in auxiliis dandis & Scottis sicut alii Tenentes nostri scottabunt. Et inde ipse & heredes sui successive salvos plegios invenient de redditu terminis statutis reddendo, & de Berchariæ instauratione integre & fideliter conservanda.

Alia consimilis Charta Hospitali data.

Scriptura 9
Vide pag 38.
& 55.

Sciant presentes & futuri, quod ego

Gavelekende. Radulfus Frone tradidi & concessi Deo & fratribus Hospitalis S. Laurentii juxta Cantuariam, in orientali parte siti, septem acras terræ meæ tenendas in Gavelekende de me & heredibus meis libere & quiete. Reddendo inde annuatim mihi vel heredi- bus meis xlii. denarios, pro omni servitio, & omni exactione in duobus terminis, scil. in med. Quadragesima xxi. denar. & in festo S. Michaelis xxi. denar. Prædicta au- tem terra nominata est Prestesteghe, quæ ad- jacet terræ Heliæ de Blen. Pro hac donati- one & confirmatione dederunt mihi prædi- cti fratres & heredibus meis quinque mar- cas sterlingorum. His testibus Johanne cle-

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rico, filio Henrici Sacerdotis, &c. & plu- ribus de Halymot.

Inquisitio de terris & tenementis quæ Isa- bella de Monte alto tenuit de Priore ec- clesie Christi Cantuariæ.

Scriptura 10.
Vide pag 58.

Gavelikende.

Inquisitio facta apud Hokynden coram Eschaetore Domini Regis die Mercurii prox. ante festum S. Catherinæ viriginis, anno R. R. Edwardi secundo, de terris & tene- mentis quæ Isabella de monte alto tenuit de Priore Ecclesie Christi Cantuariæ, & per quod servitium, per sacramentum Will/mi de Co- keler, &c. qui dicunt per sacramentum suum, quod prædicta Isabella tenuit in Gavelikende die quo obiit de prædicto Priore unum messuagium, xlii. acras terræ cum pertinentiis in Hokinden, per servitium decem solid. undecim denarior. per annum, & per servitium arandi unam acram terræ ad seminandum frumentum, quod valet xii. d. per annum. Et per ser- vitium metendi prædictam acram & cari- andi in Grangiam Prioris apud Orpinton

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blada ejusdem acræ, quod servitium exten- dit per annum ad xii. d. Et per servitium arandi dimidiam acram terræ ad seminan- dum frumentum, et dimidiam acram terræ ad seminandum ordeum, et utramque dimi- diam acram metendi et ligandi, quod qui- dem servitium extendit per annum ad ii. s. Et per servitium solvendi unam denar. et obulum ad falcandum pratium Domini Prioris, & per servitium cariandi unam ca- rectatam & dimidiam feni in Grangiam Prioris apud Orpinton, & valet per annum iii. denar. Et per per servitium faciendi duo averagia de Orpinton usque Mephram per annum, & valet opus viii. denar. Et per servitium claudendi tres peticatas circa Gardinum Prioris prædicti apud Orpinton, & valet opus iii. d. per annum. Et per ser- vitium duarum gallinarum & xl. ovorum, et valet per annum vi. d. pretium gallinæ ii. d. Et per servitium faciendi sectam ad

curiam prædicti Prioris de Orpinton, de tribus septimanis in tres septimanas. Et dicunt quod prædicta Isabella obiit per tres annos

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elapsos, et quod areragia a tempore mortis prædictæ Isabellæ usque in hodiernum diem sunt l. s. i. d. ob.

Summa totius per annum xvi. s. viii. d. ob.

Unde de redditu assis. x. s. xi. d.

De Consuetudinibus v. s. ix. ob.

Servitia Tenentium de Rokinge ad redditum posita.

Scriptura 11.
Vide pag. 60.

Burghyard.

Memorand. quod in festo S. Michaelis, anno D/ni Mccclxxxix. regni vero Regis Edwardi xvii. Prior et Conventus ecclesiæ Christi Cantuar. relaxaverunt Tenentibus suis de Rokinge, viz. falcationem, levationem, cariagium, et tassationem prati. Item cariagium, impletionem & sparsionem fimo= rum, facturam cratis, & Burghyard. Item averagia apud Merseham. Item fotaveagia. Item messionem & herciaturam & collectio= nem stipularum. Item cooperturam grangia= rum, & tonsionem ovium. Et pro ista relaxatione, prædicti Tenentes solvent annuatim ad manerium prædict. in festo omnium San= ctorum, & ad Purificationem beatæ Mariæ

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redditus subscriptos pro equali portione viz. Robertus le Frode de xii. acris & dimid. iiiii. s. ii. d. ob. Timberdansland pro viginti sex acris iiiii. s. ii. d. ob. Terra Heymund pro novem acris iii. s. ii. d. Terra Juliani pro viginti acris iiiii. s. i. d. ob. Stameresland pro undecim acris ii. s. viii. d. Terra Smalspon pro tresdecim acris ii. s. iiiii. d. Terra le Bred pro octo acris & dimid. xvi. d. &c.

Relaxatio servitorum & consuetudinum Tenentium de Mepham, pro annuo redditu solvendo.

Scriptura 12.
Vide pag. 61.

Universis pateat per præsentis quod in festo Nativitatis Domini, Anno ejusdem Mcccv. Regni vero Regis Edwardi filii Regis Henrici xxxv. Henricus Prior et Capitulum ecclesiæ Christi Cantuar. remiserunt et relaxaverunt hominibus et tenentibus suis de Mepham quasdam consuetudines et servitia pro annuo redditu quinquaginta septem solidor. trium denarior. et unius oboli eiusdem Priori et Capitulo in prædicto manerio suo de Mepham in festo Apostolorum Petri et Pauli annuatim solvend. in forma subscripta, viz. Tenentes de Gavellond de octodecim Jugis, pro cariagio triginta et sex carectat. feni de prato de Redhamme apud

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Gavellond.

nerio suo de Mepham in festo Apostolorum Petri et Pauli annuatim solvend. in forma subscripta, viz. Tenentes de Gavellond de octodecim Jugis, pro cariagio triginta et sex carectat. feni de prato de Redhamme apud

Clyve usque Mepham, quindecim solidos, viz. pro qualibet carectat. quinque denarios. Et unum dimidium jugum est in Dominico. Item pro averagiis tresdecim solid. & quatuor denar. Item pro clausura circa blada duos solidos, undecim denar. & obulum. Item pro clausura circa Curiam quæ dicitur Burghyard, viginti duos denar. obulum & quadr. Item Tenentes de sex Jugis & dimid. de Inland pro trituratione & ventilatione triginta & quinque quarteriorum frumenti, novem solid. quinque denar. obulum & quadr. viz. pro trituratione cujuslibet summæ tres denar. & pro ventilatione unum quadr. Item pro trituratione & ventilatione septemdecim grossarum summarum et dimid. avenæ, tres solid. tres denar. & unum quadr. viz. pro trituratione cujuslibet summæ duos denar. et pro ventilatione unum quadr. Item pro opere sarclandi

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octodecim denar. Item pro opere tassandi in autumpno tresdecim denar. Item pro fimis spargendis sex denar. et obolum. Item pro xviii. (a) Cladibus faciendis ad Ovile sex denar. Item pro cibo Prioris querend. et pro servitio quod dicitur Worderinde, et pro pomis frangendis duocecim denar. Item pro clausura circa blada, quæ dicitur Swinhey, duos solidos, decem denar. et quadr. Item pro clausura xvi. perticarum et quinque pedum muri infra Curiam ab ostio Aulæ versus Portam Curie xvi. denar. et obol. Item pro grangia cooperienda duos solid. et sex denar. In quorum omnium testimonium, sigillum commune prædictorum Prioris et Capituli, et sigilla Walteri de Northwode, Johannis de Isebergh, Johannis de Halifeld, Henrici de Mildenacre, Petri de Mildenacre, et Johannis de Prestwode, pro se et omnibus aliis Tenentibus de Gavellond, ad requisitionem ipsorum: et Johannis de Pettesfeld, Johannis de la Dene Capellani, Henrici de Lomere, Alfredi de Northwode, Henrici de Northwode, et Walteri Ive, pro se et omnibus aliis Tenentibus de Inland, ad requisitionem eorum=

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dem, huic scripto cirographato alternatim sunt appensa. Acta sunt hæc anno supra dicto.

Breve Regis (W/mi i/mi) pro terris monasterii S. Augustini Cant. alienatis recuperandis.

Scriptura 13. Vide pag. 68.

Will/mus Dei gratia Rex Angliæ, Lanfranco Archiepisco Cantuar. &c. Salutem. Mando & præcipio ut faciatis S. Augustinum & Abbatem Scotlandum reseisire burgum de Fordwich, quem tenet Haymo vicecomes, omnesque alias terras quas Abbas Egelsinus fugitivus, mentis lenitate, vel

timore, vel cupiditate alicui dedit vel habere concessit. Et si aliquis, &c.

Charta W. Regis in/mi de restitutione ablatorum in Episcopatibus & Abbatibus totius Angliæ.

Scriptura 14.
Vide pag. 68.

W. Dei gratia Rex Anglorum, L. Archiepiscopo Cantuar. & G. Episcopo Constantiarum, & R. Comiti de Ou, & R. fi-

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lio Comitis Gil. & H. de monte forti, suisque aliis proceribus regni Angliæ, Salutem. Summonete Vicecomites meos ex meo præcepto, & ex parte mea eis dicite, ut reddant Episcopatibus meis, & Abbatibus totum Dominium, omnesque dominicas terras quas de Dominio Episcopatum meorum & Abbatiarum, Episcopi mei & Abbates eis vel lenitate, vel timore, vel cupiditate dederunt, vel habere consenserunt, vel ipsi violentia sua inde abstraxerunt, et quod hactenus injuste possederunt de Dominio ecclesiarum mearum. Et nisi reddiderint, sicut eos ex parte mea summonebitis, vos ipsos velint nolint constringite reddere. Quod si quilibet alius, vel aliquis vestrum quibus hanc justitiam imposui, ejusdem querelæ fuerit, reddat similiter quod de Dominio Episcopatum vel Abbatiarum mearum habuit, ne propter illud quod inde aliquis vestrum habebit minus exerceat super meos Vicecomites vel alios quicumque teneant dominium ecclesiarum mearum (b) quod præcipio.

(b) f. *quam*.

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Breve Regis in subsidium Villanorum Abbatis S. Augustini Cantuar. se gravari querentium in taxatione 10/mæ & 15/mæ.

Scriptura 15.
Vide pag 73.

Edwardus Dei gratia Rex Angliæ, Dominus Hiberniæ, & Dux Aquitaniæ, Taxatoribus Decimæ & Quintædecimæ in Comitatu Cantuar. Salutem. Ex parte dilecti nostri in Christo Abbatis S. Augustini Cantuar. nobis est ostensum, quod vos omnia bona & catalla Villanorum ipsius Abbatis in Comitatu prædicto, non deductis redditibus, servitiis & custumis quæ iidem Villani præfato Abbati reddunt & solvunt annuatim, quæ quidem redditus, servitia & custumæ inter temporalia ipsius Abbatis spiritualibus suis annexa ad decimam sunt taxata, et inde idem Abbas decimam solvit, taxastis, et decimam & quintamdecimam prædictas inde levare intenditis ad opus nostrum, in ipsius Abbatis et Villanorum suorum prædictorum præjudicium et gravamen: Nos nolentes prædictum Abbatem, pro eo quod ipse de temporalibus spiritualibus suis annexis

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decimam solvit in hac parte indebite præ

gravari, vobis mandamus, quod deductis redditibus, servitiis, et custumis Villanorum prædictorum, quæ inter temporalia prædicti Abbatis spiritualibus annexa ad decimam sic taxantur, et de quibus idem Abbas decimam solvit, sicut prædictum est, residua bona et catalla eorundem Villanorum taxari, et dictas decimam et quintamdecimam inde ad opus nostrum levari faciatis, prout alias in hujusmodi taxationibus fieri consuevit. Et si quid per vos a præfatis Villanis indubite levatum fuerit, id sine dilatione restitui faciatis eisdem. Teste meipso apud Pontefractum primo die Martii, anno regni nostri septimo.

Charta de Homagio facto pro terra de Gavelkind, sicut de Villenagio.

Scriptura 16.
Vide pag 73.

Sciatis omnes tam posteri quam præsentis quod Wulfus filius Wulfmi de Elmton, & Radulfus frater suus diviserunt hereditatem suam de duabus villis Burne et Wilrintune, sicut de Gavelikende in Curia S. Augustini,

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in præsentia Domini Rogeri electi ejusdem ecclesie & plurimorum Monachorum & Laicorum: & Radulfus relevavit in eadem Curia partem suam. Ipse vero Radulfus de medietate istarum duarum villarum fecit homagium Abbati sicut de Villenagio, & reddet de Burne gablum quinquaginta solid. quatuor terminis anni, dominica viz. Palmar. xxii. s. vi. d. in Nativitate S. Johannis tantundem, ad festum S. Michaelis tantundem, ad festum S. Thomæ ante Nativitatem Domini tantundem, & tantundem servitii quantum ad idem Villenagium pertinet, faciet. Similiter de medietate de Wilrinton, idem Radulfus alios quinquaginta solidos, eodem modo, et eisdem terminis reddet cum servitio. Ego autem R. Dei gratia electus beati Augustini Cantuariensis ejusdemque loci conventus, hanc partem suæ hereditatis præsentis charta et sigillo ecclesie nostræ eidem Radulfo confirmavimus. Hiis testibus quorum nomina subscripta sunt, Willmo filio Nigelli, Elya de Silingheld, Radulfo de S. Leodegario, Radulfo de Creye, Eylgaro de Esture, Hugone Cofin, Stephano

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de Kenardinton, Alano de Reading, Daniele de Wyvelesberhe, Hamone de Solforde, Hamone de Aldelose, Alano de Legh, Rogero de Wadenhale, et pluribus aliis.

Chirographum pervetustum de Nuptiis contrahendis, & Dote constituenda.

Scriptura 17.
Vide pag. 76.

Here appeareth in this writing the agreement that Her swutelap on pysan gewrite þa foreward þe Godwine made with Byrhtric when he his daughter

Godwine worhte wið Byrhtic þa he his dohter
wood, that is first that he gives her one pounds
awogode, þ' is ærest þ' he gæf hire anes pundes

(a) 'Conditionally' (and upon this consideration) 'that she accept of his speech,' i. e. consent to the agreement, or contract here made, and on these terms will become his wife.
(b) withall.

weight of gold (a) so as she his agreement received, & he giveth her those lands at Strete with derfenge, 7 he geuþe hire þæs landes æt Stræte mid eallan þon þe þærto herð, 7 on Burwaramersce one hundred and fifty acres, and (b) thereto thirty oðer healf hund æcera, 7 þærto þrittig oxen, & twenty cowes, & ten horses, & ten bond-

(c) agreed.

men. This was (c) spoken at Kingstone before Cnute men. Ðis wæs gespecen æt cincgestune beforan Cnute

(d) presence.

king, in Living the Archbishops (d) witness, & in cinege on Lyfinges arcebisopes gewitnesse, 7 on the Covents at Christ-Church, & Ælfmeres (the) Ab-þæs hiredes æt cristes circan, 7 on Ælfmeres ab- bates, and the Covents at S. Augustine, and Æthel- bodes, 7 þæs hiredes æt S. Augustine, 7 Æthel- wines (the) Sheriffe, and Siredes th'elder, and God- wines sciregerefan, 7 Siredes ealdan, 7 God-
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(e) Minister.

wines Wulfeyes sonne, and Ælfsy child, and Ead- wines Wulfeages sunu, 7 Ælfsige cild, 7 Ead- mer at Burham, and Godwine Wulfstanes sonne, and mer æt Burham, 7 Godwine Wulfstanes sunu, 7

(f) for surety.

Charles the kings (e) knight, and when men that mai- Kar þæs cincges cniht, 7 þa man þ' mæ-

den fetchd to Brightling, then went of all this (f) in dan fette æt Byrhtlingan, þa eode þyses ealles on pledge Ælfgar Syredes sonne, and Frerth priest of borh Ælfgar Syredes sunu, 7 Frerþ preost on

Folcstone and of Dover Leofwine priest, and Folcestane 7 of Doferan Leofwine preost, 7

Wulfsy priest, and Eadred Eadelmes sonne, and Wulfsige preost, 7 Eadræd Eadelmes sunu, 7

Leofwine Wærelmes sonne, and Cenwold rust, and Leofwine Wærelmes sunu, 7 Cenwold rust, 7

Leofwine Godwines sonne at Horton, and Leofwine Leofwine Godwines sunu æt Hortune, 7 Leofwine

the red, and Godwine Eadgifes sonne, and Leofsun se reade, 7 Godwine Eadgeofe sunu, 7 Leofsunu

his brother. And which soever of them longest liveth his broðer: 7 swa hwæðer heora læng libbe

(g) seize.
(h) inheritance.

(g) take all (h) possessions aswell that land that fo to eallan ætan ge on ðam lande þe

I to them give as every thing. This thing is knowne ic heom gæf geo ælcon þingan. Ðyssa þinga is gecnæwe

(i) of each, or every.
/* doughty.
(l) tripartite.

(i) to all /* valiant men in Kent, & in Sussex of Thanes
ælc dohtig man on Kænt, 7 on Supsexan on ðegenan
and of Churles, and this writing is (l) three-fold,
7 on ceorlan, 7 þyssa gewrita synd ðreo.

(m) a second.

one is at Christ church, (m) another at S. Augustine,
an is æt cristes cyrcan, oðer æt S. Augustine,
the third hath Byrhtic himself.
þ' þridde hæfð Byrhtic self.

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*Testamentum Ethelstani Etheling, filii regis Ethelredi,
quo (inter alia) contulit Ecclesie Christi Cantuariæ,
manerium de Holingburne, anno Christi 1015.*

In God Almightyes name ...
On Godes Almighties name ...

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that place for our ...
þare stowe vor unkre ...

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silver basin of five ...
selurene hwer of vif ...

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that men deliver ...
þet man geleste ...

202

for her great deserving ...
for hire muchele gearnunge ...

203

to Edrith Wynfelds sonne ...
Edriþ Wynfelde sunu ...

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Abbat & Eilmer ...
Abot 7 Eilmer ...

... which Gods name
... þe Godes name

do laud.
herieþ.

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Charta Libertatum Ecclesie Christi Can=
tuar. concessar. per Regem Henricum
primum.

Scriptura 19.
Vide pag. 123.

H. Dei gratia Rex Anglorum, Episcopis,
Comitibus, Proceribus, Vicecomitibus, cæ= terisque suis fidelibus Francis et Anglis in omnibus Comitibus in quibus Achiepisco= pus Radulfus & monachi ecclesie Christi Cantuariæ terras habent amicabiliter Salu= tem. Notum vobis facio me concessisse eis omnes terras quas tempore Regis Eadwardi cognati mei, & tempore Williemi patris mei habuerunt & Saca & Socne on Strande & Streame, on Wode & Felde, Tolnes & Teames,

Thegenes. & Grithbreches, & Hamsocne, & Forestealles, & Infangenes thioves, & Flemen feormthe super suos homines infra burgos & extra in tantum & tam pleniter sicut proprii ministri mei exquirere debent. Et etiam super tot Thegenes quot eis concessit pater meus. Et nolo ut aliquis hominum se intromittat nisi ipsi & ministri eorum, quibus ipsi committere voluerint, nec Francus nec Anglus:

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propterea quia ego concessi Christo has consuetudines pro redemptione animæ meæ, sicut Rex Eadwardus & pater meus antehac fecerunt. Et nolo pati ut aliquis eas infringat, si non vult perdere amicitiam meam Deus vos custodiat.

Thus Englished in the same Charter.

H. þurh godes gevu ænglelandes cining grete ealle mine biscopes 7 mine eorles 7 sciregereuan 7 ðegenas fræncisce 7 ænglisc on ðam sciran þe Raulf ærceb. 7 þe hyred æt cristescircean on Cantwareberig habbaþ land inne freondlice. 7 ic kyðe eow þ' ic hæbbe heom geunnon þ' hi by on ælce þære lande wurthe þe hi hæfdon on Edwardes Kinges dæge mines mæges, 7 on Willelmes Kynges dæge mines fæder, 7 saca, 7 sochnæ, on strande 7 on streame, on wudan, 7 on feldan, tolnes 7 teames, griðbreces 7 hamsocne, forstealles, 7 infangenes þioues, 7 flæmen feormðe ofer hire agen mæn binnan burgan 7 butan, swa full 7 swa forþ swa mine agene wicneres hit secan scoldan, 7 ouer swa fela ðegenas [swa ic heom to geleten hebbe] 7 ic nelle þ' ænig man ænig ðing þær on tyo buton hi, 7 heore wicnæres þe hi hit betæcon willaþ ne fræncisce ne ænglisc, for þan þingan þe ic hæbbe criste þas gerihthe forgeuen minre sawle to alysednesse ealswa Eadward King 7 min fæder ær hæfdon, 7 ic nelle geðauian þ' ænig man this to brece be minan fullan freondscipe. God eow gehealde.

[] This answers not to the Latine; that *quot eis concessit pater meus*; this, 'as I to them have granted.'

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Charta consimilium libertatum Ecclesiæ S. Augustini Cantuar. concessarum per S. Edwardum Regem.

Scriptura 20. Vide pag. 112. & 123.

Ego Edwardus Dei gratia Rex Anglorum, Eadsino Archiepiscopo, et Godwino Comiti, & omnibus suis Baronibus Canciæ, Salu-tem. Sciatis me dedisse Deo & S. Augusti- no & fratribus ut habeant eorum Saca & Socna, et pacis fracturam, et pugnam in do- mo factam, et viæ assaltus, et latrones in terra sua captos, latronumque susceptionem vel pastionem, super illorum proprios homi- nes infra Civitatem et extra, theloniumque suum in terra et in aqua, atque consuetudi- nem quæ dicitur Teames. Et super omnes Allodiarios suos quos eis habeo datos. Nec volo consentire ut aliquis in aliqua re de his se intromittat, nisi eorum præpositi quibus ipsi hoc commendaverint, quia habeo has consuetudines Deo datas et S. Augustino pro redemptione animæ meæ ita pleniter et

Allodiarii.

libere sicut melius habuerunt tempore prædecessoris mei Knuti Regis, et nolo consentire

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ut aliquis hæc infringat, sicut meam amicitiam vult habere.

Epistola Gaufridi Supprioris & Monachor. Ecclesiæ Cantuariensis ad Regem Henricum 2. de lite inter eos & Baldwinum Archiepisc.

Scriptura 21. Vide pag. 67. & 101.

Excellentissimo Domino suo H. Dei gratia Anglorum Regi G. Supprior & Conventus ecclesiæ Christi Cantuar. flebilis & ultra modum afflictus Salutem & suspiria flentium & afflictorum respicere. Cum scriptum sit, 'Gloria in excelsis Deo, & in terra pax hominibus bonæ voluntatis:' ut pro bona voluntate in terris habita, gloriam habeatis in cœlis, Serenitati vestræ quem in nullo offendisse credimus vel recognoscimus, supplicamus, ut si quid odii aut rancoris concepistis adversus nos aut ecclesiam Cantuar. odio personæ alicujus aut operis præsentis temporis vel præteriti, quod nos debet respicere, pietatis intuitu remittatis, attendentes innocentiam nostram, nec vindicantes aliorum peccata in nobis. Si pecca-

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Ecclesiæ Cantuariensis dignitas.

vimus publice puniamur, sin autem, quod ecclesia Cant. de qua omnes Anglorum Reges, non solum fidem Christi, sed & coronam Regni sumpserunt, quæ usque modo libera extitit, captivatur & conculcatur ab hominibus, cum sit mater omnium in regno Angliæ manentium. In Christo Jesu vobis dicimus, timemur ne novitates multæ & malæ subito oriantur, quarum principia etsi nos sensimus, forsitan exitus alios quam nos tanget nec transire permittet immunes, sed involvet. Qui hanc novitatem non admiretur, quod Dominus Archiepiscopus dicit nos debere de eo terras & possessiones nostras tenere? cum jam per quingentos annos & eo amplius, a tempore scilicet magni Theodori, qui terras partitus est, & utrique parti suam portionem assignavit, Conventus in pace possederit portionem suam, & libere administraverit, quod & chartæ Regum & Pontificum plenius attestantur, ex quarum tenore perspicuum videre est, quod usque ad hæc infœlicitatis tempora, Archiepiscopus nihil juris vel dominationis plus habebat in terris Monachorum, quam Monachi in terra

Nota.

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Archiepiscopi. Et ne super hoc quisquam dubitet, proferantur in medium charta S. Ædwardi Regis & Sancti Anselmi Archiepiscopi, & aliæ multæ Regum & Pontificum. Quod autem dicitur Lanfrancum divisisse terras, ideo est, quod cum Normanni, capta

Anglia, omnium ecclesiarum terras occupas=
sent, Rex Will. ad instantiam Lanfranci,
eas resignavit. Lanfrancum vero singulis
ecclesiis reddidit quod antea possederant, sibi
autem quod ante cessorum fuerat suorum re=
tinuit. Quod autem tempore Lanfranci non
sit facta terræ divisio, testantur chirogra=
phia ante tempora beati Dunstani facta in=
ter Archiepiscopos & Monachos de concam=
biis terrarum multarum: sed & hoc atte=
stantur scripta vetustissima quæ lingua An=
glorum, Landbokes, id est, terrarum libros,
vocant. Quia vero non erant adhuc tem=
pore Regis Willielmi milites in Anglia, sed
Threnges, præcepit Rex, ut de eis milites
fierent ad terram defendendam. Fecit au=
tem Lanfrancus Threngos suos milites:
Monachi vero non fecerunt, sed de portione
sua ducentas libratas terræ dederunt Archi=
episcopo, ut per milites suos terram eorum
defenderet, & ut omnia negotia eorum apud
Curiam Romanam suis expensis expediret.
Unde adhuc in tota terra Monachorum nul=
lus miles est, sed in terra Archiepiscopi.
Terram tamen ducentarum librarum adhuc
habent Archiepiscopi: pro quibus omnibus
valde miramur, quod vel talia dicit, vel
quod assensum ei præbetis, quod vestra au=
thoritate & nomine vestro, per ministros
vestros res & possessiones nostras invadit,
cum nichil ad eum spectent, set nos tenea=
mus post Deum in capite de vobis, sicut &
ipse: quod manifestum est, decedentibus Ar=
chiepiscopis, quia terræ eorum statim confi=
scantur, a seculo autem inauditum est, quod
possessiones nostræ confiscatæ fuerint aliquo
tempore. Quapropter supplicamus, ut ma=
turius pro Deo dum potestis hæc corrigi fa=
ciatis, cum forte tunc (a) velitis, cum non
(b) potueritis. Valeat.

Landbokes.

Threnges.

Nota.

(a) Forte,
velitis.
(b) *poteritis.*

Scriptura 22.
Vide pag. 85.

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episcopo, ut per milites suos terram eorum
defenderet, & ut omnia negotia eorum apud
Curiam Romanam suis expensis expediret.
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possessiones nostræ confiscatæ fuerint aliquo
tempore. Quapropter supplicamus, ut ma=
turius pro Deo dum potestis hæc corrigi fa=
ciatis, cum forte tunc (a) velitis, cum non
(b) potueritis. Valeat.

Donatio Wolgithæ de manerio de Stisted, A. D. 1046.

Here appeareth in this writing . . .
Hyer swotelet on þisen gewrite . . .

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her substance after . . .
hire ðing efter . . .

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ton, & to the church . . .
tune, 7 into þare chereche . . .

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there perish . . .
þer acquelm . . .
. . . & many others.
. . . 7 manie opre.

*Donatio terrarum apud Apoldre, Orpinton, Palstre, Wer=
horne, Wittrisham, ecclesiæ Christi Cantuariæ per*

Ædsum Presbyterum, de consensu Cnuti Regis & Ælf-gifæ Reginæ, ann. 1032.

- Scriptura 23.
Vide pag. 120.
(r) by. Here appeareth (r) in this writing how Cnut King
Her swutelap on pysan gewrite hu Cnut cyng
& Ælfgifæ his Lady gave to Eadsy their Priest
7 Ælfgifu seo hlæfdige geuþan Eadsige heora preost
- (s) dispose. when he turned monk that he might (s) convey that
ða he gecyrde to munece þ' he moste ateon þ'
land at Apuldore as to himselfe most pleasing were.
land æt Apoldre swa him sylfan leofast wære.
Then gave he it to Christ-church to Gods servants
þa sealde he hit into Cristes-cyrican þ' Godes ðeowum
for his soule, & he it bought that of the Covent for his
for his sawle, 7 he hit gebohte þ' æt þam hirede his
- (t) condition. dayes & Ædwines with fower pounds, on that (t) con=
dæg 7 Ædwines mid feower pundan, on þ' for=
tract that men deliver every yeare to Christ-church
wyrd þ' man gelyste ælce gear into Cristes-cirican
- (u) cadous. three weighs of cheese from that land, & three (u) bun=
.iii. wæga cyses of þam lande, 7 þreo ge=
dles of Eeles, & after his dayes & Ædwines go that
bind æles, 7 æfter his dæg 7 Ædwines gange þ'
- (x) i. e. en=
tirely. land into Christ-church, with meat and with (x) men,
lande into Cristes-cirican, mid mete 7 mid mannan,
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- (y) improved. even as it then (y) inriched is, for Eadsies soule, and
eal swa hit þænne gegodod sy for Eadsiges sawle, 7
he bought that land at Werhorne of the Covent for
he gebohte þ' land æt Werhornan æt þam hirede
his dayes and Eadwines also with fower pounds, then
his dage 7 Eadwines eac mid feower pundan, ðænne
goeth that land forth with the other after his dayes &
gaf þ' land forð mid þam oþran æfter his dæge 7
- (z) stock. Edwines to Christ-church with the (z) crop that
Edwines into Cristes-cirican mid ðære tilþe þe
there then on is, & that land for his dayes at Berwick
þar þænne on si, 7 þ' land on his dæg æt Berwican
which he obtained of his Lord Cnute king, & he
ðe he gearnode æt his hlaford Cnute cyng, 7 he
gives also those lands at Orpington in his dayes for
geunn eac þæs landes æt Orpedingtune on his dæge for
his soule to Christ-church to Gods servants for
his sawle into Cristes-cyrican ðam Godes ðeowum to
- (a) clothing.
Scrud-land. (a) garment land, which he bought with eighty
scrud land, ðe he gebohte mid hund eahtigan
- Hustings
weight. marks of white silver by Hustings weight, & he gives
marcan hwites seolfres be hustinges gewihte, 7 he geun
also those lands at Palstre & at Wittresham after
eac ðæs landes æt Palstre 7 æt Wihtriceshamme æfter
his dayes & Edwines forth with the other to Gods

- his dæge 7 Edwines forð mid ðam oþrum ðam Godes
 Foster-land. servants for foster-land for his soule. This bequest
 ðeowum to fostor-lande for his sawle. Ðises cwides
- (b) condition. he giveth to the Covent on this (b) contract that they
 he geunn ðam hirede to þam forwyrdan þ' hi
 ever him well observe, & to him faithfull be in life &
 æfre hine wel healdan, 7 him holde beon on life 7
- (c) by. after life, & if they (c) with any unadvisednesse with
 æfter life, 7 gif hi mid ænegan unrede wið
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- (d) condition. him this (d) contract shall breake, then stands it in
 hine ðas forwyrd to breacan, þænne stande hit on
 his owne power how he afterwards his owne dispose
 his agenan gewealde hu he siþþan his agen ateon
 will. Of this is for witesse Cnute King, & Ælfgif
 wille. Ðises is to gewitnesse Cnut cyng, 7 Ælfgifu
 his Lady, & Æthelnoth Archb. & Ælfstan Abb. &
 seo hlædige, 7 Æðelnoð Arceb. 7 Ælfstan Abb. 7
 the Covent at S. Austines, & Brihtric young & Æ=
 se hired æt S. Augustine, 7 Brihtric geounga 7 Æ=
 theric husbandman, & Thorth Thurkilles nephew, and
 þelric bigenga, 7 þorð þurkilles nefa, 7
 Tofi, & Ælfwine priest, & Eadwold priest, and all the
 Tofi, 7 Ælfwine preost, 7 Eadwold preost, 7 ealle ðæs
- (e) tripartite. Kings Counsellours, and this writing is (e) threefold,
 cynges rædesmen, 7 þissa gewrita synda .iii.
 one is at Christ-church, and one at S. Augustines,
 an is æt Cristes-cyrican, 7 an æt S. Augustine,
- (f) to. and one hath Eadsy (f) with himselve.
 7 an hæfð Eadsige mid him sylfan.

FINIS.

[I have perused this learned Treatise of Gavelkynd,](#)
[and judge it very fit to be published.](#)

[April 7. 1647.](#)

[Ja. Armachanus.](#)

<James Ussher>

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<This book is dated 1660, but was apparently already on sale in November 1659. It was reissued within the next few months, with six extra leaves inserted among the preliminaries. (I have put those additions into a separate file.) Copies of both issues are available through EEBO (reel numbers 149:E:1005[1] and 194:03). There are some small discrepancies – a few which I have noticed (see below), others, no doubt, which I have missed. In these places it is (as far as I can tell) the second copy which has the corrected reading. This transcription includes almost the whole of the appendix. The only items omitted are two pre-conquest documents (pp. 198–204, 211–14) printed by Somner from unsatisfactory copies in one of the Christ Church registers. It is clear, by the way, that Somner had access to some of the Saxon charters which resurfaced later in the library at Surrenden Dering (Flight 2010, p. 22). They reached Surrenden (so I suppose) through being borrowed from Christ Church by Sir Edward Dering (who died in 1644); evidently, however, they were still at Christ Church when Somner made the notes which he used in writing this book. – C.F. April 2011.>

uncorrected (reel 149:E:1005[1]) ~ corrected (reel 194:03)

17/7 ernd. ~ rend.

48/18 antiquitus ~ antiquitus,

48/32 well a ~ well as

186/10 curiandi ~ carandi

186/24 tres with e inverted ~ tres

224 (below FINIS) <nil> ~ c .