

ART. VIII.—*Enquiry into the Origin of the Mercheta Mulierum.*

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In a Letter to DR HIBBERT, Secretary.

Edinburgh, 13th December 1825.

MY DEAR SIR,—In the course of an investigation into some old papers this last summer, I found a charter from a feudal superior to his vassal, giving a variety of lands,—“cum curiis et earum exitibus, et amertiamtis, herezeldis, bluidvitis, et mulierum merchetis, liberoque introitu et exitu.” The charter is dated 13th June 1598; and is now handed for your inspection.

You are aware that the origin of this singular grant is ascribed to a law of *Evenus*, King of Scotland, by which the Lord acquired a right to the person of his female vassal on her becoming a bride; and that it is said the privilege existed till the reign of Malcolm III. “Loci dominus primam libandi pudicitiam potestatem haberet.” This fable is to be traced to the credulous theories of our earlier historians (*a*); for the pretended *Evenus* does not occur in the lists of the Dalriadic Kings. Nevertheless, as the subject is curious, I shall be glad if you can get any member, at the next meeting of the Antiquarian Society, to offer remarks on its rise and progress. Meantime, I presume to give what has occurred to myself, from the perusal of different authors.

But I may first advert very briefly to the several particulars with which the *merchet* stands allied. You are aware that, besides the quality of the estate, the *tenendas* of a feudal charter

(*a*) H. Boethii Hist. Scotorum, lib. iii.

bore an anxious enumeration of the appurtenances, privileges, and jurisdiction conveyed with the lands (*b*). Many of these appear to us redundant, synonymous, and even meaningless terms. They were the necessary results of a policy which enforced, with the most rigid exactitude, the relative duties of superior and vassal. As the latter paid homage for his possession, his infant in orphanage was the care of his lord. When the superior was deprived of his tenant by *death*, he drew an *heriot* for the return of the lands to himself; and a fine of renewal or relief when he restored them to the *heir*. From the principle of power over the person, as well as estate of the minor follower, arose the casualty of the *maritagium*, or marriage fine. The clause under consideration presents the superior divesting himself of some of his extensive privileges. The first words of style are “cum curiis et earum exitibus.” Here the heritable jurisdiction inherent in the proprietor is delegated in an inferior manner (*c*). By the “exits” are meant the fines and dues payable within the boundaries of that jurisdiction. The “amertiamtis” have clearly reference to a similar origin. “Herezeldis” (*d*) imply the *heriots* of the Saxons; mortuaries due to the seignior on the death of his military dependents—not on the entry of their heirs, as has been erroneously imagined. In the *Quon. Attach.* herezeld is defined to be the best *aver*, or beast of his cattle, provided the husbandman possessed an oxgate of land. “Bloodwytes,” says Mr Ross, are the fines imposed in petty riots where blood is drawn; wyte being still, in the Saxon tongue, expressive of a penalty.

I now come to the singular conveyance more immediately the object of our attention. “Mulierum merchetis, liberoque introitu et exitu,” are the concluding words of the sentence before us. Of the derivation of the term, much has been written.

(*b*) See Erskine's Inst. B. ii. tit. 3, sect. 24. Ross's Lectures, vol. ii. p. 165.

(*c*) Robertson's Scotland, vol. i. p. 13. Ross, vol. ii. p. 175.

(*d*) Du Cange, voce Herezelda. Black Acts, Ja. I. Parl. i. c. 10.

Arn. That when a maid is contracted
And ready for the tye o' th' Church, the Governour,
He that commands in chief, must have her maidenhead,
Or ransom it for money at his pleasure.

The books of the feus also speak of the *Mercheta Mulierum*. In the manors of Thurgarton and Horsepool—Co. Nottingham, (*s*) every naif, or she-villain, that took a husband, or committed fornication, paid *marchett* for redemption of her blood, five shillings and fourpence; and the daughter of a cottager paid half a *marchett*. Certain lands in the county of Flint are held of the King by services and by *ammobragium*, which extended to five shillings when it happened. Blount (*t*) gives the following definition of *Ammobragium*:—"A pecuniary acknowledgment paid to the King by the tenants—or vassals to their lord—for liberty of marrying or not marrying."

Something equivalent to the *Marchetum* of the Scots was the *Amobyr* of the Welsh; among the Saxons the *Lyre-wite*, *Lecher-wite*, or *Legergeldum*, composed of two Saxon words implying *concubere* and *mulcta*. The *Amobyr*, or rather *Gobr-merch*, or *Gwabr-merched*, was a British custom of great antiquity, paid either for violating the chastity of a virgin, or for the marriage of a vassal (*u*); and signifies the *price of a virgin*. (*v*)

But neither of these penalties—though often assimilated—were precisely of the nature of the *Merchet*. On the contrary, the *Lyrewite* (*w*) seems to have been a power, competent to lords of manors, of punishing offenders in adultery or fornication, and to have been exigible from virgins; the *Merchet* from girls actually married, or about to be so. In Ellis's edition of Brand's *Popular Antiquities* (*x*) occurs the following entry:—

(*s*) Blount's *Antient Tenures* by Beckwith, p. 262.

(*t*) p. 258.

(*u*) Blount.

(*v*) *Amobyr*, merces foeminarum, precium virginitatis. Davies' *Welsh Dict.* "*Gopr*, —A Reward." Lhuyd. *Archæ. Brit.* I. 204.

(*w*) *Fleta*, Lib. 1, c. 47.

(*x*) Vol. 2, p. 96, 4to. Edinburgh.

"I found the subsequent clause in a curious MS. in the Cotton Library, Vitell. E. 5, entitled, 'Excerpta ex quodam antiquo registro Prioris de Tynemouth remanente apud comitem Northumbriæ, de Baronis et Feodis, Rentale de Tynemouth, factum A. D. 1378. Omnes Tenentes de Tynemouth, cum contigerit, solvent *Láyrewite* filiabus vel ancillis suis, et etiam *Merchet* pro filiabus suis maritandis."

This quotation manifests the distinction, but leaves the occurrence of the custom in obscurity.

Seeing in this way that such a privilege as the *Merchet* was accorded to the overlord, the question which suggested itself to me was this: Was this a *right* to the *person* of the female vassal? or was it merely a *casualty* payable to the superior on her marriage, similar to that which was exigible from the *male* tenant on his entering into the same state, or becoming enfeoffed in his property at majority? The views I have taken do not solve the query; but I may be allowed to state them.

It seems noways contrary to the spirit of the feudal institutions, in their *degenerated* state, to suppose that, at a very remote period, a power over the person of his ward was conferred on the superior. Does not the history of mankind at large teach us, that it is by tardy and progressive steps woman takes her proper place in society, and exercises a dominion over the rougher sex? The *Amobyr*, or *Gobr-merch* of the Welsh, as it means "the price of a virgin," (*y*) is clearly indicative of a ransom from some established custom, and has been erroneously confounded with the *Merchetum*. It was established, it is said, as a preservative against *lewdness*. But that is anticipating the question; for when it was paid as a *fine*, society had advanced to the stage wherein crimes and usages are computed for money. On that point I shall speak hereafter. In the meantime I may remark (if we give any credence to ancient authors) that the Welsh never had very delicate notions respecting the female sex. Geraldus Cambrensis tells us that, in that country, hardly any one ever married formerly without previous cohabitation; nor is this practice

(*y*) Beckwith's Blount, p. 259.

entirely discontinued. Who has not heard of the *bundling* still customary among the Welsh peasantry? This leads me to an opinion which I have entertained from inspecting the writers on this subject, that, as the feudal system did not become corrupted till its founders had been thoroughly amalgamated with the inhabitants of the conquered territory, and adopted many of their consuetudes, so an exaction like the *Mercheta mulierum* is most likely to have originated from *Celtic* principles engrafted on feudal ones. I cannot bring myself to believe that the *Merchet* sprung from the founders of feudality. If the germs of that institution are to be traced to the Teutonic conquerors of Rome, whilst yet in their woods, we must reject the idea of slavery over the mind or the body, since the power of the chief, or civil magistrate was extremely limited. (*aa*)

The relative degrees of estimation in which women stood with the Gothic and Celtic tribes leads me still further to the conclusion, that the custom in question arose from the latter people; and I find a supporter in Mr Chalmers, for he derives the term *Merched* from the British tongue. (*bb*) Among the *northern* nations of Europe, (*cc*) the female sex were, from the beginning, courted and honoured. They possessed that influence which they will ever retain while the heart is responsive to the touch of love, and whilst they are treated as equal and intelligent beings. (*dd*) Polygamy was unknown (*ee*) at least rarely practised. Aristotle tells us that the *Celts*, upon the contrary, despised women. (*ff*) Brothers and other near relatives of the ancient Britons used their wives in common, according to Cæsar (*gg*). St Jerome severely reprehends the Scots in this particular. Adultery was rare among the Germans, though they lay promiscuously together. Among the Welsh it appears to

(*aa*) Tacitus, cap. 7.

(*bb*) Caledonia I. p. 450.

(*cc*) Kames' Sketches, vol. II. p. 69.

(*dd*) Turner's Anglo-Saxon Hist. vol. II. p. 82.

(*ee*) Tacitus.

(*ff*) Aristotle Polit. Lib. II. c. 2.

(*gg*) De Bel. Gal. Lib. V.

have repeatedly occurred; for their laws have frequent mention of the penalties against the offending parties. (*hh*) For defiling the prince's bed, the delinquent was to pay a rod of pure gold, of the thickness of the finger of a ploughman who has ploughed nine years, and in length from the ground to the prince's mouth when sitting. Some authorities add (*ii*) the culprit was fined in a gold cup and cover as broad as his Majesty's face!—The Germanic nations punished with sanguinary rigour the sin of the female (*jj*), whilst the ancient Britons checked by fines, but not by death, the repetition of the crime (*kk*). The recompense to a virgin who had been deflowered, is a proof that they rather considered the calamity in a jocular light. On stating that she was deserted by her lover, it was ordered by the court that she should lay hold of the tail of a bull of three years old, introduced through a wicker door, well shaven and greased. Two men were to goad the beast; and, if she could by dint of strength retain the bull, she was to have him in lieu of satisfaction—if not, she became the laughing-stock of the spectators.

Lord Hailes (*ll*) has written an Essay on the *Mercheta*, in which is manifested the profound and elaborate learning for which this eminent lawyer is so justly celebrated. Yet has he left its real history as much involved in doubt as he found it. He considers *Merchetum* or *Merchet* to have two significations:—1st, The fine exigible by a lord when the unmarried daughter of his villain was debauched. 2dly, To imply the composition payable on her marriage (*mm*); and in this view Mr Astle has concurred (*nn*). But the question still remains, how did a tax

(*hh*) Kames' Sketches, vol. II. p. 63.

(*ii*) Beckwith's Blount, p. 259.

(*jj*) Tacitus.

(*kk*) Blount, *ut supra*.

(*ll*) Annals, vol. i. p. 312.

(*mm*) This was the opinion of the editor of Beaumont and Fletcher's Works:—"We may trace" (says he) "the origin of this tradition to the tax imposed during the feudal times, in numerous countries, upon any tenant or bondsman when he married."

WEBER'S *Beaumont and Fletcher*, vol. ii. p. 278.

(*nn*) *Archæologia*, Lon. Soc. Antiq. vol. xii. p. 35.

on this primary law of our nature ever arise? There is a reason for the cumbersome penalties attached to a *male* fief in the feudal times, because the vassal was unable, in his minority, to render those services which a military age bound him in; but why these overlords should have laid their tyrannical bonds on woman, I cannot imagine, unless indeed, by supposing (as was the case) that in barbarous periods the gentler sex are mere domestic drudges, or instruments of sensual gratification! With all his endeavours to disprove the usage, as handed down by Boece, Lord Hailes is compelled to admit that there anciently prevailed, in many countries of Europe, a custom often allied, and with apparent justice, to the *merchetum*. It was termed *jus primæ noctis*; and, if his Lordship be correct in his authorities, existed in France in the fifteenth century. A Dutch author, to whom he refers, Van Loon, derives this *jus primæ noctis* from a very singular source. In the 4th counsel of Carthage, held anno 398, it was ordained that all new married persons, out of respect for the sacerdotal benediction, *eadem nocte in virginitate permaneant*. This species of continency, as it aggrandized the priesthood, was prolonged by them to three nights, in imitation of *Tobias*; but, about the twelfth century, a redemption of the obligation was permitted—and the abatement in the rigour of the canon is to be ascribed to the view which the common sense of mankind will in time take of all such usurpations. There was this difference between the *merchet* and the *jus primæ noctis*, that the former originated in the brutal power of a tyrannical aristocracy—the latter in the capricious conceit of the church.

The *merchetum* is said not to have been payable within a borough. Its occurrence, nevertheless, in the *Regiam Majestatem* proves that no class of female society were exempt from it. The daughter of an earl, the maid of noble birth, and the servant or slave, were alike amenable to this degrading vassalage. A thralldom so universal, and embracing every woman without

distinction, necessarily arose from some other source than the mere acknowledgment of a superior on the wedding day. Its roots strike deeper than we can now discern, and indicate a disgusting origin. For otherwise, “whence comes it to pass that the *marcheta* of a filia libera was the double of that of a mulier nobilis (oo) ? that the daughter of a thane paid four times as much as a woman nobly born?” Or, if it was a mere *villain* fine, as Bracton says, how happened it that not only *villains* paid it, but even those in England, who held their land in free soccage (pp) ? A free woman surely owed service to no one; and yet we find her taxed to an extraordinary degree. Till those difficulties be solved, we may ascribe to the *merchetum* the character of a more extravagant prerogative than our antiquaries are willing to allow (qq); and the more justly, since seignoral rights not unfavourable to the ideas of Skene are known yet to linger in Europe and America (rr). Lord Hailes has made us acquainted with an ingenious German method of enriching the treasury. The little despots there effected this by imposing fines on celibacy—for this good reason, “that

(oo) Hailes, vol. i. p. 323.

(pp) Spelman, voce Soke Manerio.

(qq) Dr Macpherson's Dissertation on Caledonians, p. 175.

(rr) Edward William A. Hay, Esquire, F.S.S.A. corroborated this opinion at the reading of this paper, by stating that claims of *Droit de Seigneur*, by some termed *Droit de Cuissage et Jambage*, prevailed, until these few years, in some districts of France; of which he afforded curious evidence, by anecdotes of the recent advancement of this right by superiors on the French coast, and in their old colony of Canada. Mr Hay, in a letter to me on this subject, says: “The Governor of Sark is deemed at this day to have ‘le droit de cuissage.’ Mr W. Y. a Scotsman, proprietor of a lordship in Lower Canada, on the banks of the river Richelieu, opposite Chambly (about 24 miles south of Montreal) told another of my friends, who chanced to be present while my informant before mentioned related to me the ancient privilege of the Governor of Sark, that he, Mr Y. in common with other *Seigneurs*, or Lords of Manors, had *le droit de cuissage et jambage*, un droit par lequel il avoit le pouvoir de coucher avec la fiancée, avant d’aller à son mari, la première nuit du mariage, passant, dit on, trois fois sa cuisse sur elle; mais, on dit, qu’actuellement ce droit n’est plus de coutume.” See “Le Droit du Seigneur,” 8 tom. Voltaire's Comedies.

“bachelors deprived their lord either of pleasure or profit, and were, therefore, justly punished.”

Struck by the evident relation of the *mercheta* to the regulations of the Welsh legislator, Howel Dha, the historian of Manchester has admitted its British, and consequently Celtic origin. (ss) He fancied that, in the antiquity of the British tenures, he beheld the establishment of feuds prior even to the epocha of the Norman conquest. Yet, as he concedes the point (tt), that the *Caeths* or *Villains*, who formed the only other rank distinct from the nobles among the British people, were in reality slaves, the concession is tantamount to proof that the custom in question was not an ingredient of feudality. For no stronger line of distinction between the Gothic and Celtic tribes can be observed than that the one were freemen, and the other wretched dependants on the will of their lord. Did our time allow of it, we might hesitate to subscribe to the learned historian's fanciful introduction of feuds. It possesses the merit of ingenuity—we can scarce confidently add, of authenticity. Some similarity to the harsher features of feudal policy may be traced in the earlier British institutions; but the bond of union which gave life and vigour to that system found no responsive echo among the Celtic *reguli*, who eyed with distrust the motions of their neighbours, and enfeebled the general welfare by the contracted policy of mutual separation (uu).

Some writers have confounded the *heriot* with the *merchet*. From the chartulary of Kelso, it is clear there was a decided difference (xx); so, in like manner, the *relief* has been improperly co-mingled with the *heriot*. There cannot be a wider distinction. The *hæred*, or *mortuary*, was due to the seignior on the demise of a vassal, and was paid out of the goods of the *deceased* possessor of the lands; it was in reality the same with the *herezeld* of the

(ss) Vol. i. pp. 262–265.

(uu) Caledonia, vol. i. p. 200.

(tt) Ibid. p. 161.

(xx) Hailes, vol. i. p. 321.

Scots (yy):—whilst the *relief* was paid by the *heir* out of his own purse, the *heriot* was the lord's sasine of the entire estate on the death of the possessor; and the *relief* was the acknowledgment from the property, as the homage was from the person, for the superior's reconveyance of the whole to the heir. The *heriot* was payable at *all* events; the *relief* *only* in case of taking up the lands in succession. (zz)

In studying this question, a very prominent fact has presented itself, which has been overlooked by previous writers, and which I am at a loss, after a minute inquiry, how to account for. It is this:—That all charters whatever, of a remote period, granted in favour of *female* crown, and other vassals, and even of convents of nuns, bear to be, ‘*cum herezeldis et merchetis mulierum.*’ This is observable even in the case of *liferent* infeftments in favour of women; and the clause is contained in the charters of dowry of our Scottish Queens, and other personages of distinction. I insert an instance in point, for which I am indebted to Robert Pitcairn, Esquire; W. S., F.S.S.A. (a)

The only principle I can suggest for an extension of the custom in favour of the softer sex, is this:—That being unable to

(yy) See Ducange, tom. iii. voce *Herezelda*.

(zz) See, on this head, Bract. Lib. ii. Hargrave's Coke on Littleton, cap. 4, sect. 112. Note. Whitaker, vol. ii. p. 150–1, 2, 3, 4, 5.

(a) [*Jac. II. circa 1451, Lib. IV. Reg. Mag. Sig. No. 257.*] Ch^r. of Confn. of an Indenture made at the Burgh of Aberdene, Feb. 5. 1447, “betuix a worschipful lady, Cristiane of Stratoun of that ilke, on ye ta part, and Alex. Frog, his sonnys, and Marione, his spouse, on ye thoyr part,” in which she had “set, & to farme latyne in hir pure wedowhed” to the said Alex^r., &c. and ‘to ye langer leuer of yim, al and sindry hir landis of Stratoun and Stratounhall, with lefe and ful power to big and mak ane mylne within ye samyn landis, and for to wyn colis and stanis within ye saide landis to yair awne mast (maist or greatest?) profit, sekande as for thingis ach and to be soch (ath & to be soth?) w^t al profitis and pertinends ferme & unlawis and eschaetis to ye saide landis perteneit or may pertene, *sauf-ande andly* (allenerly or anerly) to ye said lady bludwite and merchete, for ye terme of nyntene yer fra Witsunday next folowande ye date of yr present endenturis,” paying yearly 26 markis, (6s. 8d.) &c.

perform military services, and consequently esteemed unfit to receive the military tenures, they were absolutely precluded from any inheritance till the utter extinction of the males (*b*). Hence it became requisite for them, when they did succeed, to covenant for the insertion of these returns, so that they might at least exact their equipollent in money, if unable to accept of the tenures themselves.

Thus much on the ordinary appearance of the *merchet* in a feudal charter. It is not always to be found in the same words.

In a charter of confirmation (*c*) by James III. (dated at Edinburgh, January 31. 1476, a. 7. 17.) of a feu-charter granted by "Johannes de Ila (elsewhere styled de Insula et de Insulis) dominus Insularum, dilecto nostro *nativo* (bondsmen by birth) armigero et alumpno (foster brother?), Johanni Davidsoune filio quondam Gilberti Davidsoune," of the lands of Grenaul, in the Earldom of Carrick, and shire of Ayr, dated, apud Ila, Aug. 20. 1476, the clause in question is thus introduced:—"Cum curiis et curiarum exitibus et earundem *eschaetis*, cum averagiis et carriagiis, cum *bludewitis et herezeldis*, AC *MULIERUM ESCHAETIS*." Here we have the exits and escheats of courts, the bloodwits and herezelds, as well as *escheats* of women. After the most anxious investigation, I am convinced this is a difference more in sound than sense; and that *escheat* and *merchet* imply one and the same penalty, payable alike to all superiors, whether laymen or churchmen. Thus, in a process anent Kirkcubright of Arbuthnot (in the possession of the Viscount Arbuthnot) before the synod of Perth, upon the 3d of the ides of April, A. D. 1206, between William, Bishop of St Andrews, and Duncan of Arbuthnot, Isaac Benein "depones, that in the time of Osbert Olfard, who took on the Jerusalem Cross for an expedition to the Holy Land, he farmed the King's revenue, due by the said Os-

(*b*) Whittaker, Manchester, vol. i. p. 266.

(*c*) Reg. Mag. Sig. Lib. viii. p. 1.

"bert, out of the lands of Kirkcubright; and whilst he possessed these lands, he received nothing out of the same, unless a moiety of *Bloodwicks*, and of the *Mercheta Mulierum*—the other moiety being due to the *Bishop*."

It has been suggested to me by a friend well qualified to judge, that the word "mulier" is hostile to the sentiments I have entertained of this custom of the *Mercheta*. He contends that, had it been of so gross a nature as Skene supposes, the expression would have been, "*merchetis virginum*," or "*puellarum*;" and, if intended for all the sex, "*fæminarum* or *femellarum*." With great submission, there is nothing in the objection. *Mulier* undoubtedly signifies one that is not a *maid*:—

"*Ubico gaudens mulier marito*."—HON.

and *muneratus filius*, being a son lawfully begotten, is decisive of the point. But "mulier" is likewise expressive of "woman" herself; and when it is considered that this fine was due, not by a virgin uncontracted, but by a female entering on the married state, there was not a better term to designate it by. It was a tax imposed solely for marriage; and to have continued the use of an expression such as "*puella*," where the individual was the affianced bride of another, would have been nonsense. Having married, though consummation had not followed, the female was raised into the more elevated rank of "*woman*," and, as such, was entitled to an appellation which had reference to her future, rather than her past situation.

These views may not be conclusive; and I submit them with the deference which should accompany a novel or fanciful theory.—I now come to the second stage in the history of society. In their barbarous state, mankind pursue revenge or gratification like brutes. When they advance in the scale of civilization, they see a necessity for abating somewhat in the rigour of the former, or

the keenness of the latter. Hence, in polished communities, the civil magistrate becomes the organ of punishment, and reason the check on passion. But, in the intermediate passage from their original barbarity, crimes or peculiar privileges are compensated by money or cattle. Such was the case with the Germans. (d) With ourselves, an *assythment* was paid as the price of blood (e); and such has been the practice with most modern nations (f).

The appearance of the *mercheta mulierum* in the *Regiam Majestatem* is indicative of this improvement in society, (g); because, if we allow the rite to have been so gross in its infancy, the taking of a fine in lieu of it evinces that its rudeness had begun to be seen and estimated. According to the custom of the manor of Dinover (h), in Caermarthen, every tenant, on the marriage of his daughter, paid ten shillings to the lord, which, in the British tongue, is called *Gwahr Merched*, i. e. the *maid's fee* (i). In the manor of Builth, in Radnorshire, each vassal paid a noble to the lord, at the marriage of his daughter, for *quitting* of the custom of *marcheta* (k). These instances noways militate against the supposed cruelty of the custom in its early stage. On the contrary, they are proofs it had assumed a milder character.

But the quotation from the books of the Majesty, with which I set out, has clearly reference to a previous chapter respecting the *relief* payable by a *female* vassal. From it, it would appear that the superior was bound to see his follower married; and thence, it naturally occurred, might not the *merchetum* in the subsequent passage of the same work be the very relief due for ensuring this marriage? since no female could enter into that compact without the lord's approbation (l). The idea is plausible; but

(d) Tacit.

(e) Erskine's Institutes, p. 869.

(f) L'Esprit des Loix, lib. xxx. cap. xix.

(g) See the Theory of Hôüard, Anciennes Loix des Francois, tom. i. p. 332.

(h) Bayley's Dict. fol. London, 1730.

(i) Reeve's Cyclopædia, vol. xxii.

(k) Cowell's Law Dict. voce Maiden-Rents.

(l) Gilbert's Law of Tenures, p. 23.

why distinguish so carefully between the case of a male and female tenant? Why not let the word *escheat* or *marriage*, or whatever term the casualty bore, stand for either sex? If a peculiarity did not attach to the one class more than to the other, the penalty or gratuity was already sufficiently marked, and required no additional emblem to denote it. The answer is evident: There must have been some singular demand exigible by the superior from his female ward on her assuming her lands into her own guidance, or on her marriage, the true origin of which is now totally lost to us. We must not reason, as antiquaries, on ancient feelings by modern ones. No truth can be clearer than that man, in his savage state, compels woman to undergo the most debasing servitude, and scarcely ranks her above the brute creation. The Mahomedan creed denies their existence of soul; and the benefit of clergy was not extended to them in England till the days of William and Mary (m). At no very remote period, the fair were inadmissible as witnesses in Scotland, even in a civil suit. I will conclude by an example which, I think, is tantamount to proof of the harsher features of the *Merchet*. The tenure of *Borough English* (n) is a part of the municipal law of the land. By it a younger son was brought to succeed, to the exclusion of the eldest or heir. The reason given for this inversion of the ordinary rules of succession has been this:—The eldest son was obliged to follow his leader to the wars; and it became therefore necessary to provide for the younger, as the prop who was to continue the family. All very likely; but, if I am not mistaken in saying it was a Saxon custom, was it not contrary to their usages as a feudal people? If the feudal system originated with the Teutonic nations, surely it could not have been unknown to the

(m) Kames' Sketches, vol. ii. p. 49.

(n) Robins on Gavelkind, 38, 43, 93. Blackstone's Com. vol. ii. p. 83-4. Salmon's Surrey, p. 108.

Saxons, who were of the same stem, and must be supposed to have had the same internal government. Instead of being built on an inversion of the rules of succession, I consider it, therefore, more probable that the tenure of *Borough English* originated in a desire to evade the consequences of the landlord's privilege of lying with his tenant's wife; for, as the *eldest* son would be born under an imputation of illegitimacy, the youngest, to whom no stain could attach, would be called to the succession. Something analogous to *Borough English*, I believe, prevailed among the Norwegians; but till it be made out that this tenure was of Norwegian extraction, I humbly think we must adhere to the definition above given, which has been coincided in by many writers.

A word before I close, upon the opinion respecting the *Mercheta* expressed by Dr John McPherson (*o*). He saw the folly of attributing its introduction to *Evenus*, the fabled cotemporary of Augustus Cæsar; but he has devoted several pages to overthrow what may be done in as many words; and with a singular gravity exclaims, 'It is impossible to prove that any considerable division of Caledonia was governed by a single Monarch in the Augustan age.' He is speaking of the *Scots*; for every one knows that the Caledonians or Picts were only united under one sovereign towards the fifth century; and, as for the *Scots*, they did not effect a permanent settlement in this country till the fourth age, perhaps not till A. D. 503 (*p*). *Evenus* and Augustus being cotemporaries (supposing such a man as the former to have reigned at some period over the *Scots* in Scotland) is out of the question. But the most important conjecture stated by the learned Doctor is to follow: 'Were it true (says he) that the case was otherwise, it is not credible that the Scots would have granted so extravagant a prerogative to their king, or so uncommon a privilege

(*o*) Critical Dissertations on Ancient Caledonians, p. 174-5.

(*p*) Notes to Toland's Hist. of Druids, p. 421.—Caledonia, vol. i. p. 274.—Innes's Critical Essay, vol. ii. p. 689, 694.

"to their nobility;" and his argument is built on their supposed repugnance, as a brave people, to so ignominious a custom. The Doctor has been led away by his own feelings as a modern Scot. He should have remembered that his countrymen did not at first "grant this extravagant prerogative." It was the consequence attendant on the usurpations of the nobility, when they had violated the original nature of feudal services. These were at first designed for the protection of the vassal, and the honour of the lord. They degenerated into slavish and tyrannical penalties. No where were the usurpations of the nobles more exorbitant or oppressive than in Scotland (*p*). A continued submission to these checked every aspiration after freedom; and, I doubt not, imparted the cautious and respectful deference to power which has been observed among the national characteristics. This feeling blended into one house the two bodies who should have formed distinct branches in our legislature; and deprived the commons of that liberty of speech to which England is greatly indebted. National freedom we have enjoyed; but little, I am afraid, in past ages, of individual liberty. The slavery of feudal customs is however swept away; legislative enactments have broken their authority; and this country, so long oppressed, has tasted the sweets of the change.

The subject has swelled to a greater extent than I at first anticipated. You will receive my observations, I trust, with indulgence, they being intended more to draw out others, than as affording a satisfactory elucidation of this interesting question.

(*p*) Historical Law Tracts, vol. i. tract 6. Robertson's State of Europe, Notes, p. 298.