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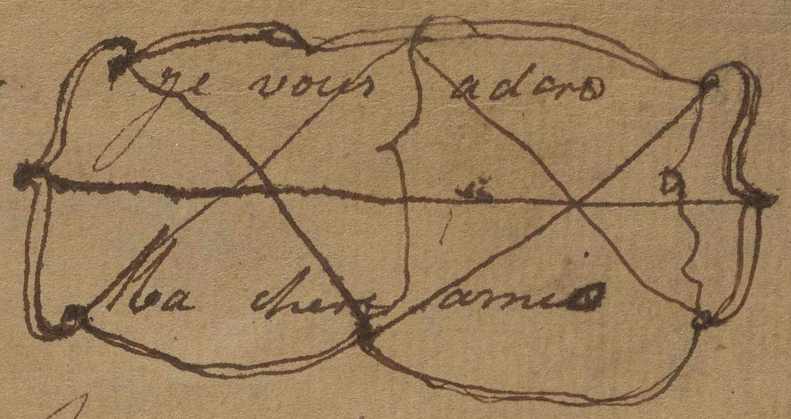

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COMMENTARIES

ON THE

LAWS

OF

ENGLAND.

BOOK THE FIRST.

BY

WILLIAM BLACKSTONE, Esq.

VINERIAN PROFESSOR OF LAW,

AND

SOLICITOR GENERAL TO HER MAJESTY.

THE THIRD EDITION.

OXFORD,

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M. DCC. LXVIII.

TO

THE QUEEN'S MOST EXCELLENT MAJESTY,

THE FOLLOWING VIEW

OF THE LAWS AND CONSTITUTION

OF ENGLAND,

THE IMPROVEMENT AND PROTECTION OF WHICH

HAVE DISTINGUISHED THE REIGN

OF HER MAJESTY'S ROYAL CONSORT,

IS,

WITH ALL GRATITUDE AND HUMILITY,

MOST RESPECTFULLY INSCRIBED

BY HER DUTIFUL

AND MOST OBEDIENT

SERVANT,

WILLIAM BLACKSTONE.

PREFACE.

THE following ſheets contain the ſubſtance of a courſe of lectures on the laws of England, which were read by the author in the univerſity of OXFORD. *His original plan took it's riſe in the year* 1753: *and, notwithſtanding the novelty of ſuch an attempt in this age and country, and the prejudices uſually conceived againſt any innovations in the eſtabliſhed mode of education, he had the ſatisfaction to find (and he acknowleges it with a mixture of pride and gratitude) that his endeavours were encouraged and patronized by thoſe, both in the univerſity and out of it, whoſe good opinion and eſteem he was principally deſirous to obtain.*

THE death of Mr VINER *in* 1756, *and his ample benefaction to the univerſity for promoting the ſtudy of the law, produced about two years afterwards a regular and public eſtabliſhment of what the author had privately un-*

 dertaken.

dertaken. The knowlege of our laws and conſtitution was adopted as a liberal ſcience by general academical authority; competent endowments were decreed for the ſupport of a lecturer, and the perpetual encouragement of ſtudents; and the compiler of the enſuing commentaries had the honour to be elected the firſt Vinerian profeſſor.

IN this ſituation he was led, both by duty and inclination, to inveſtigate the elements of the law, and the grounds of our civil polity, with greater aſſiduity and attention than many have thought it neceſſary to do. And yet all, who of late years have attended the public adminiſtration of juſtice, muſt be ſenſible that a maſterly acquaintance with the general ſpirit of laws and the principles of univerſal juriſprudence, combined with an accurate knowlege of our own municipal conſtitutions, their original, reaſon, and hiſtory, hath given a beauty and energy to many modern judicial deciſions, with which our anceſtors were wholly unacquainted. If, in the purſuit of theſe inquiries, the author hath been able to rectify any errors which either himſelf or others may have heretofore imbibed, his pains will be ſufficiently anſwered: and, if in ſome points he is ſtill miſtaken, the candid and judicious reader will make due allowances for the difficulties of a ſearch ſo new, ſo extenſive, and ſo laborious.

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THE labour indeed of these researches, and of a regular attention to his duty, for a series of so many years, he hath found inconsistent with his health, as well as his other avocations: and hath therefore desired the university's permission to retire from his office, after the conclusion of the annual course in which he is at present engaged. But the hints, which he had collected for the use of his pupils, having been thought by some of his more experienced friends not wholly unworthy of the public eye, it is therefore with the less reluctance that he now commits them to the press: though probably the little degree of reputation, which their author may have acquired by the candor of an audience (a test widely different from that of a deliberate perusal) would have been better consulted by a total suppression of his lectures; —— had that been a matter intirely within his power.

FOR the truth is, that the present publication is as much the effect of necessity, as it is of choice. The notes which were taken by his hearers, have by some of them (too partial in his favour) been thought worth revising and transcribing; and these transcripts have been frequently lent to others. Hence copies have been multiplied, in their nature imperfect, if not erroneous; some of which have fallen into mercenary hands, and become the object

of clandeſtine ſale. Having therefore ſo much reaſon to apprehend a ſurreptitious impreſſion, he choſe rather to ſubmit his own errors to the world, than to ſeem anſwerable for thoſe of other men. And, with this apology, he commits himſelf to the indulgence of the public.

2 Nov. 1765.

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COMMENTARIES

ON THE

LAWS OF ENGLAND.

INTRODUCTION.

SECTION THE FIRST.

ON THE STUDY OF THE LAW.*

MR VICE-CHANCELLOR, AND GENTLEMEN OF THE UNIVERSITY,

THE general expectation of ſo numerous and reſpectable an audience, the novelty, and (I may add) the importance of the duty required from this chair, muſt unavoidably be productive of great diffidence and apprehenſions in him who has the honour to be placed in it. He muſt be ſenſible how much will depend upon his conduct in the infancy of a ſtudy, which is now firſt adopted by public academical authority; which has generally been reputed (however unjuſtly) of a dry and unfruitful nature; and of which the theoretical, elementary parts have hitherto received a very moderate ſhare of cultivation. He cannot but reflect that, if either his plan of inſtruction be crude and injudicious, or the execution of it lame and ſuperficial, it will caſt a damp upon the farther progreſs of this moſt uſeful and moſt rational branch of learning; and may defeat for a time the public-

* Read in Oxford at the opening of the Vinerian lectures; 25 Oct. 1758.

ſpirited deſign of our wiſe and munificent benefactor. And this he muſt more eſpecially dread, when he feels by experience how unequal his abilities are (unaſſiſted by preceding examples) to complete, in the manner he could wiſh, ſo extenſive and arduous a taſk; ſince he freely confeſſes, that his former more private attempts have fallen very ſhort of his own ideas of perfection. And yet the candour he has already experienced, and this laſt tranſcendent mark of regard, his preſent nomination by the free and unanimous ſuffrage of a great and learned univerſity, (an honour to be ever remembered with the deepeſt and moſt affectionate gratitude) theſe teſtimonies of your public judgment muſt entirely ſuperſede his own, and forbid him to believe himſelf totally inſufficient for the labour at leaſt of this employment. One thing he will venture to hope for, and it certainly ſhall be his conſtant aim, by diligence and attention to atone for his other defects; eſteeming, that the beſt return, which he can poſſibly make for your favourable opinion of his capacity, will be his unwearied endeavours in ſome little degree to deſerve it.

THE ſcience thus committed to his charge, to be cultivated, methodized, and explained in a courſe of academical lectures, is that of the laws and conſtitution of our own country: a ſpecies of knowlege, in which the gentlemen of England have been more remarkably deficient than thoſe of all Europe beſides. In moſt of the nations on the continent, where the civil or imperial law under different modifications is cloſely interwoven with the municipal laws of the land, no gentleman, or at leaſt no ſcholar, thinks his education is completed, till he has attended a courſe or two of lectures, both upon the inſtitutes of Juſtinian and the local conſtitutions of his native ſoil, under the very eminent profeſſors that abound in their ſeveral univerſities. And in the northern parts of our own iſland, where alſo the municipal laws are frequently connected with the civil, it is difficult to meet with a perſon of liberal education, who is deſtitute of a competent knowlege in that ſcience, which is to be the guardian of his natural rights and the rule of his civil conduct.

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NOR have the imperial laws been totally neglected even in the Engliſh nation. A general acquaintance with their deciſions has ever been deſervedly conſidered as no ſmall accompliſhment of a gentleman; and a faſhion has prevailed, eſpecially of late, to tranſport the growing hopes of this iſland to foreign univerſities, in Switzerland, Germany, and Holland; which, though infinitely inferior to our own in every other conſideration, have been looked upon as better nurſeries of the civil, or (which is nearly the ſame) of their own municipal law. In the mean time it has been the peculiar lot of our admirable ſyſtem of laws, to be neglected, and even unknown, by all but one practical profeſſion; though built upon the ſoundeſt foundations, and approved by the experience of ages.

FAR be it from me to derogate from the ſtudy of the civil law, conſidered (apart from any binding authority) as a collection of written reaſon. No man is more thoroughly perſuaded of the general excellence of it's rules, and the uſual equity of it's deciſions, nor is better convinced of it's uſe as well as ornament to the ſcholar, the divine, the ſtateſman, and even the common lawyer. But we muſt not carry our veneration ſo far as to ſacrifice our Alfred and Edward to the manes of Theodoſius and Juſtinian: we muſt not prefer the edict of the praetor, or the reſcript of the Roman emperor, to our own immemorial cuſtoms, or the ſanctions of an Engliſh parliament; unleſs we can alſo prefer the deſpotic monarchy of Rome and Byzantium, for whoſe meridians the former were calculated, to the free conſtitution of Britain, which the latter are adapted to perpetuate.

WITHOUT detracting therefore from the real merit which abounds in the imperial law, I hope I may have leave to aſſert, that if an Engliſhman muſt be ignorant of either the one or the other, he had better be a ſtranger to the Roman than the Engliſh inſtitutions. For I think it an undeniable poſition, that a competent knowlege of the laws of that ſociety, in which we live,

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is the proper accompliſhment of every gentleman and ſcholar; an highly uſeful, I had almoſt ſaid eſſential, part of liberal and polite education. And in this I am warranted by the example of antient Rome; where, as Cicero informs us[a], the very boys were obliged to learn the twelve tables by heart, as a *carmen neceſſarium* or indiſpenſable leſſon, to imprint on their tender minds an early knowlege of the laws and conſtitutions of their country.

BUT as the long and univerſal neglect of this ſtudy, with us in England, ſeems in ſome degree to call in queſtion the truth of this evident poſition, it ſhall therefore be the buſineſs of this introductory diſcourſe, in the firſt place to demonſtrate the utility of ſome general acquaintance with the municipal law of the land, by pointing out it's particular uſes in all conſiderable ſituations of life. Some conjectures will then be offered with regard to the cauſes of neglecting this uſeful ſtudy: to which will be ſubjoined a few reflexions on the peculiar propriety of reviving it in our own univerſities.

AND, firſt, to demonſtrate the utility of ſome acquaintance with the laws of the land, let us only reflect a moment on the ſingular frame and polity of that land, which is governed by this ſyſtem of laws. A land, perhaps the only one in the univerſe, in which political or civil liberty is the very end and ſcope of the conſtitution[b]. This liberty, rightly underſtood, conſiſts in the power of doing whatever the laws permit[c]; which is only to be effected by a general conformity of all orders and degrees to thoſe equitable rules of action, by which the meaneſt individual is protected from the inſults and oppreſſion of the greateſt. As therefore every ſubject is intereſted in the preſervation of the laws, it is incumbent upon every man to be acquainted with thoſe at leaſt, with which he is immediately concerned; leſt he incur the cenſure, as well as inconvenience, of living in ſociety without knowing the obligations which it lays him under. And thus much

[a] *De Legg.* 2. 23.
[b] Monteſq. *Eſp. L. l.* 11. *c.* 5.
[c] *Facultas ejus, quod cuique facere libet, niſi quid vi, aut jure prohibetur. Inſt.* 1. 3. 1.

may

may ſuffice for perſons of inferior condition, who have neither time nor capacity to enlarge their views beyond that contracted ſphere in which they are appointed to move. But thoſe, on whom nature and fortune have beſtowed more abilities and greater leiſure, cannot be ſo eaſily excuſed. Theſe advantages are given them, not for the benefit of themſelves only, but alſo of the public: and yet they cannot, in any ſcene of life, diſcharge properly their duty either to the public or themſelves, without ſome degree of knowlege in the laws. To evince this the more clearly, it may not be amiſs to deſcend to a few particulars.

LET us therefore begin with our gentlemen of independent eſtates and fortune, the moſt uſeful as well as conſiderable body of men in the nation; whom even to ſuppoſe ignorant in this branch of learning is treated by Mr Locke[d] as a ſtrange abſurdity. It is their landed property, with it's long and voluminous train of deſcents and conveyances, ſettlements, entails, and incumbrances, that forms the moſt intricate and moſt extenſive object of legal knowlege. The thorough comprehenſion of theſe, in all their minute diſtinctions, is perhaps too laborious a taſk for any but a lawyer by profeſſion: yet ſtill the underſtanding of a few leading principles, relating to eſtates and conveyancing, may form ſome check and guard upon a gentleman's inferior agents, and preſerve him at leaſt from very groſs and notorious impoſition.

AGAIN, the policy of all laws has made ſome forms neceſſary in the wording of laſt wills and teſtaments, and more with regard to their atteſtation. An ignorance in theſe muſt always be of dangerous conſequence, to ſuch as by choice or neceſſity compile their own teſtaments without any technical aſſiſtance. Thoſe who have attended the courts of juſtice are the beſt witneſſes of the confuſion and diſtreſſes that are hereby occaſioned in families; and of the difficulties that ariſe in diſcerning the true meaning

[d] Education. §. 187.

of

of the teſtator, or ſometimes in diſcovering any meaning at all: ſo that in the end his eſtate may often be veſted quite contrary to theſe his enigmatical intentions, becauſe perhaps he has omitted one or two formal words, which are neceſſary to aſcertain the ſenſe with indiſputable legal preciſion, or has executed his will in the preſence of fewer witneſſes than the law requires.

BUT to proceed from private concerns to thoſe of a more public conſideration. All gentlemen of fortune are, in conſequence of their property, liable to be called upon to eſtabliſh the rights, to eſtimate the injuries, to weigh the accuſations, and ſometimes to diſpoſe of the lives of their fellow-ſubjects, by ſerving upon juries. In this ſituation they have frequently a right to decide, and that upon their oaths, queſtions of nice importance, in the ſolution of which ſome legal ſkill is requiſite; eſpecially where the law and the fact, as it often happens, are intimately blended together. And the general incapacity, even of our beſt juries, to do this with any tolerable propriety has greatly debaſed their authority; and has unavoidably thrown more power into the hands of the judges, to direct, control, and even reverſe their verdicts, than perhaps the conſtitution intended.

BUT it is not as a juror only that the Engliſh gentleman is called upon to determine queſtions of right, and diſtribute juſtice to his fellow-ſubjects: it is principally with this order of men that the commiſſion of the peace is filled. And here a very ample field is opened for a gentleman to exert his talents, by maintaining good order in his neighbourhood; by puniſhing the diſſolute and idle; by protecting the peaceable and induſtrious; and, above all, by healing petty differences and preventing vexatious proſecutions. But, in order to attain theſe deſirable ends, it is neceſſary that the magiſtrate ſhould underſtand his buſineſs; and have not only the will, but the power alſo, (under which muſt be included the knowlege) of adminiſtring legal and effectual juſtice. Elſe, when he has miſtaken his authority, through paſſion, through ignorance, or abſurdity, he will be the object of contempt

contempt from his inferiors, and of cenſure from thoſe to whom he is accountable for his conduct.

YET farther; moſt gentlemen of conſiderable property, at ſome period or other in their lives, are ambitious of repreſenting their country in parliament: and thoſe, who are ambitious of receiving ſo high a truſt, would alſo do well to remember it's nature and importance. They are not thus honourably diſtinguiſhed from the reſt of their fellow-ſubjects, merely that they may privilege their perſons, their eſtates, or their domeſtics; that they may liſt under party banners; may grant or with-hold ſupplies; may vote with or vote againſt a popular or unpopular adminiſtration; but upon conſiderations far more intereſting and important. They are the guardians of the Engliſh conſtitution; the makers, repealers, and interpreters of the Engliſh laws; delegated to watch, to check, and to avert every dangerous innovation, to propoſe, to adopt, and to cheriſh any ſolid and well-weighed improvement; bound by every tie of nature, of honour, and of religion, to tranſmit that conſtitution and thoſe laws to their poſterity, amended if poſſible, at leaſt without any derogation. And how unbecoming muſt it appear in a member of the legiſlature to vote for a new law, who is utterly ignorant of the old! what kind of interpretation can he be enabled to give, who is a ſtranger to the text upon which he comments!

INDEED it is perfectly amazing, that there ſhould be no other ſtate of life, no other occupation, art, or ſcience, in which ſome method of inſtruction is not looked upon as requiſite, except only the ſcience of legiſlation, the nobleſt and moſt difficult of any. Apprenticeſhips are held neceſſary to almoſt every art, commercial or mechanical: a long courſe of reading and ſtudy muſt form the divine, the phyſician, and the practical profeſſor of the laws: but every man of ſuperior fortune thinks himſelf *born* a legiſlator. Yet Tully was of a different opinion: "it is neceſ-

"fary, ſays he[e], for a ſenator to be thoroughly acquainted with "the conſtitution; and this, he declares, is a knowlege of the "moſt extenſive nature; a matter of ſcience, of diligence, of "reflexion; without which no ſenator can poſſibly be fit for his "office."

THE miſchiefs that have ariſen to the public from inconſiderate alterations in our laws, are too obvious to be called in queſtion; and how far they have been owing to the defective education of our ſenators, is a point well worthy the public attention. The common law of England has fared like other venerable edifices of antiquity, which raſh and unexperienced workmen have ventured to new-dreſs and refine, with all the rage of modern improvement. Hence frequently it's ſymmetry has been deſtroyed, it's proportions diſtorted, and it's majeſtic ſimplicity exchanged for ſpecious embelliſhments and fantaſtic novelties. For, to ſay the truth, almoſt all the perplexed queſtions, almoſt all the niceties, intricacies, and delays (which have ſometimes diſgraced the Engliſh, as well as other, courts of juſtice) owe their original not to the common law itſelf, but to innovations that have been made in it by acts of parliament; "overladen (as ſir Edward "Coke expreſſes it[f]) with proviſoes and additions, and many "times on a ſudden penned or corrected by men of none or very "little judgment in law." This great and well-experienced judge declares, that in all his time he never knew two queſtions made upon rights merely depending upon the common law; and warmly laments the confuſion introduced by ill-judging and unlearned legiſlators. "But if, he ſubjoins, acts of parliament were "after the old faſhion penned, by ſuch only as perfectly knew "what the common law was before the making of any act of "parliament concerning that matter, as alſo how far forth for"mer ſtatutes had provided remedy for former miſchiefs, and "defects diſcovered by experience; then ſhould very few queſ-

[e] *De Legg.* 3. 18. *Eſt ſenatori neceſſarium noſſe rempublicam; idque late patet: — genus hoc omne ſcientiae, diligentiae, memoriae eſt; ſine quo paratus eſſe ſenator nullo pacto poteſt.*

[f] 2 Rep. Pref.

"tions

"tions in law ariſe, and the learned ſhould not ſo often and ſo "much perplex their heads to make atonement and peace, by "conſtruction of law, between inſenſible and diſagreeing words, "ſentences, and proviſoes, as they now do." And if this inconvenience was ſo heavily felt in the reign of queen Elizabeth, you may judge how the evil is increaſed in later times, when the ſtatute book is ſwelled to ten times a larger bulk; unleſs it ſhould be found, that the penners of our modern ſtatutes have proportionably better informed themſelves in the knowlege of the common law.

WHAT is ſaid of our gentlemen in general, and the propriety of their application to the ſtudy of the laws of their country, will hold equally ſtrong or ſtill ſtronger with regard to the nobility of this realm, except only in the article of ſerving upon juries. But, inſtead of this, they have ſeveral peculiar provinces of far greater conſequence and concern; being not only by birth hereditary counſellors of the crown, and judges upon their honour of the lives of their brother-peers, but alſo arbiters of the property of all their fellow-ſubjects, and that in the laſt reſort. In this their judicial capacity they are bound to decide the niceſt and moſt critical points of the law; to examine and correct ſuch errors as have eſcaped the moſt experienced ſages of the profeſſion, the lord keeper and the judges of the courts at Weſtminſter. Their ſentence is final, deciſive, irrevocable: no appeal, no correction, not even a review can be had: and to their determination, whatever it be, the inferior courts of juſtice muſt conform; otherwiſe the rule of property would no longer be uniform and ſteady.

SHOULD a judge in the moſt ſubordinate juriſdiction be deficient in the knowlege of the law, it would reflect infinite contempt upon himſelf and diſgrace upon thoſe who employ him. And yet the conſequence of his ignorance is comparatively very trifling and ſmall: his judgment may be examined, and his errors rectified, by other courts. But how much more ſerious and

affecting is the caſe of a ſuperior judge, if without any ſkill in the laws he will boldly venture to decide a queſtion, upon which the welfare and ſubſiſtence of whole families may depend! where the chance of his judging right, or wrong, is barely equal; and where, if he chances to judge wrong, he does an injury of the moſt alarming nature, an injury without poſſibility of redreſs!

YET, vaſt as this truſt is, it can no where be ſo properly repoſed as in the noble hands where our excellent conſtitution has placed it: and therefore placed it, becauſe, from the independence of their fortune and the dignity of their ſtation, they are preſumed to employ that leiſure which is the conſequence of both, in attaining a more extenſive knowlege of the laws than perſons of inferior rank: and becauſe the founders of our polity relied upon that delicacy of ſentiment, ſo peculiar to noble birth; which, as on the one hand it will prevent either intereſt or affection from interfering in queſtions of right, ſo on the other it will bind a peer in honour, an obligation which the law eſteems equal to another's oath, to be maſter of thoſe points upon which it is his birthright to decide.

THE Roman pandects will furniſh us with a piece of hiſtory not unapplicable to our preſent purpoſe. Servius Sulpicius, a gentleman of the patrician order, and a celebrated orator, had occaſion to take the opinion of Quintus Mutius Scaevola, the oracle of the Roman law; but for want of ſome knowlege in that ſcience, could not ſo much as underſtand even the technical terms, which his friend was obliged to make uſe of. Upon which Mutius Scaevola could not forbear to upbraid him with this memorable reproof[g], "that it was a ſhame for a patrician, a noble-"man, and an orator of cauſes, to be ignorant of that law in "which he was ſo peculiarly concerned." This reproach made ſo deep an impreſſion on Sulpicius, that he immediately applied himſelf to the ſtudy of the law; wherein he arrived to that pro-

[g] *Ff.* 1. 2. 2. §. 43. *Turpe eſſe patricio, et nobili, et cauſas oranti, jus in quo verſaretur ignorare.*

ficiency,

ficiency, that he left behind him about a hundred and fourſcore volumes of his own compiling upon the ſubject; and became, in the opinion of Cicero[h], a much more complete lawyer than even Mutius Scaevola himſelf.

I WOULD not be thought to recommend to our Engliſh nobility and gentry to become as great lawyers as Sulpicius; though he, together with this character, ſuſtained likewiſe that of an excellent orator, a firm patriot, and a wiſe indefatigable ſenator; but the inference which ariſes from the ſtory is this, that ignorance of the laws of the land hath ever been eſteemed diſhonourable, in thoſe who are entruſted by their country to maintain, to adminiſter, and to amend them.

BUT ſurely there is little occaſion to enforce this argument any farther to perſons of rank and diſtinction, if we of this place may be allowed to form a general judgment from thoſe who are under our inſpection: happy, that while we lay down the rule, we can alſo produce the example. You will therefore permit your profeſſor to indulge both a public and private ſatisfaction, by bearing this open teſtimony; that in the infancy of theſe ſtudies among us, they were favoured with the moſt diligent attendance, and purſued with the moſt unwearied application, by thoſe of the nobleſt birth and moſt ample patrimony: ſome of whom are ſtill the ornaments of this ſeat of learning; and others at a greater diſtance continue doing honour to it's inſtitutions, by comparing our polity and laws with thoſe of other kingdoms abroad, or exerting their ſenatorial abilities in the councils of the nation at home.

NOR will ſome degree of legal knowlege be found in the leaſt ſuperfluous to perſons of inferior rank; eſpecially thoſe of the learned profeſſions. The clergy in particular, beſides the common obligations they are under in proportion to their rank and fortune, have alſo abundant reaſon, conſidered merely as clergy-

[h] *Brut.* 41.

men,

men, to be acquainted with many branches of the law, which are almoſt peculiar and appropriated to themſelves alone. Such are the laws relating to advowſons, inſtitutions, and inductions; to ſimony, and ſimoniacal contracts; to uniformity, reſidence, and pluralities; to tithes and other eccleſiaſtical dues; to marriages (more eſpecially of late) and to a variety of other ſubjects, which are conſigned to the care of their order by the proviſions of particular ſtatutes. To underſtand theſe aright, to diſcern what is warranted or enjoined, and what is forbidden by law, demands a ſort of legal apprehenſion; which is no otherwiſe to be acquired than by uſe and a familiar acquaintance with legal writers.

FOR the gentlemen of the faculty of phyſic, I muſt frankly own that I ſee no ſpecial reaſon, why they in particular ſhould apply themſelves to the ſtudy of the law; unleſs in common with other gentlemen, and to complete the character of general and extenſive knowlege; a character which their profeſſion, beyond others, has remarkably deſerved. They will give me leave however to ſuggeſt, and that not ludicrouſly, that it might frequently be of uſe to families upon ſudden emergencies, if the phyſician were acquainted with the doctrine of laſt wills and teſtaments, at leaſt ſo far as relates to the formal part of their execution.

BUT thoſe gentlemen who intend to profeſs the civil and eccleſiaſtical laws in the ſpiritual and maritime courts of this kingdom, are of all men (next to common lawyers) the moſt indiſpenſably obliged to apply themſelves ſeriouſly to the ſtudy of our municipal laws. For the civil and canon laws, conſidered with reſpect to any intrinſic obligation, have no force or authority in this kingdom; they are no more binding in England than our laws are binding at Rome. But as far as theſe foreign laws, on account of ſome peculiar propriety, have in ſome particular caſes, and in ſome particular courts, been introduced and allowed by our laws, ſo far they oblige, and no farther; their authority being wholly founded upon that permiſſion and adoption. In which we are not ſingular in our notions: for even in Holland, where the imperial

imperial law is much cultivated and it's deciſions pretty generally followed, we are informed by Van Leeuwen [i], that, "it receives "it's force from cuſtom and the conſent of the people, either ta- "citly or expreſſly given: for otherwiſe, he adds, we ſhould no "more be bound by this law, than by that of the Almains, the "Franks, the Saxons, the Goths, the Vandals, and other of the "antient nations." Wherefore, in all points in which the diffe- rent ſyſtems depart from each other, the law of the land takes place of the law of Rome, whether antient or modern, imperial or pontificial. And in thoſe of our Engliſh courts wherein a re- ception has been allowed to the civil and canon laws, if either they exceed the bounds of that reception, by extending them- ſelves to other matters, than are permitted to them; or if ſuch courts proceed according to the deciſions of thoſe laws, in caſes wherein it is controlled by the law of the land, the common law in either inſtance both may, and frequently does, prohibit and annul their proceedings [k]: and it will not be a ſufficient excuſe for them to tell the king's courts at Weſtminſter, that their prac- tice is warranted by the laws of Juſtinian or Gregory, or is con- formable to the decrees of the Rota or imperial chamber. For which reaſon it becomes highly neceſſary for every civilian and canoniſt that would act with ſafety as a judge, or with prudence and reputation as an advocate, to know in what caſes and how far the Engliſh laws have given ſanction to the Roman; in what points the latter are rejected; and where they are both ſo inter- mixed and blended together, as to form certain ſupplemental parts of the common law of England, diſtinguiſhed by the titles of the king's maritime, the king's military, and the king's eccle- ſiaſtical law. The propriety of which enquiry the univerſity of Oxford has for more than a century ſo thoroughly ſeen, that in her ſtatutes [l] ſhe appoints, that one of the three queſtions to be annually diſcuſſed at the act by the juriſt-inceptors ſhall relate to the common law; ſubjoining this reaſon, "*quia juris civilis ſtu-* "*dioſos decet haud imperitos eſſe juris municipalis, et differentias ex-*

[i] *Dedicatio corporis juris civilis. Edit.* 1663.
[k] Hale. Hiſt. C. L. c. 2. Selden *in Fle-* *tam.* 5 Rep. Caudrey's caſe. 2 Inſt. 599.
[l] *Tit. VII. Sect.* 2. §. 2.

"*teri*

"*teri patriique juris notas habere.*" And the ſtatutes[m] of the univerſity of Cambridge ſpeak expreſſly to the ſame effect.

FROM the general uſe and neceſſity of ſome acquaintance with the common law, the inference were extremely eaſy, with regard to the propriety of the preſent inſtitution, in a place to which gentlemen of all ranks and degrees reſort, as the fountain of all uſeful knowlege. But how it has come to paſs that a deſign of this ſort has never before taken place in the univerſity, and the reaſon why the ſtudy of our laws has in general fallen into diſuſe, I ſhall previouſly proceed to enquire.

SIR John Forteſcue, in his panegyric on the laws of England, (which was written in the reign of Henry the ſixth) puts[n] a very obvious queſtion in the mouth of the young prince, whom he is exhorting to apply himſelf to that branch of learning; "why the "laws of England, being ſo good, ſo fruitful, and ſo commo- "dious, are not taught in the univerſities, as the civil and canon "laws are?" In anſwer to which he gives[o] what ſeems, with due deference be it ſpoken, a very jejune and unſatisfactory reaſon; being in ſhort, that "as the proceedings at common law "were in his time carried on in three different tongues, the "Engliſh, the Latin, and the French, that ſcience muſt be ne- "ceſſarily taught in thoſe three ſeveral languages; but that in "the univerſities all ſciences were taught in the Latin tongue "only; and therefore he concludes, that they could not be con- "veniently taught or ſtudied in our univerſities." But without attempting to examine ſeriouſly the validity of this reaſon, (the very ſhadow of which by the wiſdom of your late conſtitutions is entirely taken away) we perhaps may find out a better, or at leaſt a more plauſible account, why the ſtudy of the municipal laws has been baniſhed from theſe ſeats of ſcience, than what the learned chancellor thought it prudent to give to his royal pupil.

[m] *Doctor legum mox a doctoratu dabit operam legibus Angliae, ut non ſit imperitus earum legum quas habet ſua patria, et differentias exteri patriique juris noſcat.* *Stat.* Eliz. *R.* *c.* 14. Cowel. *Inſtitut. in proëmio.*

[n] *c.* 47. [o] *c.* 48.

THAT

THAT antient collection of unwritten maxims and cuſtoms, which is called the common law, however compounded or from whatever fountains derived, had ſubſiſted immemorially in this kingdom; and, though ſomewhat altered and impaired by the violence of the times, had in great meaſure weathered the rude ſhock of the Norman conqueſt. This had endeared it to the people in general, as well becauſe it's deciſions were univerſally known, as becauſe it was found to be excellently adapted to the genius of the Engliſh nation. In the knowlege of this law conſiſted great part of the learning of thoſe dark ages; it was then taught, ſays Mr Selden[p], in the monaſteries, *in the univerſities*, and in the families of the principal nobility. The clergy in particular, as they then engroſſed almoſt every other branch of learning, ſo (like their predeceſſors the Britiſh druids[q]) they were peculiarly remarkable for their proficiency in the ſtudy of the law. *Nullus clericus niſi cauſidicus*, is the character given of them ſoon after the conqueſt by William of Malmſbury[r]. The judges therefore were uſually created out of the ſacred order[s], as was likewiſe the caſe among the Normans[t]; and all the inferior offices were ſupplied by the lower clergy, which has occaſioned their ſucceſſors to be denominated *clerks* to this day.

BUT the common law of England, being not committed to writing, but only handed down by tradition, uſe, and experience, was not ſo heartily reliſhed by the foreign clergy; who came over hither in ſhoals during the reign of the conqueror and his two ſons, and were utter ſtrangers to our conſtitution as well as our language. And an accident, which ſoon after happened, had nearly completed it's ruin. A copy of Juſtinian's pandects, being newly[u] diſcovered at Amalfi, ſoon brought the civil law into

[p] *in Fletam.* 7. 7.

[q] Caeſar *de bello Gal.* 6. 12.

[r] *de geſt. reg. l.* 4.

[s] Dugdale *Orig. jurid. c.* 8.

[t] *Les juges ſont ſages perſonnes et autentiques, — ſicome les archeveſques, eveſques, les chanoines les egliſes cathedraulx, et les autres perſonnes qui ont dignitez in ſaincte egliſe; les abbez, les prieurs conventaulx, et les gouverneurs des egliſes, &c. Grand Couſtumier, ch.* 9.

[u] *circ. A. D.* 1130.

vogue all over the weſt of Europe, where before it was quite laid aſide[w] and in a manner forgotten; though ſome traces of it's authority remained in Italy[x] and the eaſtern provinces of the empire[y]. This now became in a particular manner the favourite of the popiſh clergy, who borrowed the method and many of the maxims of their canon law from this original. The ſtudy of it was introduced into ſeveral univerſities abroad, particularly that of Bologna; where exerciſes were performed, lectures read, and degrees conferred in this faculty, as in other branches of ſcience: and many nations on the continent, juſt then beginning to recover from the convulſions conſequent upon the overthrow of the Roman empire, and ſettling by degrees into peaceable forms of government, adopted the civil law, (being the beſt written ſyſtem then extant) as the baſis of their ſeveral conſtitutions; blending and interweaving it among their own feodal cuſtoms, in ſome places with a more extenſive, in others a more confined authority[z].

NOR was it long before the prevailing mode of the times reached England. For Theobald, a Norman abbot, being elected to the ſee of Canterbury[a], and extremely addicted to this new ſtudy, brought over with him in his retinue many learned proficients therein; and among the reſt Roger ſirnamed Vacarius, whom he placed in the univerſity of Oxford[b], to teach it to the people of this country. But it did not meet with the ſame eaſy reception in England, where a mild and rational ſyſtem of laws had been long eſtabliſhed, as it did upon the continent; and, though the monkiſh clergy (devoted to the will of a foreign primate) received it with eagerneſs and zeal, yet the laity who were more intereſted to preſerve the old conſtitution, and had already ſeverely felt the effect of many Norman innovations, continued wedded to the uſe of the common law. King Stephen imme-

[w] *LL. Wiſigoth.* 2. 1. 9.
[x] *Capitular. Hludov. Pii.* 4. 102.
[y] Selden *in Fletam.* 5. 5.
[z] Domat's treatiſe of law. c. 13. §. 9. *Epiſtol. Innocent. IV. in M. Paris. ad A.D.* 1254.
[a] *A.D.* 1138.
[b] Gervaſ. Dorobern. *Act. Pontif. Cantuar. col.* 1665.

diately

diately publiſhed a proclamation [c], forbidding the ſtudy of the laws, then newly imported from Italy; which was treated by the monks [d] as a piece of impiety, and, though it might prevent the introduction of the civil law proceſs into our courts of juſtice, yet did not hinder the clergy from reading and teaching it in their own ſchools and monaſteries.

FROM this time the nation ſeems to have been divided into two parties; the biſhops and clergy, many of them foreigners, who applied themſelves wholly to the ſtudy of the civil and canon laws, which now came to be inſeparably interwoven with each other; and the nobility and laity, who adhered with equal pertinacity to the old common law; both of them reciprocally jealous of what they were unacquainted with, and neither of them perhaps allowing the oppoſite ſyſtem that real merit which is abundantly to be found in each. This appears on the one hand from the ſpleen with which the monaſtic writers [e] ſpeak of our municipal laws upon all occaſions; and, on the other, from the firm temper which the nobility ſhewed at the famous parliament of Merton; when the prelates endeavoured to procure an act, to declare all baſtards legitimate in caſe the parents intermarried at any time afterwards; alleging this only reaſon, becauſe holy church (that is, the canon law) declared ſuch children legitimate: but "all the earls and barons (ſays the parliament roll [f]) "with one voice anſwered, that they would not change the laws "of England, which had hitherto been uſed and approved." And we find the ſame jealouſy prevailing above a century afterwards [g], when the nobility declared with a kind of prophetic ſpirit, "that the realm of England hath never been unto this "hour, neither by the conſent of our lord the king and the lords "of parliament ſhall it ever be, ruled or governed by the civil

[c] Rog. Bacon. *citat. per* Selden. *in Fletam.* 7. 6. *in Forteſc. c.* 33. & 8 Rep. Pref.

[d] Joan. Sariſburiens. *Polycrat.* 8. 22.

[e] *Idem, ibid.* 5. 16. Polydor. Vergil. *Hiſt. l.* 9.

[f] *Stat. Merton.* 20 *Hen. III. c.* 9. *Et omnes comites et barones una voce reſponderunt, quod nolunt leges Angliae mutare, quae hucuſque uſitatae ſunt et approbatae.*

[g] 11 Ric. II.

"law [h]."

"law[h]." And of this temper between the clergy and laity many more inſtances might be given.

WHILE things were in this ſituation, the clergy, finding it impoſſible to root out the municipal law, began to withdraw themſelves by degrees from the temporal courts; and to that end, very early in the reign of king Henry the third, epiſcopal conſtitutions were publiſhed[i], forbidding all eccleſiaſtics to appear as advocates *in foro ſaeculari*; nor did they long continue to act as judges there, not caring to take the oath of office which was then found neceſſary to be adminiſtred, that they ſhould in all things determine according to the law and cuſtom of this realm[k]; though they ſtill kept poſſeſſion of the high office of chancellor, an office then of little juridical power; and afterwards, as it's buſineſs increaſed by degrees, they modelled the proceſs of the court at their own diſcretion.

BUT wherever they retired, and wherever their authority extended, they carried with them the ſame zeal to introduce the rules of the civil, in excluſion of the municipal law. This appears in a particular manner from the ſpiritual courts of all denominations, from the chancellor's courts in both our univerſities, and from the high court of chancery before-mentioned; in all of which the proceedings are to this day in a courſe much conformed to the civil law: for which no tolerable reaſon can be aſſigned, unleſs that theſe courts were all under the immediate direction of the popiſh eccleſiaſtics, among whom it was a point of religion to exclude the municipal law; pope Innocent the fourth having forbidden[l] the very reading of it by the clergy, becauſe it's deciſions were not founded on the imperial conſtitutions, but merely on the cuſtoms of the laity. And if it be conſidered, that our univerſities began about that period to receive their preſent form of ſcholaſtic diſcipline; that they were then, and continued to

[h] Selden. *Jan. Anglor. l.* 2. §. 43. *in Fortesc. c.* 33.

[i] Spelman. *Concil. A. D.* 1217. Wilkins, *vol.* 1. *p.* 574. 599.

[k] Selden. *in Fletam.* 9. 3.

[l] M. Paris *ad A. D.* 1254.

be

be till the time of the reformation, entirely under the influence of the popiſh clergy; (ſir John Maſon the firſt proteſtant, being alſo the firſt lay, chancellor of Oxford) this will lead us to perceive the reaſon, why the ſtudy of the Roman laws was in thoſe days of bigotry [m] purſued with ſuch alacrity in theſe ſeats of learning; and why the common law was entirely deſpiſed, and eſteemed little better than heretical.

AND, ſince the reformation, many cauſes have conſpired to prevent it's becoming a part of academical education. As, firſt, long uſage and eſtabliſhed cuſtom; which, as in every thing elſe, ſo eſpecially in the forms of ſcholaſtic exerciſe, have juſtly great weight and authority. Secondly, the real intrinſic merit of the civil law, conſidered upon the footing of reaſon and not of obligation, which was well known to the inſtructors of our youth; and their total ignorance of the merit of the common law, though it's equal at leaſt, and perhaps an improvement on the other. But the principal reaſon of all, that has hindered the introduction of this branch of learning, is, that the ſtudy of the common law, being baniſhed from hence in the times of popery, has fallen into a quite different chanel, and has hitherto been wholly cultivated in another place. But as this long uſage and eſtabliſhed cuſtom, of ignorance in the laws of the land, begin now to be thought unreaſonable; and as by this means the merit of thoſe

[m] There cannot be a ſtronger inſtance of the abſurd and ſuperſtitious veneration that was paid to theſe laws, than that the moſt learned writers of the times thought they could not form a perfect character, even of the bleſſed virgin, without making her a civilian and a canoniſt. Which Albertus Magnus, the renowned dominican doctor of the thirteenth century, thus proves in his *Summa de laudibus chriſtiferae virginis (divinum magis quam humanum opus) qu.* 23. §. 5. "*Item quod jura civilia, & leges, & decreta* "*ſcivit in ſummo, probatur hoc modo: ſapien-* "*tia advocati manifeſtatur in tribus; unum,* "*quod obtineat omnia contra judicem juſtum &* "*ſapientem; ſecundo, quod contra adverſarium* "*aſtutum & ſagacem; tertio, quod in cauſa* "*deſperata: ſed beatiſſima virgo, contra ju-* "*dicem ſapientiſſimum, Dominum; contra ad-* "*verſarium callidiſſimum, dyabolum; in cauſa* "*noſtra deſperata; ſententiam optatam obti-* "*nuit.*" To which an eminent franciſcan, two centuries afterwards, Bernardinus de Buſti (*Mariale, part.* 4. *ſerm.* 9.) very gravely ſubjoins this note. "*Nec videtur incongruum* "*mulieres habere peritiam juris. Legitur enim* "*de uxore Joannis Andreae gloſſatoris, quod* "*tantam peritiam in utroque jure habuit, ut* "*publice in ſcholis legere auſa ſit.*

laws

laws will probably be more generally known; we may hope that the method of ſtudying them will ſoon revert to it's antient courſe, and the foundations at leaſt of that ſcience will be laid in the two univerſities; without being excluſively confined to the chanel which it fell into at the times I have been juſt deſcribing.

FOR, being then entirely abandoned by the clergy, a few ſtragglers excepted, the ſtudy and practice of it devolved of courſe into the hands of laymen; who entertained upon their parts a moſt hearty averſion to the civil law[n], and made no ſcruple to profeſs their contempt, nay even their ignorance[o] of it, in the moſt public manner. But ſtill, as the ballance of learning was greatly on the ſide of the clergy, and as the common law was no longer *taught*, as formerly, in any part of the kingdom, it muſt have been ſubjected to many inconveniences, and perhaps would have been gradually loſt and overrun by the civil, (a ſuſpicion well juſtified from the frequent tranſcripts of Juſtinian to be met with in Bracton and Fleta) had it not been for a peculiar incident, which happened at a very critical time, and contributed greatly to it's ſupport.

THE incident I mean was the fixing the court of common pleas, the grand tribunal for diſputes of property, to be held in one certain ſpot; that the ſeat of ordinary juſtice might be permanent and notorious to all the nation. Formerly that, in conjunction with all the other ſuperior courts, was held before the

[n] Forteſc. *de laud. LL. c.* 25.

[o] This remarkably appeared in the caſe of the abbot of Torun, *M.* 22 *Edw. III.* 24. who had cauſed a certain prior to be ſummoned to anſwer at Avignon for erecting an oratory *contra inhibitionem novi operis*; by which words Mr Selden, (*in Flet.* 8. 5.) very juſtly underſtands to be meant the title *de novi operis nuntiatione* both in the civil and canon laws, (*Ff.* 39. 1. *C.* 8. 11. and *Decretal.* not *Extrav.* 5. 32.) whereby the erection of any new buildings in prejudice of more antient ones was prohibited. But Skipwith the king's ſerjeant, and afterwards chief baron of the exchequer, declares them to be flat nonſenſe; "*in ceux parolx*, contra inhibiti-" onem novi operis, *ny ad pas entendment*:" and juſtice Schardelow mends the matter but little by informing him, that they ſignify a reſtitution *in their law*; for which reaſon he very ſagely reſolves to pay no ſort of regard to them. "*Ceo n'eſt que un reſti-*" *tution en lour ley, pur que a ceo n'avomus* " *regard, &c.*"

king's

king's capital juſticiary of England, in the *aula regis*, or ſuch of his palaces wherein his royal perſon reſided; and removed with his houſhold from one end of the kingdom to the other. This was found to occaſion great inconvenience to the ſuitors; to remedy which it was made an article of the great charter of liberties, both that of king John and king Henry the third [p], that "common pleas ſhould no longer follow the king's court, but be "held in ſome certain place:" in conſequence of which they have ever ſince been held (a few neceſſary removals in times of the plague excepted) in the palace of Weſtminſter only. This brought together the profeſſors of the municipal law, who before were diſperſed about the kingdom, and formed them into an aggregate body; whereby a ſociety was eſtabliſhed of perſons, who (as Spelman [q] obſerves) addicting themſelves wholly to the ſtudy of the laws of the land, and no longer conſidering it as a mere ſubordinate ſcience for the amuſement of leiſure hours, ſoon raiſed thoſe laws to that pitch of perfection, which they ſuddenly attained under the auſpices of our Engliſh Juſtinian, king Edward the firſt.

IN conſequence of this lucky aſſemblage, they naturally fell into a kind of collegiate order, and, being excluded from Oxford and Cambridge, found it neceſſary to eſtabliſh a new univerſity of their own. This they did by purchaſing at various times certain houſes (now called the inns of court and of chancery) between the city of Weſtminſter, the place of holding the king's courts, and the city of London; for advantage of ready acceſs to the one, and plenty of proviſions in the other [r]. Here exerciſes were performed, lectures read, and degrees were at length conferred in the common law, as at other univerſities in the canon and civil. The degrees were thoſe of barriſters (firſt ſtiled apprentices [s] from *apprendre*, to learn) who anſwered to our ba-

[p] *c.* 11.
[q] *Gloſſar.* 334.
[r] Forteſc. *c.* 48.
[s] Apprentices or barriſters ſeem to have been firſt appointed by an ordinance of king Edward the firſt in parliament, in the 20th year of his reign. (Spelm. *Gloſſ.* 37. Dugdale. *Orig. jurid.* 55.)

chelors;

chelors; as the ſtate and degree of a ſerjeant[t], *ſervientis ad legem*, did to that of doctor.

THE crown ſeems to have ſoon taken under it's protection this infant ſeminary of common law; and, the more effectually to foſter and cheriſh it, king Henry the third in the nineteenth year of his reign iſſued out an order directed to the mayor and ſheriffs of London, commanding that no regent of any law ſchools *within* that city ſhould for the future teach law therein[u]. The word, law, or *leges*, being a general term, may create ſome doubt at this diſtance of time whether the teaching of the civil law, or the common, or both, is hereby reſtrained. But in either caſe it tends to the ſame end. If the civil law only is prohibited, (which is Mr Selden's[w] opinion) it is then a retaliation upon the clergy, who had excluded the common law from *their* ſeats of learning. If the municipal law be alſo included in the reſtriction, (as ſir Edward Coke[x] underſtands it, and which the words ſeem to import) then the intention is evidently this; by preventing private teachers within the walls of the city, to collect all the common lawyers into the one public univerſity, which was newly inſtituted in the ſuburbs.

[t] The firſt mention which I have met with in our lawbooks of ſerjeants or countors, is in the ſtatute of Weſtm. 1. 3 Edw. I. *c.* 29. and in Horn's Mirror, *c.* 1. §. 10. c. 2. §. 5. *c.* 3. §. 1. in the ſame reign. But M. Paris in his life of John II, abbot of St. Alban's, which he wrote in 1255, 39 Hen. III. ſpeaks of advocates at the common law, or countors *(quos banci narratores vulgariter appellamus)* as of an order of men well known. And we have an example of the antiquity of the coif in the ſame author's hiſtory of England, *A. D.* 1259. in the caſe of one William de Buſſy; who, being called to account for his great knavery and malpractices, claimed the benefit of his orders or clergy, which till then remained an entire ſecret; and to that end *voluit ligamenta coifae ſuae ſolvere, ut palam monſtraret ſe tonſuram habere clericalem; ſed non eſt permiſſus. —— Satelles vero eum arripiens, non per coifae ligamina ſed per guttur eum apprehendens, traxit ad carcerem.* And hence ſir H. Spelman conjectures, (*Gloſſar.* 335.) that coifs were introduced to hide the tonſure of ſuch renegade clerks, as were ſtill tempted to remain in the ſecular courts in the quality of advocates or judges, notwithſtanding their prohibition by canon.

[u] *Ne aliquis ſcholas regens de legibus in eadem civitate de caetero ibidem leges doceat.*

[w] *in Flet.* 8. 2.

[x] 2 Inſt. proëm.

IN

IN this juridical univerſity (for ſuch it is inſiſted to have been by Forteſcue[y] and ſir Edward Coke[z]) there are two ſorts of collegiate houſes; one called inns of chancery, in which the younger ſtudents of the law were uſually placed, "learning and ſtudying, "ſays Forteſcue[a], the originals and as it were the elements of "the law; who, profiting therein, as they grew to ripeneſs ſo "were they admitted into the greater inns of the ſame ſtudy, "called the inns of court." And in theſe inns of both kinds, he goes on to tell us, the knights and barons, with other grandees and noblemen of the realm, did uſe to place their children, though they did not deſire to have them thoroughly learned in the law, or to get their living by it's practice: and that in his time there were about two thouſand ſtudents at theſe ſeveral inns, all of whom he informs us were *filii nobilium*, or gentlemen born.

HENCE it is evident, that (though under the influence of the monks our univerſities neglected this ſtudy, yet) in the time of Henry the ſixth it was thought highly neceſſary and was the univerſal practice, for the young nobility and gentry to be inſtructed in the originals and elements of the laws. But by degrees this cuſtom has fallen into diſuſe; ſo that in the reign of queen Elizabeth ſir Edward Coke[b] does not reckon above a thouſand ſtudents, and the number at preſent is very conſiderably leſs. Which ſeems principally owing to theſe reaſons: firſt, becauſe the inns of chancery being now almoſt totally filled by the inferior branch of the profeſſion, they are neither commodious nor proper for the reſort of gentlemen of any rank or figure; ſo that there are very rarely any young ſtudents entered at the inns of chancery: ſecondly, becauſe in the inns of court all ſorts of regimen and academical ſuperintendance, either with regard to morals or ſtudies, are found impracticable and therefore entirely neglected: laſtly, becauſe perſons of birth and fortune, after having finiſhed their uſual courſes at the univerſities, have ſeldom

[y] *c.* 49.
[z] 3 Rep. pref.
[a] *ibid.*
[b] *ibid.*

leiſure or reſolution ſufficient to enter upon a new ſcheme of ſtudy at a new place of inſtruction. Wherefore few gentlemen now reſort to the inns of court, but ſuch for whom the knowlege of practice is abſolutely neceſſary; ſuch, I mean, as are intended for the profeſſion: the reſt of our gentry, (not to ſay our nobility alſo) having uſually retired to their eſtates, or viſited foreign kingdoms, or entered upon public life, without any inſtruction in the laws of the land; and indeed with hardly any opportunity of gaining inſtruction, unleſs it can be afforded them in theſe ſeats of learning.

AND that theſe are the proper places, for affording aſſiſtances of this kind to gentlemen of all ſtations and degrees, cannot (I think) with any colour of reaſon be denied. For not one of the objections, which are made to the inns of court and chancery, and which I have juſt enumerated, will hold with regard to the univerſities. Gentlemen may here aſſociate with gentlemen of their own rank and degree. Nor are their conduct and ſtudies left entirely to their own diſcretion; but regulated by a diſcipline ſo wiſe and exact, yet ſo liberal, ſo ſenſible and manly, that their conformity to it's rules (which does at preſent ſo much honour to our youth) is not more the effect of conſtraint, than of their own inclinations and choice. Neither need they apprehend too long an avocation hereby from their private concerns and amuſements, or (what is a more noble object) the ſervice of their friends and their country. This ſtudy will go hand in hand with their other purſuits: it will obſtruct none of them; it will ornament and aſſiſt them all.

BUT if, upon the whole, there are any ſtill wedded to monaſtic prejudice, that can entertain a doubt how far this ſtudy is properly and regularly *academical*, ſuch perſons I am afraid either have not conſidered the conſtitution and deſign of an univerſity, or elſe think very meanly of it. It muſt be a deplorable narrowneſs of mind, that would confine theſe ſeats of inſtruction to the limited views of one or two learned profeſſions. To the praiſe of

of this age be it ſpoken, a more open and generous way of thinking begins now univerſally to prevail. The attainment of liberal and genteel accompliſhments, though not of the intellectual ſort, has been thought by our wiſeſt and moſt affectionate patrons [c], and very lately by the whole univerſity [d], no ſmall improvement of our antient plan of education; and therefore I may ſafely affirm that nothing (how *unuſual* ſoever) is, under due regulations, improper to be *taught* in this place, which is proper for a gentleman to *learn*. But that a ſcience, which diſtinguiſhes the criterions of right and wrong; which teaches to eſtabliſh the one, and prevent, puniſh, or redreſs the other; which employs in it's theory the nobleſt faculties of the ſoul, and exerts in it's practice the cardinal virtues of the heart; a ſcience, which is univerſal in it's uſe and extent, accommodated to each individual, yet comprehending the whole community; that a ſcience like this ſhould have ever been deemed unneceſſary to be ſtudied in an univerſity, is matter of aſtoniſhment and concern. Surely, if it were not before an object of academical knowlege, it was high time to make it one; and to thoſe who can doubt the propriety of it's reception among us (if any ſuch there be) we may return an anſwer in their own way; that ethics are confeſſedly a branch of academical learning, and Ariſtotle *himſelf has ſaid*, ſpeaking of the laws of his own country, that juriſprudence or the knowlege of thoſe laws is the principal and moſt perfect branch of ethics [e].

FROM a thorough conviction of this truth, our munificent benefactor Mr VINER, having employed above half a century in amaſſing materials for new-modelling and rendering more commodious the rude ſtudy of the laws of the land, conſigned both

[c] Lord chancellor Clarendon, in his dialogue of education, among his tracts, p. 325. appears to have been very ſolicitous, that it might be made "a part of the ornament "of our learned academies to teach the "qualities of riding, dancing, and fencing, "at thoſe hours when more ſerious exer-"ciſes ſhould be intermitted."

[d] By accepting in full convocation the remainder of lord Clarendon's hiſtory from his noble deſcendants, on condition to apply the profits ariſing from it's publication to the eſtabliſhment of a *manage* in the univerſity.

[e] Τελειοτατη μαλιστα αρετη, ὁτι της τελειας αρετης χρησις ετι. *Ethic. ad Nicomach. l.* 5. *c.* 3.

the plan and execution of theſe his public-ſpirited deſigns to the wiſdom of his parent univerſity. Reſolving to dedicate his learned labours "to the benefit of poſterity and the perpetual ſervice "of his country[f]," he was ſenſible he could not perform his reſolutions in a better and more effectual manner, than by extending to the youth of this place thoſe aſſiſtances, of which he ſo well remembered and ſo heartily regretted the want. And the ſenſe, which the univerſity has entertained of this ample and moſt uſeful benefaction, muſt appear beyond a doubt from their gratitude in receiving it with all poſſible marks of eſteem[g]; from their alacrity and unexampled diſpatch in carrying it into execution[h]; and, above all, from the laws and conſtitutions by which they have effectually guarded it from the neglect and abuſe to which ſuch inſtitutions are liable[i]. We have ſeen an univerſal emulation, who beſt ſhould underſtand, or moſt faithfully pur-

[f] See the preface to the eighteenth volume of his abridgment.

[g] Mr Viner is enrolled among the public benefactors of the univerſity by decree of convocation.

[h] Mr Viner died June 5, 1756. His effects were collected and ſettled, near a volume of his work printed, almoſt the whole diſpoſed of, and the accounts made up, in a year and a half from his deceaſe, by the very diligent and worthy adminiſtrators with the will annexed, (Dr Weſt and Dr Good of Magdalene, Dr Whalley of Oriel, Mr Buckler of All Souls, and Mr Betts of Univerſity college) to whom that care was conſigned by the univerſity. Another half year was employed in conſidering and ſettling a plan of the propoſed inſtitution, and in framing the ſtatutes thereupon, which were finally confirmed by convocation on the 3d of July, 1758. The profeſſor was elected on the 20th of October following, and two ſcholars on the ſucceeding day. And, laſtly, it was agreed at the annual audit in 1761, to eſtabliſh a fellowſhip; and a fellow was accordingly elected in January following. — The reſidue of this fund, ariſing from the ſale of Mr Viner's abridgment, will probably be ſufficient hereafter to found another fellowſhip and ſcholarſhip, or three more ſcholarſhips, as ſhall be thought moſt expedient.

[i] The ſtatutes are in ſubſtance as follows:

1. THAT the accounts of this benefaction be ſeparately kept, and annually audited by the delegates of accounts and profeſſor, and afterwards reported to convocation.

2. THAT a profeſſorſhip of the laws of England be eſtabliſhed, with a ſalary of two hundred pounds *per annum*; the profeſſor to be elected by convocation, and to be at the time of his election at leaſt a maſter of arts or bachelor of civil law in the univerſity of Oxford, of ten years ſtanding from his matriculation; and alſo a barriſter at law of four years ſtanding at the bar.

3. THAT ſuch profeſſor (by himſelf, or by deputy to be previouſly approved by convocation)

ſue, the deſigns of our generous patron: and with pleaſure we recollect, that thoſe who are moſt diſtinguiſhed by their quality,

convocation) do read one ſolemn public lecture on the laws of England, and in the Engliſh language, in every academical term, at certain ſtated times previous to the commencement of the common law term; or forfeit twenty pounds for every omiſſion to Mr Viner's general fund: and alſo (by himſelf, or by deputy to be approved, if occaſional, by the vice-chancellor and proctors; or, if permanent, both the cauſe and the deputy to be annually approved by convocation) do yearly read one complete courſe of lectures on the laws of England, and in the Engliſh language, conſiſting of ſixty lectures at the leaſt; to be read during the univerſity term time, with ſuch proper intervals that not more than four lectures may fall within any ſingle week: that the profeſſor do give a month's notice of the time when the courſe is to begin, and do read *gratis* to the ſcholars of Mr Viner's foundation; but may demand of other auditors ſuch gratuity as ſhall be ſettled from time to time by decree of convocation: and that, for every of the ſaid ſixty lectures omitted, the profeſſor, on complaint made to the vice-chancellor within the year, do forfeit forty ſhillings to Mr Viner's general fund; the proof of having performed his duty to lie upon the ſaid profeſſor.

4. THAT every profeſſor do continue in his office during life, unleſs in caſe of ſuch miſbehaviour as ſhall amount to bannition by the univerſity ſtatutes; or unleſs he deſerts the profeſſion of the law by betaking himſelf to another profeſſion; or unleſs, after one admonition by the vice-chancellor and proctors for notorious neglect, he is guilty of another flagrant omiſſion: in any of which caſes he be deprived by the vice-chancellor, with conſent of the houſe of convocation.

5. THAT ſuch a number of fellowſhips with a ſtipend of fifty pounds *per annum*, and ſcholarſhips with a ſtipend of thirty pounds, be eſtabliſhed, as the convocation ſhall from time to time ordain, according to the ſtate of Mr Viner's revenues.

6. THAT every fellow be elected by convocation, and at the time of election be unmarried, and at leaſt a maſter of arts or bachelor of civil law, and a member of ſome college or hall in the univerſity of Oxford; the ſcholars of this foundation or ſuch as have been ſcholars (if qualified and approved of by convocation) to have the preference: that, if not a barriſter when choſen, he be called to the bar within one year after his election; but do reſide in the univerſity two months in every year, or in caſe of non-reſidence do forfeit the ſtipend of that year to Mr Viner's general fund.

7. THAT every ſcholar be elected by convocation, and at the time of election be unmarried, and a member of ſome college or hall in the univerſity of Oxford, who ſhall have been matriculated twenty four calendar months at the leaſt: that he do take the degree of bachelor of civil law with all convenient ſpeed; (either proceeding in arts or otherwiſe) and previous to his taking the ſame, between the ſecond and eighth year from his matriculation, be bound to attend two courſes of the profeſſor's lectures, to be certified under the profeſſor's hand; and within one year after taking the ſame to be called to the bar: that he do annually reſide ſix months till he is of four years ſtanding, and four months from that time till he is maſter of arts or bachelor of civil law; after which he be bound to reſide two months in every year; or, in caſe of non-reſidence, do forfeit the ſtipend of that year to Mr Viner's general fund.

8. THAT the ſcholarſhips do become void in caſe of non-attendance on the profeſſor, or not taking the degree of bachelor of

their fortune, their ſtation, their learning, or their experience, have appeared the moſt zealous to promote the ſucceſs of Mr Viner's eſtabliſhment.

THE advantages that might reſult to the ſcience of the law itſelf, when a little more attended to in theſe ſeats of knowlege, perhaps would be very conſiderable. The leiſure and abilities of the learned in theſe retirements might either ſuggeſt expedients, or execute thoſe dictated by wiſer heads[k], for improving it's method, retrenching it's ſuperfluities, and reconciling the little contrarieties, which the practice of many centuries will neceſſarily create in any human ſyſtem: a taſk, which thoſe who are deeply employed in buſineſs, and the more active ſcenes of the profeſſion, can hardly condeſcend to engage in. And as to the intereſt, or (which is the ſame) the reputation of the univerſities themſelves, I may venture to pronounce, that if ever this ſtudy ſhould arrive to any tolerable perfection either here or at Cambridge, the nobility and gentry of this kingdom would not ſhorten their reſidence upon this account, nor perhaps entertain a worſe opinion of the benefits of academical education. Neither ſhould it be conſidered as a matter of light importance, that while we thus extend the *pomoeria* of univerſity learning, and adopt a new tribe of citizens within theſe philoſophical walls, we intereſt a

of civil law, being duly admoniſhed ſo to do by the vice-chancellor and proctors: and that both fellowſhips and ſcholarſhips do expire at the end of ten years after each reſpective election; and become void in caſe of groſs miſbehaviour, non-reſidence for two years together, marriage, not being called to the bar within the time before limited, (being duly admoniſhed ſo to be by the vice-chancellor and proctors) or deſerting the profeſſion of the law by following any other profeſſion: and that in any of theſe caſes the vice-chancellor, with conſent of convocation, do declare the place actually void.

9. THAT in caſe of any vacancy of the profeſſorſhip, fellowſhips, or ſcholarſhips, the profits of the current year be ratably divided between the predeceſſor or his repreſentatives, and the ſucceſſor; and that a new election be had within one month afterwards, unleſs by that means the time of election ſhall fall within any vacation, in which caſe it be deferred to the firſt week in the next full term. And that before any convocation ſhall be held for ſuch election, or for any other matter relating to Mr Viner's benefaction, ten days public notice be given to each college and hall of the convocation, and the cauſe of convoking it.

[k] See lord Bacon's propoſals and offer of a digeſt.

very

very numerous and very powerful profeſſion in the preſervation of our rights and revenues.

FOR I think it paſt diſpute that thoſe gentlemen, who reſort to the inns of court with a view to purſue the profeſſion, will find it expedient (whenever it is practicable) to lay the previous foundations of this, as well as every other ſcience, in one of our learned univerſities. We may appeal to the experience of every ſenſible lawyer, whether any thing can be more hazardous or diſcouraging than the uſual entrance on the ſtudy of the law. A raw and unexperienced youth, in the moſt dangerous ſeaſon of life, is tranſplanted on a ſudden into the midſt of allurements to pleaſure, without any reſtraint or check but what his own prudence can ſuggeſt; with no public direction in what courſe to purſue his enquiries; no private aſſiſtance to remove the diſtreſſes and difficulties, which will always embaraſs a beginner. In this ſituation he is expected to ſequeſter himſelf from the world, and by a tedious lonely proceſs to extract the theory of law from a maſs of undigeſted learning; or elſe by an aſſiduous attendance on the courts to pick up theory and practice together, ſufficient to qualify him for the ordinary run of buſineſs. How little therefore is it to be wondered at, that we hear of ſo frequent miſcarriages; that ſo many gentlemen of bright imaginations grow weary of ſo unpromiſing a ſearch [1], and addict themſelves wholly to amuſements, or other leſs innocent purſuits; and that ſo many perſons of moderate capacity confuſe themſelves at firſt ſetting out, and continue ever dark and puzzled during the remainder of their lives!

THE evident want of ſome aſſiſtance in the rudiments of legal knowlege has given birth to a practice, which, if ever it had grown to be general, muſt have proved of extremely perni-

[1] Sir Henry Spelman, in the preface to his gloſſary, has given us a very lively picture of his own diſtreſs upon this occaſion. "*Emiſit me mater Londinum, juris noſtri ca-*
"*peſſendi gratia; cujus cum veſtibulum ſalu-*
"*taſſem, reperiſſemque linguam peregrinam, dia-*
"*lectum barbaram, methodum inconcinnam, mo-*
"*lem non ingentem ſolum ſed perpetuis humeris*
"*ſuſtinendam, excidit mihi (fateor) animus,*
"*&c.*"

cious

cious conſequence: I mean the cuſtom, by ſome ſo very warmly recommended, to drop all liberal education, as of no uſe to ſtudents in the law; but to place them, in it's ſtead, at the deſk of ſome ſkilful attorney; in order to initiate them early in all the depths of practice, and render them more dextrous in the mechanical part of buſineſs. A few inſtances of particular perſons, (men of excellent learning, and unblemiſhed integrity) who, in ſpight of this method of education, have ſhone in the foremoſt ranks of the bar, have afforded ſome kind of ſanction to this illiberal path to the profeſſion, and biaſſed many parents, of ſhortſighted judgment, in it's favour: not conſidering, that there are ſome geniuſes, formed to overcome all diſadvantages, and that from ſuch particular inſtances no general rules can be formed; nor obſerving, that thoſe very perſons have frequently recommended by the moſt forcible of all examples, the diſpoſal of their own offſpring, a very different foundation of legal ſtudies, a regular academical education. Perhaps too, in return, I could now direct their eyes to our principal ſeats of juſtice, and ſuggeſt a few hints, in favour of univerſity learning[m]:---but in theſe all who hear me, I know, have already prevented me.

MAKING therefore due allowance for one or two ſhining exceptions, experience may teach us to foretell that a lawyer thus educated to the bar, in ſubſervience to attorneys and ſolicitors[n], will find he has begun at the wrong end. If practice be the whole he is taught, practice muſt alſo be the whole he will ever know: if he be uninſtructed in the elements and firſt principles upon which the rule of practice is founded, the leaſt variation from eſtabliſhed precedents will totally diſtract and bewilder him: *ita lex ſcripta eſt*[o] is the utmoſt his knowlege will arrive at; he muſt never aſpire to form, and ſeldom expect to comprehend, any arguments drawn *a priori*, from the ſpirit of the laws and the natural foundations of juſtice.

[m] The four higheſt judicial offices were at that time filled by gentlemen, two of whom had been fellows of All Souls college; another, ſtudent of Chriſt-Church; and the fourth a fellow of Trinity college, Cambridge.

[n] See Kennet's life of Somner. p. 67.

[o] *Ff.* 40. 9. 12.

NOR

NOR is this all; for (as few perſons of birth, or fortune, or even of ſcholaſtic education, will ſubmit to the drudgery of ſervitude and the manual labour of copying the traſh of an office) ſhould this infatuation prevail to any conſiderable degree, we muſt rarely expect to ſee a gentleman of diſtinction or learning at the bar. And what the conſequence may be, to have the interpretation and enforcement of the laws (which include the entire diſpoſal of our properties, liberties, and lives) fall wholly into the hands of obſcure or illiterate men, is matter of very public concern.

THE inconveniences here pointed out can never be effectually prevented, but by making academical education a previous ſtep to the profeſſion of the common law, and at the ſame time making the rudiments of the law a part of academical education. For ſciences are of a ſociable diſpoſition, and flouriſh beſt in the neighbourhood of each other: nor is there any branch of learning, but may be helped and improved by aſſiſtances drawn from other arts. If therefore the ſtudent in our laws hath formed both his ſentiments and ſtyle, by peruſal and imitation of the pureſt claſſical writers, among whom the hiſtorians and orators will beſt deſerve his regard; if he can reaſon with preciſion, and ſeparate argument from fallacy, by the clear ſimple rules of pure unſophiſticated logic; if he can fix his attention, and ſteadily purſue truth through any the moſt intricate deduction, by the uſe of mathematical demonſtrations; if he has enlarged his conceptions of nature and art, by a view of the ſeveral branches of genuine, experimental, philoſophy; if he has impreſſed on his mind the ſound maxims of the law of nature, the beſt and moſt authentic foundation of human laws; if, laſtly, he has contemplated thoſe maxims reduced to a practical ſyſtem in the laws of imperial Rome; if he has done this or any part of it, (though all may be eaſily done under as able inſtructors as ever graced any ſeats of learning) a ſtudent thus qualified may enter upon the ſtudy of the law with incredible advantage and reputation. And if,

at the concluſion, or during the acquiſition of theſe accompliſhments, he will afford himſelf here a year or two's farther leiſure, to lay the foundation of his future labours in a ſolid ſcientifical method, without thirſting too early to attend that practice which it is impoſſible he ſhould rightly comprehend, he will afterwards proceed with the greateſt eaſe, and will unfold the moſt intricate points with an intuitive rapidity and clearneſs.

I SHALL not inſiſt upon ſuch motives as might be drawn from principles of oeconomy, and are applicable to particulars only: I reaſon upon more general topics. And therefore to the qualities of the head, which I have juſt enumerated, I cannot but add thoſe of the heart; affectionate loyalty to the king, a zeal for liberty and the conſtitution, a ſenſe of real honour, and well grounded principles of religion; as neceſſary to form a truly valuable Engliſh lawyer, a Hyde, a Hale, or a Talbot. And, whatever the ignorance of ſome, or unkindneſs of others, may have heretofore untruly ſuggeſted, experience will warrant us to affirm, that theſe endowments of loyalty and public ſpirit, of honour and religion, are no where to be found in more high perfection than in the two univerſities of this kingdom.

BEFORE I conclude, it may perhaps be expected, that I lay before you a ſhort and general account of the method I propoſe to follow, in endeavouring to execute the truſt you have been pleaſed to repoſe in my hands. And in theſe ſolemn lectures, which are ordained to be read at the entrance of every term, (more perhaps to do public honour to this laudable inſtitution, than for the private inſtruction of individuals[p]) I preſume it will beſt anſwer the intent of our benefactor and the expectation of this learned body, if I attempt to illuſtrate at times ſuch detached titles of the law, as are the moſt eaſy to be underſtood, and moſt capable of hiſtorical or critical ornament. But in reading the complete courſe, which is annually conſigned to my care, a more regular method will be neceſſary; and, till a better is propoſed,

[p] See Lowth's *Oratio Crewiana*, p. 365.

I ſhall

I ſhall take the liberty to follow the ſame that I have already ſubmitted to the public [q]. To fill up and finiſh that outline with propriety and correctneſs, and to render the whole intelligible to the uninformed minds of beginners, (whom we are too apt to ſuppoſe acquainted with terms and ideas, which they never had opportunity to learn) this muſt be my ardent endeavour, though by no means my promiſe to accompliſh. You will permit me however very briefly to deſcribe, rather what I conceive an academical expounder of the laws ſhould do, than what I have ever known to be done.

HE ſhould conſider his courſe as a general map of the law, marking out the ſhape of the country, it's connexions and boundaries, it's greater diviſions and principal cities: it is not his buſineſs to deſcribe minutely the ſubordinate limits, or to fix the longitude and latitude of every inconſiderable hamlet. His attention ſhould be engaged, like that of the readers in Forteſcue's inns of chancery, "in tracing out the originals and as it were the ele-"ments of the law." For if, as Juſtinian [r] has obſerved, the tender underſtanding of the ſtudent be loaded at the firſt with a multitude and variety of matter, it will either occaſion him to deſert his ſtudies, or will carry him heavily through them, with much labour, delay, and deſpondence. Theſe originals ſhould be traced to their fountains, as well as our diſtance will permit; to the cuſtoms of the Britons and Germans, as recorded by Caeſar and Tacitus; to the codes of the northern nations on the continent, and more eſpecially to thoſe of our own Saxon princes; to the rules of the Roman law, either left here in the days of Papinian, or imported by Vacarius and his followers; but, above

[q] The Analyſis of the laws of England, firſt publiſhed, *A. D.* 1756, and exhibiting the order and principal diviſions of the enſuing COMMENTARIES; which were originally ſubmitted to the univerſity in a private courſe of lectures, *A. D.* 1753.

[r] *Incipientibus nobis exponere jura populi Romani, ita videntur tradi poſſe commodiſſime, ſi primo levi ac ſimplici via ſingula tradantur: Alioqui, ſi ſtatim ab initio rudem adhuc et infirmum animum ſtudioſi multitudine ac varietate rerum oneravimus, duorum alterum, aut deſertorem ſtudiorum efficiemus, aut cum magno labore, ſaepe etiam cum diffidentia (quae plerumque juvenes avertit) ſerius ad id perducemus, ad quod, leviore via ductus, ſine magno labore et ſine ulla diffidentia maturius perduci potuiſſet. Inſt.* 1. 1. 2.

all, to that inexhauſtible reſervoir of legal antiquities and learning, the feodal law, or, as Spelman[s] has entitled it, the law of nations in our weſtern orb. Theſe primary rules and fundamental principles ſhould be weighed and compared with the precepts of the law of nature, and the practice of other countries; ſhould be explained by reaſons, illuſtrated by examples, and confirmed by undoubted authorities; their hiſtory ſhould be deduced, their changes and revolutions obſerved, and it ſhould be ſhewn how far they are connected with, or have at any time been affected by, the civil tranſactions of the kingdom.

A PLAN of this nature, if executed with care and ability, cannot fail of adminiſtring a moſt uſeful and rational entertainment to ſtudents of all ranks and profeſſions; and yet it muſt be confeſſed that the ſtudy of the laws is not merely a matter of amuſement: for, as a very judicious writer[t] has obſerved upon a ſimilar occaſion, the learner "will be conſiderably diſappointed "if he looks for entertainment without the expenſe of attention." An attention, however, not greater than is uſually beſtowed in maſtering the rudiments of other ſciences, or ſometimes in purſuing a favorite recreation or exerciſe. And this attention is not equally neceſſary to be exerted by every ſtudent upon every occaſion. Some branches of the law, as the formal proceſs of civil ſuits, and the ſubtile diſtinctions incident to landed property, which are the moſt difficult to be thoroughly underſtood, are the leaſt worth the pains of underſtanding, except to ſuch gentlemen as intend to purſue the profeſſion. To others I may venture to apply, with a ſlight alteration, the words of ſir John Forteſcue[u],

[s] Of parliaments. 57.

[t] Dr Taylor's pref. to Elem. of civil law.

[u] *Tibi, princeps, neceſſe non erit myſteria legis Angliae longo diſciplinatu rimare. Sufficiet tibi,* — et ſatis *denominari legiſta mereberis, ſi legum principia et cauſas, uſque ad elementa, diſcipuli more indagaveris.* — *Quare tu, princeps ſereniſſime, parvo tempore, parva induſtria, ſufficienter eris in legibus regni Angliae eruditus, dummodo ad ejus apprehenſionem tu conferas animum tuum.* — *Noſco namque ingenii tui perſpicacitatem, quo audacter pronuntio quod in legibus illis (licet earum peritia, qualis judicibus neceſſaria eſt, vix viginti annorum lucubrationibus acquiratur) tu doctrinam principi congruam in anno uno ſufficienter nanciſceris; nec interim militarem diſciplinam, ad quam tam ardenter anhelas, negliges; ſed ea, recreationis loco, etiam anno illo tu ad libitum perfrueris.* c. 8.

when

when firſt his royal pupil determines to engage in this ſtudy. "It will not be neceſſary for a gentleman, as ſuch, to examine "with a cloſe application the critical niceties of the law. It will "fully be ſufficient, and he may well enough be denominated a "lawyer, if under the inſtruction of a maſter he traces up the "principles and grounds of the law, even to their original ele- "ments. Therefore in a very ſhort period, and with very little "labour, he may be ſufficiently informed in the laws of his "country, if he will but apply his mind in good earneſt to re- "ceive and apprehend them. For, though ſuch knowlege as is "neceſſary for a judge is hardly to be acquired by the lucubra- "tions of twenty years, yet with a genius of tolerable perſpica- "city, that knowlege which is fit for a perſon of birth or con- "dition may be learned in a ſingle year, without neglecting his "other improvements."

To the few therefore (the very few, I am perſuaded,) that entertain ſuch unworthy notions of an univerſity, as to ſuppoſe it intended for mere diſſipation of thought; to ſuch as mean only to while away the aukward interval from childhood to twenty one, between the reſtraints of the ſchool and the licentiouſneſs of politer life, in a calm middle ſtate of mental and of moral inactivity; to theſe Mr Viner gives no invitation to an entertainment which they never can reliſh. But to the long and illuſtrious train of noble and ingenuous youth, who are not more diſtinguiſhed among us by their birth and poſſeſſions, than by the regularity of their conduct and their thirſt after uſeful knowlege, to theſe our benefactor has conſecrated the fruits of a long and laborious life, worn out in the duties of his calling; and will joyfully reflect (if ſuch reflexions can be now the employment of his thoughts) that he could not more effectually have benefited poſterity, or contributed to the ſervice of the public, than by founding an inſtitution which may inſtruct the riſing generation in the wiſdom of our civil polity, and inform them with a deſire to be ſtill better acquainted with the laws and conſtitution of their country.

SECTION THE SECOND.

OF THE NATURE OF LAWS IN GENERAL.

LAW, in it's moſt general and comprehenſive ſenſe, ſignifies a rule of action; and is applied indiſcriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we ſay, the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations. And it is that rule of action, which is preſcribed by ſome ſuperior, and which the inferior is bound to obey.

THUS when the ſupreme being formed the univerſe, and created matter out of nothing, he impreſſed certain principles upon that matter, from which it can never depart, and without which it would ceaſe to be. When he put that matter into motion, he eſtabliſhed certain laws of motion, to which all moveable bodies muſt conform. And, to deſcend from the greateſt operations to the ſmalleſt, when a workman forms a clock, or other piece of mechaniſm, he eſtabliſhes at his own pleaſure certain arbitrary laws for it's direction; as that the hand ſhall deſcribe a given ſpace in a given time; to which law as long as the work conforms, ſo long it continues in perfection, and anſwers the end of it's formation.

IF we farther advance, from mere inactive matter to vegetable and animal life, we ſhall find them ſtill governed by laws; more numerous indeed, but equally fixed and invariable. The whole progreſs of plants, from the ſeed to the root, and from thence to the ſeed again; --- the method of animal nutrition, digeſtion, ſecretion,

ſecretion, and all other branches of vital oeconomy;---are not left to chance, or the will of the creature itſelf, but are performed in a wondrous involuntary manner, and guided by unerring rules laid down by the great creator.

THIS then is the general ſignification of law, a rule of action dictated by ſome ſuperior being; and in thoſe creatures that have neither the power to think, nor to will, ſuch laws muſt be invariably obeyed, ſo long as the creature itſelf ſubſiſts, for it's exiſtence depends on that obedience. But laws, in their more confined ſenſe, and in which it is our preſent buſineſs to conſider them, denote the rules, not of action in general, but of *human* action or conduct: that is, the precepts by which man, the nobleſt of all ſublunary beings, a creature endowed with both reaſon and freewill, is commanded to make uſe of thoſe faculties in the general regulation of his behaviour.

MAN, conſidered as a creature, muſt neceſſarily be ſubject to the laws of his creator, for he is entirely a dependent being. A being, independent of any other, has no rule to purſue, but ſuch as he preſcribes to himſelf; but a ſtate of dependance will inevitably oblige the inferior to take the will of him, on whom he depends, as the rule of his conduct: not indeed in every particular, but in all thoſe points wherein his dependance conſiſts. This principle therefore has more or leſs extent and effect, in proportion as the ſuperiority of the one and the dependance of the other is greater or leſs, abſolute or limited. And conſequently, as man depends abſolutely upon his maker for every thing, it is neceſſary that he ſhould in all points conform to his maker's will.

THIS will of his maker is called the law of nature. For as God, when he created matter, and endued it with a principle of mobility, eſtabliſhed certain rules for the perpetual direction of that motion; ſo, when he created man, and endued him with freewill to conduct himſelf in all parts of life, he laid down certain

tain immutable laws of human nature, whereby that freewill is in ſome degree regulated and reſtrained, and gave him alſo the faculty of reaſon to diſcover the purport of thoſe laws.

CONSIDERING the creator only as a being of infinite *power*, he was able unqueſtionably to have preſcribed whatever laws he pleaſed to his creature, man, however unjuſt or ſevere. But as he is alſo a being of infinite *wiſdom*, he has laid down only ſuch laws as were founded in thoſe relations of juſtice, that exiſted in the nature of things antecedent to any poſitive precept. Theſe are the eternal, immutable laws of good and evil, to which the creator himſelf in all his diſpenſations conforms; and which he has enabled human reaſon to diſcover, ſo far as they are neceſſary for the conduct of human actions. Such among others are theſe principles: that we ſhould live honeſtly, ſhould hurt nobody, and ſhould render to every one his due; to which three general precepts Juſtinian[a] has reduced the whole doctrine of law.

BUT if the diſcovery of theſe firſt principles of the law of nature depended only upon the due exertion of right reaſon, and could not otherwiſe be attained than by a chain of metaphyſical diſquiſitions, mankind would have wanted ſome inducement to have quickened their inquiries, and the greater part of the world would have reſted content in mental indolence, and ignorance it's inſeparable companion. As therefore the creator is a being, not only of infinite *power*, and *wiſdom*, but alſo of infinite *goodneſs*, he has been pleaſed ſo to contrive the conſtitution and frame of humanity, that we ſhould want no other prompter to enquire after and purſue the rule of right, but only our own ſelf-love, that univerſal principle of action. For he has ſo intimately connected, ſo inſeparably interwoven the laws of eternal juſtice with the happineſs of each individual, that the latter cannot be attained but by obſerving the former; and, if the former be punctually obeyed, it cannot but induce the latter. In conſequence of which mutual connection of juſtice and human felicity, he has not per-

[a] *Juris praecepta ſunt haec, honeſte vivere, alterum non laedere, ſuum cuique tribuere. Inſt.* 1.1.3.

plexed

plexed the law of nature with a multitude of abſtracted rules and precepts, referring merely to the fitneſs or unfitneſs of things, as ſome have vainly ſurmiſed; but has graciouſly reduced the rule of obedience to this one paternal precept, "that man ſhould "purſue his own happineſs." This is the foundation of what we call ethics, or natural law. For the ſeveral articles, into which it is branched in our ſyſtems, amount to no more than demonſtrating, that this or that action tends to man's real happineſs, and therefore very juſtly concluding that the performance of it is a part of the law of nature; or, on the other hand, that this or that action is deſtructive of man's real happineſs, and therefore that the law of nature forbids it.

THIS law of nature, being co-eval with mankind and dictated by God himſelf, is of courſe ſuperior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and ſuch of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.

BUT in order to apply this to the particular exigencies of each individual, it is ſtill neceſſary to have recourſe to reaſon: whoſe office it is to diſcover, as was before obſerved, what the law of nature directs in every circumſtance of life; by conſidering, what method will tend the moſt effectually to our own ſubſtantial happineſs. And if our reaſon were always, as in our firſt anceſtor before his tranſgreſſion, clear and perfect, unruffled by paſſions, unclouded by prejudice, unimpaired by diſeaſe or intemperance, the taſk would be pleaſant and eaſy; we ſhould need no other guide but this. But every man now finds the contrary in his own experience; that his reaſon is corrupt, and his underſtanding full of ignorance and error.

THIS has given manifold occaſion for the benign interpoſition of divine providence; which, in compaſſion to the frailty, the imperfection, and the blindneſs of human reaſon, hath been

pleaſed, at ſundry times and in divers manners, to diſcover and enforce it's laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy ſcriptures. Theſe precepts, when revealed, are found upon compariſon to be really a part of the original law of nature, as they tend in all their conſequences to man's felicity. But we are not from thence to conclude that the knowlege of theſe truths was attainable by reaſon, in it's preſent corrupted ſtate; ſince we find that, until they were revealed, they were hid from the wiſdom of ages. As then the moral precepts of this law are indeed of the ſame original with thoſe of the law of nature, ſo their intrinſic obligation is of equal ſtrength and perpetuity. Yet undoubtedly the revealed law is of infinitely more authenticity than that moral ſyſtem, which is framed by ethical writers, and denominated the natural law. Becauſe one is the law of nature, expreſſly declared ſo to be by God himſelf; the other is only what, by the aſſiſtance of human reaſon, we imagine to be that law. If we could be as certain of the latter as we are of the former, both would have an equal authority: but, till then, they can never be put in any competition together.

UPON theſe two foundations, the law of nature and the law of revelation, depend all human laws; that is to ſay, no human laws ſhould be ſuffered to contradict theſe. There is, it is true, a great number of indifferent points, in which both the divine law and the natural leave a man at his own liberty; but which are found neceſſary for the benefit of ſociety to be reſtrained within certain limits. And herein it is that human laws have their greateſt force and efficacy; for, with regard to ſuch points as are not indifferent, human laws are only declaratory of, and act in ſubordination to, the former. To inſtance in the caſe of murder: this is expreſſly forbidden by the divine, and demonſtrably by the natural law; and from theſe prohibitions ariſes the true unlawfulneſs of this crime. Thoſe human laws, that annex a puniſhment to it, do not at all increaſe it's moral guilt, or

ſuperadd

ſuperadd any freſh obligation *in foro conſcientiae* to abſtain from it's perpetration. Nay, if any human law ſhould allow or injoin us to commit it, we are bound to tranſgreſs that human law, or elſe we muſt offend both the natural and the divine. But with regard to matters that are in themſelves indifferent, and are not commanded or forbidden by thoſe ſuperior laws; ſuch, for inſtance, as exporting of wool into foreign countries; here the inferior legiſlature has ſcope and opportunity to interpoſe, and to make that action unlawful which before was not ſo.

IF man were to live in a ſtate of nature, unconnected with other individuals, there would be no occaſion for any other laws, than the law of nature, and the law of God. Neither could any other law poſſibly exiſt; for a law always ſuppoſes ſome ſuperior who is to make it; and in a ſtate of nature we are all equal, without any other ſuperior but him who is the author of our being. But man was formed for ſociety; and, as is demonſtrated by the writers on this ſubject[b], is neither capable of living alone, nor indeed has the courage to do it. However, as it is impoſſible for the whole race of mankind to be united in one great ſociety, they muſt neceſſarily divide into many; and form ſeparate ſtates, commonwealths, and nations; entirely independent of each other, and yet liable to a mutual intercourſe. Hence ariſes a third kind of law to regulate this mutual intercourſe, called "the law of "nations;" which, as none of theſe ſtates will acknowlege a ſuperiority in the other, cannot be dictated by either; but depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between theſe ſeveral communities: in the conſtruction alſo of which compacts we have no other rule to reſort to, but the law of nature; being the only one to which both communities are equally ſubject: and therefore the civil law[c] very juſtly obſerves, that *quod naturalis ratio inter omnes homines conſtituit, vocatur jus gentium.*

[b] Puffendorf, *l.* 7. *c.* 1. compared with Barbeyrac's commentary. [c] *Ff.* 1. 1. 9.

THUS much I thought it neceſſary to premiſe concerning the law of nature, the revealed law, and the law of nations, before I proceeded to treat more fully of the principal ſubject of this ſection, municipal or civil law; that is, the rule by which particular diſtricts, communities, or nations are governed; being thus defined by Juſtinian[d], "*jus civile eſt quod quiſque ſibi populus con-*"*ſtituit*." I call it *municipal* law, in compliance with common ſpeech; for, though ſtrictly that expreſſion denotes the particular cuſtoms of one ſingle *municipium* or free town, yet it may with ſufficient propriety be applied to any one ſtate or nation, which is governed by the ſame laws and cuſtoms.

MUNICIPAL law, thus underſtood, is properly defined to be "a rule of civil conduct preſcribed by the ſupreme power in "a ſtate, commanding what is right and prohibiting what is "wrong." Let us endeavour to explain it's ſeveral properties, as they ariſe out of this definition.

AND, firſt, it is a *rule*; not a tranſient ſudden order from a ſuperior to or concerning a particular perſon; but ſomething permanent, uniform, and univerſal. Therefore a particular act of the legiſlature to confiſcate the goods of Titius, or to attaint him of high treaſon, does not enter into the idea of a municipal law: for the operation of this act is ſpent upon Titius only, and has no relation to the community in general; it is rather a ſentence than a law. But an act to declare that the crime of which Titius is accuſed ſhall be deemed high treaſon; this has permanency, uniformity, and univerſality, and therefore is properly a *rule*. It is alſo called a *rule*, to diſtinguiſh it from *advice* or *counſel*, which we are at liberty to follow or not, as we ſee proper; and to judge upon the reaſonableneſs or unreaſonableneſs of the thing adviſed. Whereas our obedience to the *law* depends not upon *our approbation*, but upon the *maker's will*. Counſel is only matter of perſuaſion, law is matter of injunction; counſel acts only upon the willing, law upon the unwilling alſo.

[d] *Inſt.* 1. 2. 1.

IT

IT is alſo called a *rule*, to diſtinguiſh it from a *compact* or *agreement*; for a compact is a promiſe proceeding *from* us, law is a command directed *to* us. The language of a compact is, "I "will, or will not, do this;" that of a law is, "thou ſhalt, or "ſhalt not, do it." It is true there is an obligation which a compact carries with it, equal in point of conſcience to that of a law; but then the original of the obligation is different. In compacts, we ourſelves determine and promiſe what ſhall be done, before we are obliged to do it; in laws, we are obliged to act, without ourſelves determining or promiſing any thing at all. Upon theſe accounts law is defined to be "*a rule.*"

MUNICIPAL law is alſo "a rule *of civil conduct.*" This diſtinguiſhes municipal law from the natural, or revealed; the former of which is the rule of *moral* conduct, and the latter not only the rule of moral conduct, but alſo the rule of faith. Theſe regard man as a creature, and point out his duty to God, to himſelf, and to his neighbour, conſidered in the light of an individual. But municipal or civil law regards him alſo as a citizen, and bound to other duties towards his neighbour, than thoſe of mere nature and religion: duties, which he has engaged in by enjoying the benefits of the common union; and which amount to no more, than that he do contribute, on his part, to the ſubſiſtence and peace of the ſociety.

IT is likewiſe "a rule *preſcribed.*" Becauſe a bare reſolution, confined in the breaſt of the legiſlator, without manifeſting itſelf by ſome external ſign, can never be properly a law. It is requiſite that this reſolution be notified to the people who are to obey it. But the manner in which this notification is to be made, is matter of very great indifference. It may be notified by univerſal tradition and long practice, which ſuppoſes a previous publication, and is the caſe of the common law of England. It may be notified, *viva voce*, by officers appointed for that purpoſe, as is done with regard to proclamations, and ſuch acts of parliament as

as are appointed to be publicly read in churches and other aſſemblies. It may laſtly be notified by writing, printing, or the like; which is the general courſe taken with all our acts of parliament. Yet, whatever way is made uſe of, it is incumbent on the promulgators to do it in the moſt public and perſpicuous manner; not like Caligula, who (according to Dio Caſſius) wrote his laws in a very ſmall character, and hung them up upon high pillars, the more effectually to enſnare the people. There is ſtill a more unreaſonable method than this, which is called making of laws *ex poſt facto*; when *after* an action (indifferent in itſelf) is committed, the legiſlator then for the firſt time declares it to have been a crime, and inflicts a puniſhment upon the perſon who has committed it; here it is impoſſible that the party could foreſee that an action, innocent when it was done, ſhould be afterwards converted to guilt by a ſubſequent law; he had therefore no cauſe to abſtain from it; and all puniſhment for not abſtaining muſt of conſequence be cruel and unjuſt[e]. All laws ſhould be therefore made to commence *in futuro*, and be notified before their commencement; which is implied in the term "*preſcribed.*" But when this rule is in the uſual manner notified, or preſcribed, it is then the ſubject's buſineſs to be thoroughly acquainted therewith; for if ignorance, of what he *might* know, were admitted as a legitimate excuſe, the laws would be of no effect, but might always be eluded with impunity.

BUT farther: municipal law is "a rule of civil conduct pre-"ſcribed *by the ſupreme power in a ſtate.*" For legiſlature, as was before obſerved, is the greateſt act of ſuperiority that can be exerciſed by one being over another. Wherefore it is requiſite to the very eſſence of a law, that it be made by the ſupreme power. Sovereignty and legiſlature are indeed convertible terms; one cannot ſubſiſt without the other.

[e] Such laws among the Romans were denominated *privilegia*, or private laws, of which Cicero *de leg.* 3. 19. and in his oration *pro domo*, 17. thus ſpeaks; "*Vetant leges* "*ſacratae, vetant duodecim tabulae, leges pri-*"*vatis hominibus irrogari; id enim eſt privi-*"*legium. Nemo unquam tulit, nihil eſt crudelius,* "*nihil perniciоſius, nihil quod minus haec civi-*"*tas ferre poſſit.*"

THIS

THIS will naturally lead us into a ſhort enquiry concerning the nature of ſociety and civil government; and the natural, inherent right that belongs to the ſovereignty of a ſtate, wherever that ſovereignty be lodged, of making and enforcing laws.

THE only true and natural foundations of ſociety are the wants and the fears of individuals. Not that we can believe, with ſome theoretical writers, that there ever was a time when there was no ſuch thing as ſociety; and that, from the impulſe of reaſon, and through a ſenſe of their wants and weakneſſes, individuals met together in a large plain, entered into an original contract, and choſe the talleſt man preſent to be their governor. This notion, of an actually exiſting unconnected ſtate of nature, is too wild to be ſeriouſly admitted; and beſides it is plainly contradictory to the revealed accounts of the primitive origin of mankind, and their preſervation two thouſand years afterwards; both which were effected by the means of ſingle families. Theſe formed the firſt ſociety, among themſelves; which every day extended it's limits, and when it grew too large to ſubſiſt with convenience in that paſtoral ſtate, wherein the patriarchs appear to have lived, it neceſſarily ſubdivided itſelf by various migrations into more. Afterwards, as agriculture increaſed, which employs and can maintain a much greater number of hands, migrations became leſs frequent; and various tribes, which had formerly ſeparated, reunited again; ſometimes by compulſion and conqueſt, ſometimes by accident, and ſometimes perhaps by compact. But though ſociety had not it's formal beginning from any convention of individuals, actuated by their wants and their fears; yet it is the *ſenſe* of their weakneſs and imperfection that *keeps* mankind together; that demonſtrates the neceſſity of this union; and that therefore is the ſolid and natural foundation, as well as the cement, of ſociety. And this is what we mean by the original contract of ſociety; which, though perhaps in no inſtance it has ever been formally expreſſed at the firſt inſtitution of a ſtate, yet in nature and reaſon muſt always be underſtood and implied,

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in the very act of associating together: namely, that the whole should protect all it's parts, and that every part should pay obedience to the will of the whole; or, in other words, that the community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of the community; without which submission of all it was impossible that protection could be certainly extended to any.

FOR when society is once formed, government results of course, as necessary to preserve and to keep that society in order. Unless some superior were constituted, whose commands and decisions all the members are bound to obey, they would still remain as in a state of nature, without any judge upon earth to define their several rights, and redress their several wrongs. But, as all the members of society are naturally equal, it may be asked, in whose hands are the reins of government to be entrusted? To this the general answer is easy; but the application of it to particular cases has occasioned one half of those mischiefs which are apt to proceed from misguided political zeal. In general, all mankind will agree that government should be reposed in such persons, in whom those qualities are most likely to be found, the perfection of which are among the attributes of him who is emphatically stiled the supreme being; the three grand requisites, I mean, of wisdom, of goodness, and of power: wisdom, to discern the real interest of the community; goodness, to endeavour always to pursue that real interest; and strength, or power, to carry this knowlege and intention into action. These are the natural foundations of sovereignty, and these are the requisites that ought to be found in every well constituted frame of government.

How the several forms of government we now see in the world at first actually began, is matter of great uncertainty, and has occasioned infinite disputes. It is not my business or intention to enter into any of them. However they began, or by what

what right ſoever they ſubſiſt, there is and muſt be in all of them a ſupreme, irreſiſtible, abſolute, uncontrolled authority, in which the *jura ſummi imperii*, or the rights of ſovereignty, reſide. And this authority is placed in thoſe hands, wherein (according to the opinion of the founders of ſuch reſpective ſtates, either expreſſly given, or collected from their tacit approbation) the qualities requiſite for ſupremacy, wiſdom, goodneſs, and power, are the moſt likely to be found.

THE political writers of antiquity will not allow more than three regular forms of government; the firſt, when the ſovereign power is lodged in an aggregate aſſembly conſiſting of all the members of a community, which is called a democracy; the ſecond, when it is lodged in a council, compoſed of ſelect members, and then it is ſtiled an ariſtocracy; the laſt, when it is entruſted in the hands of a ſingle perſon, and then it takes the name of a monarchy. All other ſpecies of government, they ſay, are either corruptions of, or reducible to, theſe three.

BY the ſovereign power, as was before obſerved, is meant the making of laws; for wherever that power reſides, all others muſt conform to, and be directed by it, whatever appearance the outward form and adminiſtration of the government may put on. For it is at any time in the option of the legiſlature to alter that form and adminiſtration by a new edict or rule, and to put the execution of the laws into whatever hands it pleaſes: and all the other powers of the ſtate muſt obey the legiſlative power in the execution of their ſeveral functions, or elſe the conſtitution is at an end.

IN a democracy, where the right of making laws reſides in the people at large, public virtue, or goodneſs of intention, is more likely to be found, than either of the other qualities of government. Popular aſſemblies are frequently fooliſh in their contrivance, and weak in their execution; but generally mean to do the thing that is right and juſt, and have always a degree of pa-

triotiſm or public ſpirit. In ariſtocracies there is more wiſdom to be found, than in the other frames of government; being compoſed, or intended to be compoſed, of the moſt experienced citizens; but there is leſs honeſty than in a republic, and leſs ſtrength than in a monarchy. A monarchy is indeed the moſt powerful of any, all the ſinews of government being knit together, and united in the hand of the prince; but then there is imminent danger of his employing that ſtrength to improvident or oppreſſive purpoſes.

THUS theſe three ſpecies of government have, all of them, their ſeveral perfections and imperfections. Democracies are uſually the beſt calculated to direct the end of a law; ariſtocracies to invent the means by which that end ſhall be obtained; and monarchies to carry thoſe means into execution. And the antients, as was obſerved, had in general no idea of any other permanent form of government but theſe three: for though Cicero[f] declares himſelf of opinion, "*eſſe optime conſtitutam rem-*"*publicam, quae ex tribus generibus illis, regali, optimo, et populari,* "*ſit modice confuſa;*" yet Tacitus treats this notion of a mixed government, formed out of them all, and partaking of the advantages of each, as a viſionary whim, and one that, if effected, could never be laſting or ſecure[g].

BUT, happily for us of this iſland, the Britiſh conſtitution has long remained, and I truſt will long continue, a ſtanding exception to the truth of this obſervation. For, as with us the executive power of the laws is lodged in a ſingle perſon, they have all the advantages of ſtrength and diſpatch, that are to be found in the moſt abſolute monarchy; and, as the legiſlature of the kingdom is entruſted to three diſtinct powers, entirely independent of each other; firſt, the king; ſecondly, the lords ſpiritual and temporal, which is an ariſtocratical aſſembly of perſons

[f] In his fragments *de rep. l.* 2.

[g] "*Cunctas nationes et urbes populus, aut* "*primores, aut ſinguli regunt: delecta ex his* "*et conſtituta reipublicae forma laudari facilius* "*quam evenire, vel, ſi evenit, haud diuturna* "*eſſe poteſt.*" *Ann. l.* 4.

ſelected

ſelected for their piety, their birth, their wiſdom, their valour, or their property; and, thirdly, the houſe of commons, freely choſen by the people from among themſelves, which makes it a kind of democracy; as this aggregate body, actuated by different ſprings, and attentive to different intereſts, compoſes the Britiſh parliament, and has the ſupreme diſpoſal of every thing; there can no inconvenience be attempted by either of the three branches, but will be withſtood by one of the other two; each branch being armed with a negative power, ſufficient to repel any innovation which it ſhall think inexpedient or dangerous.

HERE then is lodged the ſovereignty of the Britiſh conſtitution; and lodged as beneficially as is poſſible for ſociety. For in no other ſhape could we be ſo certain of finding the three great qualities of government ſo well and ſo happily united. If the ſupreme power were lodged in any one of the three branches ſeparately, we muſt be expoſed to the inconveniences of either abſolute monarchy, ariſtocracy, or democracy; and ſo want two of the three principal ingredients of good polity, either virtue, wiſdom, or power. If it were lodged in any two of the branches; for inſtance, in the king and houſe of lords, our laws might be providently made, and well executed, but they might not always have the good of the people in view: if lodged in the king and commons, we ſhould want that circumſpection and mediatory caution, which the wiſdom of the peers is to afford: if the ſupreme rights of legiſlature were lodged in the two houſes only, and the king had no negative upon their proceedings, they might be tempted to encroach upon the royal prerogative, or perhaps to aboliſh the kingly office, and thereby weaken (if not totally deſtroy) the ſtrength of the executive power. But the conſtitutional government of this iſland is ſo admirably tempered and compounded, that nothing can endanger or hurt it, but deſtroying the equilibrium of power between one branch of the legiſlature and the reſt. For if ever it ſhould happen that the independence of any one of the three ſhould be loſt, or that it ſhould become ſubſervient to the views of either of the other two, there would

ſoon be an end of our conſtitution. The legiſlature would be changed from that, which was originally ſet up by the general conſent and fundamental act of the ſociety; and ſuch a change, however effected, is according to Mr Locke[h] (who perhaps carries his theory too far) at once an entire diſſolution of the bands of government; and the people would be reduced to a ſtate of anarchy, with liberty to conſtitute to themſelves a new legiſlative power.

HAVING thus curſorily conſidered the three uſual ſpecies of government, and our own ſingular conſtitution, ſelected and compounded from them all, I proceed to obſerve, that, as the power of making laws conſtitutes the ſupreme authority, ſo wherever the ſupreme authority in any ſtate reſides, it is the right of that authority to make laws; that is, in the words of our definition, *to preſcribe the rule of civil action*. And this may be diſcovered from the very end and inſtitution of civil ſtates. For a ſtate is a collective body, compoſed of a multitude of individuals, united for their ſafety and convenience, and intending to act together as one man. If it therefore is to act as one man, it ought to act by one uniform will. But, inaſmuch as political communities are made up of many natural perſons, each of whom has his particular will and inclination, theſe ſeveral wills cannot by any *natural* union be joined together, or tempered and diſpoſed into a laſting harmony, ſo as to conſtitute and produce that one uniform will of the whole. It can therefore be no otherwiſe produced than by a *political* union; by the conſent of all perſons to ſubmit their own private wills to the will of one man, or of one or more aſſemblies of men, to whom the ſupreme authority is entruſted: and this will of that one man, or aſſemblage of men, is in different ſtates, according to their different conſtitutions, underſtood to be *law*.

THUS far as to the *right* of the ſupreme power to make laws; but farther, it is it's *duty* likewiſe. For ſince the reſpec-

[h] On government, part. 2. §. 212.

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tive members are bound to conform themſelves to the will of the ſtate, it is expedient that they receive directions from the ſtate declaratory of that it's will. But ſince it is impoſſible, in ſo great a multitude, to give injunctions to every particular man, relative to each particular action, therefore the ſtate eſtabliſhes general rules, for the perpetual information and direction of all perſons in all points, whether of poſitive or negative duty. And this, in order that every man may know what to look upon as his own, what as another's; what abſolute and what relative duties are required at his hands; what is to be eſteemed honeſt, diſhoneſt, or indifferent; what degree every man retains of his natural liberty; what he has given up as the price of the benefits of ſociety; and after what manner each perſon is to moderate the uſe and exerciſe of thoſe rights which the ſtate aſſigns him, in order to promote and ſecure the public tranquillity.

FROM what has been advanced, the truth of the former branch of our definition, is (I truſt) ſufficiently evident; that "*municipal law is a rule of civil conduct prescribed by the ſupreme* "*power in a ſtate.*" I proceed now to the latter branch of it; that it is a rule ſo preſcribed, "*commanding what is right, and* "*prohibiting what is wrong.*"

NOW in order to do this completely, it is firſt of all neceſſary that the boundaries of right and wrong be eſtabliſhed and aſcertained by law. And when this is once done, it will follow of courſe that it is likewiſe the buſineſs of the law, conſidered as a rule of civil conduct, to enforce theſe rights and to reſtrain or redreſs theſe wrongs. It remains therefore only to conſider in what manner the law is ſaid to aſcertain the boundaries of right and wrong; and the methods which it takes to command the one and prohibit the other.

FOR this purpoſe every law may be ſaid to conſiſt of ſeveral parts: one, *declaratory*; whereby the rights to be obſerved, and the wrongs to be eſchewed, are clearly defined and laid down: another,

another, *directory*; whereby the ſubject is inſtructed and enjoined to obſerve thoſe rights, and to abſtain from the commiſſion of thoſe wrongs: a third, *remedial*; whereby a method is pointed out to recover a man's private rights, or redreſs his private wrongs: to which may be added a fourth, uſually termed the *ſanction*, or *vindicatory* branch of the law; whereby it is ſignified what evil or penalty ſhall be incurred by ſuch as commit any public wrongs, and tranſgreſs or neglect their duty.

WITH regard to the firſt of theſe, the *declaratory* part of the municipal law, this depends not ſo much upon the law of revelation or of nature, as upon the wiſdom and will of the legiſlator. This doctrine, which before was ſlightly touched, deſerves a more particular explication. Thoſe rights then which God and nature have eſtabliſhed, and are therefore called natural rights, ſuch as are life and liberty, need not the aid of human laws to be more effectually inveſted in every man than they are; neither do they receive any additional ſtrength when declared by the municipal laws to be inviolable. On the contrary, no human legiſlature has power to abridge or deſtroy them, unleſs the owner ſhall himſelf commit ſome act that amounts to a forfeiture. Neither do divine or natural *duties* (ſuch as, for inſtance, the worſhip of God, the maintenance of children, and the like) receive any ſtronger ſanction from being alſo declared to be duties by the law of the land. The caſe is the ſame as to crimes and miſdemeſnors, that are forbidden by the ſuperior laws, and therefore ſtiled *mala in ſe*, ſuch as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legiſlature. For that legiſlature in all theſe caſes acts only, as was before obſerved, in ſubordination to the great lawgiver, tranſcribing and publiſhing his precepts. So that, upon the whole, the declaratory part of the municipal law has no force or operation at all, with regard to actions that are naturally and intrinſically right or wrong.

BUT,

BUT, with regard to things in themſelves indifferent, the caſe is entirely altered. Theſe become either right or wrong, juſt or unjuſt, duties or miſdemeſnors, according as the municipal legiſlator ſees proper, for promoting the welfare of the ſociety, and more effectually carrying on the purpoſes of civil life. Thus our own common law has declared, that the goods of the wife do inſtantly upon marriage become the property and right of the huſband; and our ſtatute law has declared all monopolies a public offence: yet that right, and this offence, have no foundation in nature; but are merely created by the law, for the purpoſes of civil ſociety. And ſometimes, where the thing itſelf has it's riſe from the law of nature, the particular circumſtances and mode of doing it become right or wrong, as the laws of the land ſhall direct. Thus, for inſtance, in civil duties; obedience to ſuperiors is the doctrine of revealed as well as natural religion: but who thoſe ſuperiors ſhall be, and in what circumſtances, or to what degrees they ſhall be obeyed, is the province of human laws to determine. And ſo, as to injuries or crimes, it muſt be left to our own legiſlature to decide, in what caſes the ſeiſing another's cattle ſhall amount to the crime of robbery; and where it ſhall be a juſtifiable action, as when a landlord takes them by way of diſtreſs for rent.

THUS much for the *declaratory* part of the municipal law: and the *directory* ſtands much upon the ſame footing; for this virtually includes the former, the declaration being uſually collected from the direction. The law that ſays, "thou ſhalt not "ſteal," implies a declaration that ſtealing is a crime. And we have ſeen[j] that, in things naturally indifferent, the very eſſence of right and wrong depends upon the direction of the laws to do or to omit them.

THE *remedial* part of a law is ſo neceſſary a conſequence of the former two, that laws muſt be very vague and imperfect

[j] See pag. 43.

without

without it. For in vain would rights be declared, in vain directed to be obſerved, if there were no method of recovering and aſſerting thoſe rights, when wrongfully withheld or invaded. This is what we mean properly, when we ſpeak of the protection of the law. When, for inſtance, the *declaratory* part of the law has ſaid "that the field or inheritance, which belonged to Titius's "father, is veſted by his death in Titius;" and the *directory* part has "forbidden any one to enter on another's property without "the leave of the owner;" if Gaius after this will preſume to take poſſeſſion of the land, the *remedial* part of the law will then interpoſe it's office; will make Gaius reſtore the poſſeſſion to Titius, and alſo pay him damages for the invaſion.

WITH regard to the *ſanction* of laws, or the evil that may attend the breach of public duties; it is obſerved, that human legiſlators have for the moſt part choſen to make the ſanction of their laws rather *vindicatory* than *remuneratory*, or to conſiſt rather in puniſhments, than in actual particular rewards. Becauſe, in the firſt place, the quiet enjoyment and protection of all our civil rights and liberties, which are the ſure and general conſequence of obedience to the municipal law, are in themſelves the beſt and moſt valuable of all rewards. Becauſe alſo, were the exerciſe of every virtue to be enforced by the propoſal of particular rewards, it were impoſſible for any ſtate to furniſh ſtock enough for ſo profuſe a bounty. And farther, becauſe the dread of evil is a much more forcible principle of human actions than the proſpect of good[i]. For which reaſons, though a prudent beſtowing of rewards is ſometimes of exquiſite uſe, yet we find that thoſe civil laws, which enforce and enjoin our duty, do ſeldom, if ever, propoſe any privilege or gift to ſuch as obey the law; but do conſtantly come armed with a penalty denounced againſt tranſgreſſors, either expreſſly defining the nature and quantity of the puniſhment, or elſe leaving it to the diſcretion of the judges, and thoſe who are entruſted with the care of putting the laws in execution.

[i] Locke, Hum. Und. b. 2. c. 21.

OF

OF all the parts of a law the moſt effectual is the *vindicatory*. For it is but loſt labour to ſay, "do this, or avoid that," unleſs we alſo declare, "this ſhall be the conſequence of your non-com-"pliance." We muſt therefore obſerve, that the main ſtrength and force of a law conſiſts in the penalty annexed to it. Herein is to be found the principal obligation of human laws.

LEGISLATORS and their laws are ſaid to *compel* and *oblige*; not that by any natural violence they ſo conſtrain a man, as to render it impoſſible for him to act otherwiſe than as they direct, which is the ſtrict ſenſe of obligation: but becauſe, by declaring and exhibiting a penalty againſt offenders, they bring it to paſs that no man can eaſily chooſe to tranſgreſs the law; ſince, by reaſon of the impending correction, compliance is in a high degree preferable to diſobedience. And, even where rewards are propoſed as well as puniſhments threatened, the obligation of the law ſeems chiefly to conſiſt in the penalty: for rewards, in their nature, can only *perſuade* and *allure*; nothing is *compulſory* but puniſhment.

IT is held, it is true, and very juſtly, by the principal of our ethical writers, that human laws are binding upon mens conſciences. But if that were the only, or moſt forcible obligation, the good only would regard the laws, and the bad would ſet them at defiance. And, true as this principle is, it muſt ſtill be underſtood with ſome reſtriction. It holds, I apprehend, as to *rights*; and that, when the law has determined the field to belong to Titius, it is matter of conſcience no longer to withhold or to invade it. So alſo in regard to *natural duties*, and ſuch offences as are *mala in ſe*: here we are bound in conſcience, becauſe we are bound by ſuperior laws, before thoſe human laws were in being, to perform the one and abſtain from the other. But in relation to thoſe laws which enjoin only *poſitive duties*, and forbid only ſuch things as are not *mala in ſe* but *mala prohibita* merely, an-

nexing a penalty to non-compliance, here I apprehend conſcience is no farther concerned, than by directing a ſubmiſſion to the penalty, in caſe of our breach of thoſe laws: for otherwiſe the multitude of penal laws in a ſtate would not only be looked upon as an impolitic, but would alſo be a very wicked thing; if every ſuch law were a ſnare for the conſcience of the ſubject. But in theſe caſes the alternative is offered to every man; "either ab-"ſtain from this, or ſubmit to ſuch a penalty;" and his conſcience will be clear, whichever ſide of the alternative he thinks proper to embrace. Thus, by the ſtatutes for preſerving the game, a penalty is denounced againſt every unqualified perſon that kills a hare. Now this prohibitory law does not make the tranſgreſſion a moral offence: the only obligation in conſcience is to ſubmit to the penalty if levied.

I HAVE now gone through the definition laid down of a municipal law; and have ſhewn that it is "a rule---of civil con-"duct---preſcribed---by the ſupreme power in a ſtate---com-"manding what is right, and prohibiting what is wrong:" in the explication of which I have endeavoured to interweave a few uſeful principles, concerning the nature of civil government, and the obligation of human laws. Before I conclude this ſection, it may not be amiſs to add a few obſervations concerning the *interpretation* of laws.

WHEN any doubt aroſe upon the conſtruction of the Roman laws, the uſage was to ſtate the caſe to the emperor in writing, and take his opinion upon it. This was certainly a bad method of interpretation. To interrogate the legiſlature to decide particular diſputes, is not only endleſs, but affords great room for partiality and oppreſſion. The anſwers of the emperor were called his reſcripts, and theſe had in ſucceeding caſes the force of perpetual laws; though they ought to be carefully diſtinguiſhed, by every rational civilian, from thoſe general conſtitutions, which had only the nature of things for their guide. The emperor Macrinus, as his hiſtorian Capitolinus informs us, had once reſolved

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to abolish these rescripts, and retain only the general edicts; he could not bear that the hasty and crude answers of such princes as Commodus and Caracalla should be reverenced as laws. But Justinian thought otherwise[k], and he has preserved them all. In like manner the canon laws, or decretal epistles of the popes, are all of them rescripts in the strictest sense. Contrary to all true forms of reasoning, they argue from particulars to generals.

THE fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law. Let us take a short view of them all.

1. WORDS are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use. Thus the law mentioned by Puffendorf[l], which forbad a layman to *lay hands* on a priest, was adjudged to extend to him, who had hurt a priest with a weapon. Again; terms of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade, and science. So in the act of settlement, where the crown of England is limited "to the princess Sophia, and the heirs "of her body, being protestants," it becomes necessary to call in the assistance of lawyers, to ascertain the precise idea of the words "*heirs of her body*;" which in a legal sense comprize only certain of her lineal descendants. Lastly, where words are clearly *repugnant* in two laws, the latter law takes place of the elder: *leges posteriores priores contrarias abrogant* is a maxim of universal law, as well as of our own constitutions. And accordingly it was laid down by a law of the twelve tables at Rome, *quod populus postremum jussit, id jus ratum esto.*

[k] *Inst.* 1. 2. 6.

[l] L. of N. and N. 5. 12. 3.

2. IF words happen to be ſtill dubious, we may eſtabliſh their meaning from the context; with which it may be of ſingular uſe to compare a word, or a ſentence, whenever they are ambiguous, equivocal, or intricate. Thus the proeme, or preamble, is often called in to help the conſtruction of an act of parliament. Of the ſame nature and uſe is the compariſon of a law with other laws, that are made by the ſame legiſlator, that have ſome affinity with the ſubject, or that expreſſly relate to the ſame point. Thus, when the law of England declares murder to be felony without benefit of clergy, we muſt reſort to the ſame law of England to learn what the benefit of clergy is: and, when the common law cenſures ſimoniacal contracts, it affords great light to the ſubject to conſider what the canon law has adjudged to be ſimony.

3. AS to the ſubject matter, words are always to be underſtood as having a regard thereto; for that is always ſuppoſed to be in the eye of the legiſlator, and all his expreſſions directed to that end. Thus, when a law of our Edward III forbids all eccleſiaſtical perſons to purchaſe *proviſions* at Rome, it might ſeem to prohibit the buying of grain and other victual; but when we conſider that the ſtatute was made to repreſs the uſurpations of the papal ſee, and that the nominations to benefices by the pope were called *proviſions*, we ſhall ſee that the reſtraint is intended to be laid upon ſuch proviſions only.

4. As to the effects and conſequence, the rule is, where words bear either none, or a very abſurd ſignification, if literally underſtood, we muſt a little deviate from the received ſenſe of them. Therefore the Bolognian law, mentioned by Puffendorf [m], which enacted "that whoever drew blood in the ſtreets ſhould be puniſh-"ed with the utmoſt ſeverity," was held after long debate not to extend to the ſurgeon, who opened the vein of a perſon that fell down in the ſtreet with a fit.

[m] *l.* 5. *c.* 12. §. 8.

5. BUT,

5. BUT, laſtly, the moſt univerſal and effectual way of diſcovering the true meaning of a law, when the words are dubious, is by conſidering the reaſon and ſpirit of it; or the cauſe which moved the legiſlator to enact it. For when this reaſon ceaſes, the law itſelf ought likewiſe to ceaſe with it. An inſtance of this is given in a caſe put by Cicero, or whoever was the author of the rhetorical treatiſe inſcribed to Herennius[n]. There was a law, that thoſe who in a ſtorm forſook the ſhip ſhould forfeit all property therein; and the ſhip and lading ſhould belong entirely to thoſe who ſtaid in it. In a dangerous tempeſt all the mariners forſook the ſhip, except only one ſick paſſenger, who by reaſon of his diſeaſe was unable to get out and eſcape. By chance the ſhip came ſafe to port. The ſick man kept poſſeſſion and claimed the benefit of the law. Now here all the learned agree, that the ſick man is not within the reaſon of the law; for the reaſon of making it was, to give encouragement to ſuch as ſhould venture their lives to ſave the veſſel: but this is a merit, which he could never pretend to, who neither ſtaid in the ſhip upon that account, nor contributed any thing to it's preſervation.

FROM this method of interpreting laws, by the reaſon of them, ariſes what we call *equity*; which is thus defined by Grotius[o], "the correction of that, wherein the law (by reaſon of it's uni-"verſality) is deficient." For ſince in laws all caſes cannot be foreſeen or expreſſed, it is neceſſary, that when the general decrees of the law come to be applied to particular caſes, there ſhould be ſomewhere a power veſted of defining thoſe circumſtances, which (had they been foreſeen) the legiſlator himſelf would have expreſſed. And theſe are the caſes, which, according to Grotius, "*lex non exacte definit, ſed arbitrio boni viri permittit.*"

EQUITY thus depending, eſſentially, upon the particular circumſtances of each individual caſe, there can be no eſtabliſhed

[n] *l.* 1. *c.* 11.

[o] *de aequitate.*

rules

rules and fixed precepts of equity laid down, without deſtroying it's very eſſence, and reducing it to a poſitive law. And, on the other hand, the liberty of conſidering all caſes in an equitable light muſt not be indulged too far, leſt thereby we deſtroy all law, and leave the deciſion of every queſtion entirely in the breaſt of the judge. And law, without equity, though hard and diſagreeable, is much more deſirable for the public good, than equity without law; which would make every judge a legiſlator, and introduce moſt infinite confuſion; as there would then be almoſt as many different rules of action laid down in our courts, as there are differences of capacity and ſentiment in the human mind.

SECTION THE THIRD.

OF THE LAWS OF ENGLAND.

THE municipal law of England, or the rule of civil conduct preſcribed to the inhabitants of this kingdom, may with ſufficient propriety be divided into two kinds; the *lex non ſcripta*, the unwritten, or common law; and the *lex ſcripta*, the written, or ſtatute law.

THE *lex non ſcripta*, or unwritten law, includes not only *general cuſtoms*, or the common law properly ſo called; but alſo the *particular cuſtoms* of certain parts of the kingdom; and likewiſe thoſe *particular laws*, that are by cuſtom obſerved only in certain courts and juriſdictions.

WHEN I call theſe parts of our law *leges non ſcriptae*, I would not be underſtood as if all thoſe laws were at preſent merely *oral*, or communicated from the former ages to the preſent ſolely by word of mouth. It is true indeed that, in the profound ignorance of letters which formerly overſpread the whole weſtern world, all laws were intirely traditional, for this plain reaſon, that the nations among which they prevailed had but little idea of writing. Thus the Britiſh as well as the Gallic druids committed all their laws as well as learning to memory [a]; and it is ſaid of the primitive Saxons here, as well as their brethren on the continent, that *leges ſola memoria et uſu retinebant* [b]. But, with us at preſent, the monuments and evidences of our legal cuſtoms are contained in the records of the ſeveral courts of juſtice, in books

[a] Caeſ. *de b. G. lib.* 6. *c.* 13. [b] Spelm. *Gl.* 362.

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of reports and judicial deciſions, and in the treatiſes of learned ſages of the profeſſion, preſerved and handed down to us from the times of higheſt antiquity. However I therefore ſtile theſe parts of our law *leges non ſcriptae*, becauſe their original inſtitution and authority are not ſet down in writing, as acts of parliament are, but they receive their binding power, and the force of laws, by long and immemorial uſage, and by their univerſal reception throughout the kingdom. In like manner as Aulus Gellius defines the *jus non ſcriptum* to be that, which is "*tacito* "*et illiterato hominum conſenſu et moribus expreſſum.*"

OUR antient lawyers, and particularly Forteſcue[c], inſiſt with abundance of warmth, that theſe cuſtoms are as old as the primitive Britons, and continued down, through the ſeveral mutations of government and inhabitants, to the preſent time, unchanged and unadulterated. This may be the caſe as to ſome: but in general, as Mr Selden in his notes obſerves, this aſſertion muſt be underſtood with many grains of allowance; and ought only to ſignify, as the truth ſeems to be, that there never was any formal exchange of one ſyſtem of laws for another: though doubtleſs by the intermixture of adventitious nations, the Romans, the Picts, the Saxons, the Danes, and the Normans, they muſt have inſenſibly introduced and incorporated many of their own cuſtoms with thoſe that were before eſtabliſhed: thereby in all probability improving the texture and wiſdom of the whole, by the accumulated wiſdom of divers particular countries. Our laws, ſaith lord Bacon[d], are mixed as our language: and as our language is ſo much the richer, the laws are the more complete.

AND indeed our antiquarians and firſt hiſtorians do all poſitively aſſure us, that our body of laws is of this compounded nature. For they tell us, that in the time of Alfred the local cuſtoms of the ſeveral provinces of the kingdom were grown ſo various, that he found it expedient to compile his *dome-book* or *liber judicialis*, for the general uſe of the whole kingdom. This

[c] *c.* 17.

[d] See his propoſals for a digeſt.

book

book is said to have been extant so late as the reign of king Edward the fourth, but is now unfortunately lost. It contained, we may probably suppose, the principal maxims of the common law, the penalties for misdemesnors, and the forms of judicial proceedings. Thus much may at least be collected from that injunction to observe it, which we find in the laws of king Edward the elder, the son of Alfred[e]. "*Omnibus qui reipublicae praesunt "etiam atque etiam mando, ut omnibus aequos se praebeant judices, "perinde ac in judiciali libro (Saxonice,* ðom-bec*) scriptum habetur; "nec quicquam formident quin jus commune (Saxonice,* folcrihte*) "audacter libereque dicant.*"

BUT the irruption and establishment of the Danes in England, which followed soon after, introduced new customs, and caused this code of Alfred in many provinces to fall into disuse; or at least to be mixed and debased with other laws of a coarser alloy. So that about the beginning of the eleventh century there were three principal systems of laws prevailing in different districts. 1. The *Mercen-Lage*, or Mercian laws, which were observed in many of the midland counties, and those bordering on the principality of Wales, the retreat of the antient Britons; and therefore very probably intermixed with the British or Druidical customs. 2. The *West-Saxon-Lage*, or laws of the west Saxons, which obtained in the counties to the south and west of the island, from Kent to Devonshire. These were probably much the same with the laws of Alfred above-mentioned, being the municipal law of the far most considerable part of his dominions, and particularly including Berkshire, the seat of his peculiar residence. 3. The *Dane-Lage*, or Danish law, the very name of which speaks it's original and composition. This was principally maintained in the rest of the midland counties, and also on the eastern coast, the part most exposed to the visits of that piratical people. As for the very northern provinces, they were at that time under a distinct government[f].

[e] c. 1.

[f] Hal. Hist. 55.

OUT of theſe three laws, Roger Hoveden [g] and Ranulphus Ceſtrenſis [h] inform us, king Edward the confeſſor extracted one uniform law or digeſt of laws, to be obſerved throughout the whole kingdom; though Hoveden and the author of an old manuſcript chronicle [i] aſſure us likewiſe, that this work was projected and begun by his grandfather king Edgar. And indeed a general digeſt of the ſame nature has been conſtantly found expedient, and therefore put in practice by other great nations, which were formed from an aſſemblage of little provinces, governed by peculiar cuſtoms. As in Portugal, under king Edward, about the beginning of the fifteenth century [k]. In Spain under Alonzo X, who about the year 1250 executed the plan of his father St. Ferdinand, and collected all the provincial cuſtoms into one uniform law, in the celebrated code entitled *las partidas* [l]. And in Sweden, about the ſame aera, a univerſal body of common law was compiled out of the particular cuſtoms eſtabliſhed by the laghman of every province, and intitled the *land's lagh*, being analagous to the *common law* of England [m].

BOTH theſe undertakings, of king Edgar and Edward the confeſſor, ſeem to have been no more than a new edition, or freſh promulgation, of Alfred's code or dome-book, with ſuch additions and improvements as the experience of a century and an half had ſuggeſted. For Alfred is generally ſtiled by the ſame hiſtorians the *legum Anglicanarum conditor*, as Edward the confeſſor is the *reſtitutor*. Theſe however are the laws which our hiſtories ſo often mention under the name of the laws of Edward the confeſſor; which our anceſtors ſtruggled ſo hardly to maintain, under the firſt princes of the Norman line; and which ſubſequent princes ſo frequently promiſed to keep and to reſtore, as the moſt popular act they could do, when preſſed by foreign emergencies or domeſtic diſcontents. Theſe are the laws, that

[g] *in Hen. II.*
[h] *in Edw. Confeſſor.*
[i] *in Seld. ad Eadmer.* 6.
[k] Mod. Un. Hiſt. xxii. 135.
[l] *Ibid.* xx. 211.
[m] *Ibid.* xxxiii. 21. 58.

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ſo vigorouſly withſtood the repeated attacks of the civil law; which eſtabliſhed in the twelfth century a new Roman empire over moſt of the ſtates on the continent: ſtates that have loſt, and perhaps upon that account, their political liberties; while the free conſtitution of England, perhaps upon the ſame account, has been rather improved than debaſed. Theſe, in ſhort, are the laws which gave riſe and original to that collection of maxims and cuſtoms, which is now known by the name of the common laws. A name either given to it, in contradiſtinction to other laws, as the ſtatute law, the civil law, the law merchant, and the like; or, more probably, as a law *common* to all the realm, the *jus commune* or *folcright* mentioned by king Edward the elder, after the abolition of the ſeveral provincial cuſtoms and particular laws before-mentioned.

BUT though this is the moſt likely foundation of this collection of maxims and cuſtoms, yet the maxims and cuſtoms, ſo collected, are of higher antiquity than memory or hiſtory can reach: nothing being more difficult than to aſcertain the preciſe beginning and firſt ſpring of an antient and long eſtabliſhed cuſtom. Whence it is that in our law the goodneſs of a cuſtom depends upon it's having been uſed time out of mind; or, in the ſolemnity of our legal phraſe, time whereof the memory of man runneth not to the contrary. This it is that gives it it's weight and authority; and of this nature are the maxims and cuſtoms which compoſe the common law, or *lex non ſcripta*, of this kingdom.

THIS unwritten, or common, law is properly diſtinguiſhable into three kinds: 1. General cuſtoms; which are the univerſal rule of the whole kingdom, and form the common law, in it's ſtricter and more uſual ſignification. 2. Particular cuſtoms; which for the moſt part affect only the inhabitants of particular diſtricts. 3. Certain particular laws; which by cuſtom are adopted and uſed by ſome particular courts, of pretty general and extenſive juriſdiction.

I. As to general cuſtoms, or the common law, properly ſo called; this is that law, by which proceedings and determinations in the king's ordinary courts of juſtice are guided and directed. This, for the moſt part, ſettles the courſe in which lands deſcend by inheritance; the manner and form of acquiring and transferring property; the ſolemnities and obligation of contracts; the rules of expounding wills, deeds, and acts of parliament; the reſpective remedies of civil injuries; the ſeveral ſpecies of temporal offences, with the manner and degree of puniſhment; and an infinite number of minuter particulars, which diffuſe themſelves as extenſively as the ordinary diſtribution of common juſtice requires. Thus, for example, that there ſhall be four ſuperior courts of record, the chancery, the king's bench, the common pleas, and the exchequer;---that the eldeſt ſon alone is heir to his anceſtor;---that property may be acquired and transferred by writing;---that a deed is of no validity unleſs ſealed and delivered;---that wills ſhall be conſtrued more favorably, and deeds more ſtrictly;---that money lent upon bond is recoverable by action of debt;---that breaking the public peace is an offence, and puniſhable by fine and impriſonment;---all theſe are doctrines that are not ſet down in any written ſtatute or ordinance, but depend merely upon immemorial uſage, that is, upon common law, for their ſupport.

SOME have divided the common law into two principal grounds or foundations: 1. Eſtabliſhed cuſtoms; ſuch as that where there are three brothers, the eldeſt brother ſhall be heir to the ſecond, in excluſion of the youngeſt: and 2. Eſtabliſhed rules and maxims; as, "that the king can do no wrong, that no "man ſhall be bound to accuſe himſelf," and the like. But I take theſe to be one and the ſame thing. For the authority of theſe maxims reſts entirely upon general reception and uſage; and the only method of proving, that this or that maxim is a rule of the common law, is by ſhewing that it hath been always the cuſtom to obſerve it.

BUT

BUT here a very natural, and very material, queſtion ariſes: how are theſe cuſtoms or maxims to be known, and by whom is their validity to be determined? The anſwer is, by the judges in the ſeveral courts of juſtice. They are the depoſitary of the laws; the living oracles, who muſt decide in all caſes of doubt, and who are bound by an oath to decide according to the law of the land. Their knowlege of that law is derived from experience and ſtudy; from the "*viginti annorum lucubrationes*," which Fortеſcue[n] mentions; and from being long perſonally accuſtomed to the judicial deciſions of their predeceſſors. And indeed theſe judicial deciſions are the principal and moſt authoritative evidence, that can be given, of the exiſtence of ſuch a cuſtom as ſhall form a part of the common law. The judgment itſelf, and all the proceedings previous thereto, are carefully regiſtered and preſerved, under the name of *records*, in public repoſitories ſet apart for that particular purpoſe; and to them frequent recourſe is had, when any critical queſtion ariſes, in the determination of which former precedents may give light or aſſiſtance. And therefore, even ſo early as the conqueſt, we find the "*praeteritorum* "*memoria eventorum*" reckoned up as one of the chief qualifications of thoſe who were held to be "*legibus patriae optime inſti*- "*tuti*[o]." For it is an eſtabliſhed rule to abide by former precedents, where the ſame points come again in litigation; as well to keep the ſcale of juſtice even and ſteady, and not liable to waver with every new judge's opinion; as alſo becauſe the law in that caſe being ſolemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breaſt of any ſubſequent judge to alter or vary from, according to his private ſentiments: he being ſworn to determine, not according to his own private judgment, but according to the known laws and cuſtoms of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is moſt evidently contrary to reaſon;

[n] *cap.* 8.

[o] Seld. review of Tith. c. 8.

much

much more if it be contrary to the divine law. But even in ſuch caſes the ſubſequent judges do not pretend to make a new law, but to vindicate the old one from miſrepreſentation. For if it be found that the former deciſion is manifeſtly abſurd or unjuſt, it is declared, not that ſuch a ſentence was *bad law*, but that it was *not law*; that is, that it is not the eſtabliſhed cuſtom of the realm, as has been erroneouſly determined. And hence it is that our lawyers are with juſtice ſo copious in their encomiums on the reaſon of the common law; that they tell us, that the law is the perfection of reaſon, that it always intends to conform thereto, and that what is not reaſon is not law. Not that the particular reaſon of every rule in the law can at this diſtance of time be always preciſely aſſigned; but it is ſufficient that there be nothing in the rule flatly contradictory to reaſon, and then the law will preſume it to be well founded [p]. And it hath been an antient obſervation in the laws of England, that whenever a ſtanding rule of law, of which the reaſon perhaps could not be remembered or diſcerned, hath been wantonly broke in upon by ſtatutes or new reſolutions, the wiſdom of the rule hath in the end appeared from the inconveniences that have followed the innovation.

THE doctrine of the law then is this: that precedents and rules muſt be followed, unleſs flatly abſurd or unjuſt: for though their reaſon be not obvious at firſt view, yet we owe ſuch a deference to former times as not to ſuppoſe they acted wholly without conſideration. To illuſtrate this doctrine by examples. It has been determined, time out of mind, that a brother of the half blood ſhall never ſucceed as heir to the eſtate of his half brother, but it ſhall rather eſcheat to the king, or other ſuperior lord. Now this is a poſitive law, fixed and eſtabliſhed by cuſtom, which cuſtom is evidenced by judicial deciſions; and therefore can never be departed from by any modern judge without a

[p] Herein agreeing with the civil law, *Ff.* 1. 3. 20, 21. "*Non omnium, quae a majo-*
"*ribus noſtris conſtituta ſunt, ratio reddi poteſt.*
"*Et ideo rationes eorum quae conſtituuntur, in-*
"*quiri non oportet: alioquin multa ex his, quae*
"*certa ſunt, ſubvertuntur.*"

breach

breach of his oath and the law. For herein there is nothing repugnant to natural juſtice; though the reaſon of it, drawn from the feodal law, may not be quite obvious to every body. And therefore, on account of a ſuppoſed hardſhip upon the half brother, a modern judge might wiſh it had been otherwiſe ſettled; yet it is not in his power to alter it. But if any court were now to determine, that an elder brother of the half blood might enter upon and ſeiſe any lands that were purchaſed by his younger brother, no ſubſequent judges would ſcruple to declare that ſuch prior determination was unjuſt, was unreaſonable, and therefore was *not law*. So that *the law*, and the *opinion of the judge* are not always convertible terms, or one and the ſame thing; ſince it ſometimes may happen that the judge may *miſtake* the law. Upon the whole however, we may take it as a general rule, "that the "deciſions of courts of juſtice are the evidence of what is com-"mon law:" in the ſame manner as, in the civil law, what the emperor had once determined was to ſerve for a guide for the future [q].

THE deciſions therefore of courts are held in the higheſt regard, and are not only preſerved as authentic records in the treaſuries of the ſeveral courts, but are handed out to public view in the numerous volumes of *reports* which furniſh the lawyer's library. Theſe reports are hiſtories of the ſeveral caſes, with a ſhort ſummary of the proceedings, which are preſerved at large in the record; the arguments on both ſides; and the reaſons the court gave for it's judgment; taken down in ſhort notes by perſons preſent at the determination. And theſe ſerve as indexes to, and alſo to explain, the records; which always, in matters of conſequence and nicety, the judges direct to be ſearched. The reports are extant in a regular ſeries from the reign of king Edward the ſecond incluſive; and from his time to that of Henry

[q] "*Si imperialis majeſtas cauſam cognitiona-*
"*liter examinaverit, et partibus cominus conſti-*
"*tutis ſententiam dixerit, omnes omnino judices,*
"*qui ſub noſtro imperio ſunt, ſciant hanc eſſe*
"*legem, non ſolum illi cauſae pro qua producta*
"*eſt, ſed et in omnibus ſimilibus.*" C.1.14.12.

the

the eighth were taken by the prothonotaries, or chief ſcribes of the court, at the expenſe of the crown, and publiſhed *annually*, whence they are known under the denomination of the *year books*. And it is much to be wiſhed that this beneficial cuſtom had, under proper regulations, been continued to this day: for, though king James the firſt at the inſtance of lord Bacon appointed two reporters with a handſome ſtipend for this purpoſe, yet that wiſe inſtitution was ſoon neglected, and from the reign of Henry the eighth to the preſent time this taſk has been executed by many private and cotemporary hands; who ſometimes through haſte and inaccuracy, ſometimes through miſtake and want of ſkill, have publiſhed very crude and imperfect (perhaps contradictory) accounts of one and the ſame determination. Some of the moſt valuable of the antient reports are thoſe publiſhed by lord chief juſtice Coke; a man of infinite learning in his profeſſion, though not a little infected with the pedantry and quaintneſs of the times he lived in, which appear ſtrongly in all his works. However his writings are ſo highly eſteemed, that they are generally cited without the author's name[r].

BESIDES theſe reporters, there are alſo other authors, to whom great veneration and reſpect is paid by the ſtudents of the common law. Such are Glanvil and Bracton, Britton and Fleta, Littleton and Fitzherbert, with ſome others of antient date, whoſe treatiſes are cited as authority; and are evidence that caſes have formerly happened in which ſuch and ſuch points were determined, which are now become ſettled and firſt principles. One of the laſt of theſe methodical writers in point of time, whoſe works are of any intrinſic authority in the courts of juſtice, and do not entirely depend on the ſtrength of their quotations from older

[r] His reports, for inſtance, are ſtiled, κατ' ἐξοχην, *the reports*; and in quoting them we uſually ſay, 1 or 2 Rep. not 1 or 2 Coke's Rep. as in citing other authors. The reports of judge Croke are alſo cited in a peculiar manner, by the name of thoſe princes, in whoſe reigns the caſes reported in his three volumes were determined; *viz.* queen Elizabeth, king James, and king Charles the firſt; as well as by the number of each volume. For ſometimes we call them 1, 2, and 3 Cro. but more commonly Cro. Eliz. Cro. Jac. and Cro. Car.

authors,

authors, is the ſame learned judge we have juſt mentioned, ſir Edward Coke; who hath written four volumes of inſtitutes, as he is pleaſed to call them, though they have little of the inſtitutional method to warrant ſuch a title. The firſt volume is a very extenſive comment upon a little excellent treatiſe of tenures, compiled by judge Littleton in the reign of Edward the fourth. This comment is a rich mine of valuable common law learning, collected and heaped together from the antient reports and year books, but greatly defective in method[s]. The ſecond volume is a comment upon many old acts of parliament, without any ſyſtematical order; the third a more methodical treatiſe of the pleas of the crown; and the fourth an account of the ſeveral ſpecies of courts[t].

AND thus much for the firſt ground and chief corner ſtone of the laws of England, which is, general immemorial cuſtom, or common law, from time to time declared in the deciſions of the courts of juſtice; which deciſions are preſerved among our public records, explained in our reports, and digeſted for general uſe in the authoritative writings of the venerable ſages of the law.

THE Roman law, as practiſed in the times of it's liberty, paid alſo a great regard to cuſtom; but not ſo much as our law: it only then adopting it, when the written law was deficient. Though the reaſons alleged in the digeſt[u] will fully juſtify our practice, in making it of equal authority with, when it is not contradicted by, the written law. "For ſince, ſays Julianus, the "written law binds us for no other reaſon but becauſe it is ap-"proved by the judgment of the people, therefore thoſe laws "which the people have approved without writing ought alſo to "bind every body. For where is the difference, whether the "people declare their aſſent to a law by ſuffrage, or by a uniform

[s] It is uſually cited either by the name of Co. Litt. or as 1 Inſt.

[t] Theſe are cited as 2, 3, or 4 Inſt. without any author's name. An honorary diſtinction, which, we obſerved, is paid to the works of no other writer; the generality of reports and other tracts being quoted in the name of the compiler, as 2 Ventris, 4 Leonard, 1 Siderfin, and the like.

[u] *Ff.* 1. 3. 32.

"courſe of acting accordingly?" Thus did they reaſon while Rome had ſome remains of her freedom; but, when the imperial tyranny came to be fully eſtabliſhed, the civil laws ſpeak a very different language. "*Quod principi placuit legis habet vigorem,* "*cum populus ei et in eum omne ſuum imperium et poteſtatem confe-* "*rat,*" ſays Ulpian[w]. "*Imperator ſolus et conditor et interpres le-* "*gis exiſtimatur,*" ſays the code[x]. And again, "*ſacrilegii inſtar* "*eſt reſcripto principis obviare*[y]." And indeed it is one of the characteriſtic marks of Engliſh liberty, that our common law depends upon cuſtom; which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary conſent of the people.

II. THE ſecond branch of the unwritten laws of England are particular cuſtoms, or laws which affect only the inhabitants of particular diſtricts.

THESE particular cuſtoms, or ſome of them, are without doubt the remains of that multitude of local cuſtoms before-mentioned, out of which the common law, as it now ſtands, was collected at firſt by king Alfred, and afterwards by king Edgar and Edward the confeſſor: each diſtrict mutually ſacrificing ſome of it's own ſpecial uſages, in order that the whole kingdom might enjoy the benefit of one uniform and univerſal ſyſtem of laws. But, for reaſons that have been now long forgotten, particular counties, cities, towns, manors, and lordſhips, were very early indulged with the privilege of abiding by their own cuſtoms, in contradiſtinction to the reſt of the nation at large: which privilege is confirmed to them by ſeveral acts of parliament[z].

SUCH is the cuſtom of gavelkind in Kent and ſome other parts of the kingdom (though perhaps it was alſo general till the Norman conqueſt) which ordains, among other things, that not

[w] *Ff.* 1. 4. 1.
[x] *C.* 1. 14. 12.
[y] *C.* 1. 23. 5.
[z] Mag. Cart. c. 9. — 1 Edw. III. ſt. 2. c. 9. — 14 Edw. III. ſt. 1. c. 1. — and 2 Hen. IV. c. 1.

the

the eldeſt ſon only of the father ſhall ſucceed to his inheritance, but all the ſons alike: and that, though the anceſtor be attainted and hanged, yet the heir ſhall ſucceed to his eſtate, without any eſcheat to the lord. --- Such is the cuſtom that prevails in divers antient boroughs, and therefore called borough-engliſh, that the youngeſt ſon ſhall inherit the eſtate, in preference to all his elder brothers. --- Such is the cuſtom in other boroughs that a widow ſhall be intitled, for her dower, to all her huſband's lands; whereas at the common law ſhe ſhall be endowed of one third part only. --- Such alſo are the ſpecial and particular cuſtoms of manors, of which every one has more or leſs, and which bind all the copy-hold-tenants that hold of the ſaid manors. --- Such likewiſe is the cuſtom of holding divers inferior courts, with power of trying cauſes, in cities and trading towns; the right of holding which, when no royal grant can be ſhewn, depends entirely upon immemorial and eſtabliſhed uſage. --- Such, laſtly, are many particular cuſtoms within the city of London, with regard to trade, apprentices, widows, orphans, and a variety of other matters. All theſe are contrary to the general law of the land, and are good only by ſpecial uſage, though the cuſtoms of London are alſo confirmed by act of parliament[a].

To this head may moſt properly be referred a particular ſyſtem of cuſtoms uſed only among one ſet of the king's ſubjects, called the cuſtom of merchants or *lex mercatoria:* which, however different from the general rules of the common law, is yet ingrafted into it, and made a part of it[b]; being allowed, for the benefit of trade, to be of the utmoſt validity in all commercial tranſactions: for it is a maxim of law, that "*cuilibet in ſua arte* "*credendum eſt.*"

THE rules relating to particular cuſtoms regard either the *proof* of their exiſtence; their *legality* when proved; or their uſual method of *allowance.* And firſt we will conſider the rules of *proof.*

[a] 8 Rep. 126. Cro. Car. 347. [b] Winch. 24.

As to gavelkind, and borough-engliſh, the law takes particular notice of them [c], and there is no occaſion to prove that ſuch cuſtoms actually exiſt, but only that the lands in queſtion are ſubject thereto. All other private cuſtoms muſt be particularly pleaded [d], and as well the exiſtence of ſuch cuſtoms muſt be ſhewn, as that the thing in diſpute is within the cuſtom alleged. The trial in both caſes (both to ſhew the exiſtence of the cuſtom, as, "that in the manor of Dale lands ſhall deſcend only to the "heirs male, and never to the heirs female;" and alſo to ſhew "that the lands in queſtion are within that manor") is by a jury of twelve men, and not by the judges; except the ſame particular cuſtom has been before tried, determined, and recorded in the ſame court [e].

THE cuſtoms of London differ from all others in point of trial: for, if the exiſtence of the cuſtom be brought in queſtion, it ſhall not be tried by a jury, but by certificate from the lord mayor and aldermen by the mouth of their recorder [f]; unleſs it be ſuch a cuſtom as the corporation is itſelf intereſted in, as a right of taking toll, *&c*, for then the law permits them not to certify on their own behalf [g].

WHEN a cuſtom is actually proved to exiſt, the next enquiry is into the *legality* of it; for, if it is not a good cuſtom, it ought to be no longer uſed. "*Malus uſus abolendus eſt*" is an eſtabliſhed maxim of the law [h]. To make a particular cuſtom good, the following are neceſſary requiſites.

1. THAT it have been uſed ſo long, that the memory of man runneth not to the contrary. So that, if any one can ſhew the beginning of it, it is no good cuſtom. For which reaſon no cuſtom can prevail againſt an expreſs act of parliament; ſince

[c] Co. Litt. 175.
[d] Litt. §. 265.
[e] Dr & St. 1. 10.
[f] Cro. Car. 516.
[g] Hob. 85.
[h] Litt. §. 212. 4 Inſt. 274.

the

the ſtatute itſelf is a proof of a time when ſuch a cuſtom did not exiſt [j].

2. IT muſt have been *continued*. Any interruption would cauſe a temporary ceaſing: the revival gives it a new beginning, which will be within time of memory, and thereupon the cuſtom will be void. But this muſt be underſtood with regard to an interruption of the *right*; for an interruption of the *poſſeſſion* only, for ten or twenty years, will not deſtroy the cuſtom [i]. As if the inhabitants of a pariſh have a cuſtomary right of watering their cattle at a certain pool, the cuſtom is not deſtroyed, though they do not uſe it for ten years; it only becomes more difficult to prove: but if the *right* be any how diſcontinued for a day, the cuſtom is quite at an end.

3. IT muſt have been *peaceable*, and acquieſced in; not ſubject to contention and diſpute [k]. For as cuſtoms owe their original to common conſent, their being immemorially diſputed either at law or otherwiſe is a proof that ſuch conſent was wanting.

4. CUSTOMS muſt be *reaſonable* [l]; or rather, taken negatively, they muſt not be unreaſonable. Which is not always, as ſir Edward Coke ſays [m], to be underſtood of every unlearned man's reaſon, but of artificial and legal reaſon, warranted by authority of law. Upon which account a cuſtom may be good, though the particular reaſon of it cannot be aſſigned; for it ſufficeth, if no good legal reaſon can be aſſigned againſt it. Thus a cuſtom in a pariſh, that no man ſhall put his beaſts into the common till the third of October, would be good; and yet it would be hard to ſhew the reaſon why that day in particular is fixed upon, rather than the day before or after. But a cuſtom, that no cattle ſhall be put in till the lord of the manor has firſt put in his, is unreaſonable, and therefore bad: for peradventure the lord will never put in his; and then the tenants will loſe all their profits [n].

[j] Co. Litt. 113.
[i] *Ibid.* 114.
[k] *Ibid.*
[l] Litt. §. 212.
[m] 1 Inſt. 62.
[n] Co. Copyh. §. 33.

5. CUS-

5. CUSTOMS ought to be *certain*. A cuſtom, that lands ſhall deſcend to the moſt worthy of the owner's blood, is void; for how ſhall this worth be determined? but a cuſtom to deſcend to the next male of the blood, excluſive of females, is certain, and therefore good [o]. A cuſtom, to pay two pence an acre in lieu of tithes, is good; but to pay ſometimes two pence and ſometimes three pence, as the occupier of the land pleaſes, is bad for it's uncertainty. Yet a cuſtom, to pay a year's improved value for a fine on a copyhold eſtate, is good: though the value is a thing uncertain: for the value may at any time be aſcertained; and the maxim of law is, *id certum eſt, quod certum reddi poteſt*.

6. CUSTOMS, though eſtabliſhed by conſent, muſt be (when eſtabliſhed) *compulſory*; and not left to the option of every man, whether he will uſe them or no. Therefore a cuſtom, that all the inhabitants ſhall be rated toward the maintenance of a bridge, will be good; but a cuſtom, that every man is to contribute thereto at his own pleaſure, is idle and abſurd, and, indeed, no cuſtom at all.

7. LASTLY, cuſtoms muſt be *conſiſtent* with each other: one cuſtom cannot be ſet up in oppoſition to another. For if both are really cuſtoms, then both are of equal antiquity, and both eſtabliſhed by mutual conſent: which to ſay of contradictory cuſtoms is abſurd. Therefore, if one man preſcribes that by cuſtom he has a right to have windows looking into another's garden; the other cannot claim a right by cuſtom to ſtop up or obſtruct thoſe windows: for theſe two contradictory cuſtoms cannot both be good, nor both ſtand together. He ought rather to deny the exiſtence of the former cuſtom [p].

NEXT, as to the *allowance* of ſpecial cuſtoms. Cuſtoms, in derogation of the common law, muſt be conſtrued ſtrictly. Thus, by the cuſtom of gavelkind, an infant of fifteen years may by one

[o] 1 Roll. Abr. 565. [p] 9 Rep. 58.

ſpecies

ſpecies of conveyance (called a deed of feoffment) convey away his lands in fee-ſimple, or for ever. Yet this cuſtom does not impower him to uſe any other conveyance, or even to leaſe them for ſeven years: for the cuſtom muſt be ſtrictly purſued [q]. And, moreover, all ſpecial cuſtoms muſt ſubmit to the king's prerogative. Therefore, if the king purchaſes lands of the nature of gavelkind, where all the ſons inherit equally; yet, upon the king's demiſe, his eldeſt ſon ſhall ſucceed to thoſe lands alone [r]. And thus much for the ſecond part of the *leges non ſcriptae*, or thoſe particular cuſtoms which affect particular perſons or diſtricts only.

III. THE third branch of them are thoſe peculiar laws, which by cuſtom are adopted and uſed only in certain peculiar courts and juriſdictions. And by theſe I underſtand the civil and canon laws.

IT may ſeem a little improper at firſt view to rank theſe laws under the head of *leges non ſcriptae*, or unwritten laws, ſeeing they are ſet forth by authority in their pandects, their codes, and their inſtitutions; their councils, decrees, and decretals; and enforced by an immenſe number of expoſitions, deciſions, and treatiſes of the learned in both branches of the law. But I do this, after the example of ſir Matthew Hale [s], becauſe it is moſt plain, that it is not on account of their being *written* laws, that either the canon law, or the civil law, have any obligation within this kingdom; neither do their force and efficacy depend upon their own intrinſic authority; which is the caſe of our written laws, or acts of parliament. They bind not the ſubjects of England, becauſe their materials were collected from popes or emperors; were digeſted by Juſtinian, or declared to be authentic by Gregory. Theſe conſiderations give them no authority here: for the legiſlature of England doth not, nor ever did, recognize any foreign power, as ſuperior or equal to it in this kingdom; or as having the right to give law to any, the meaneſt, of it's

[q] Co. Cop. §. 33.
[r] Co. Litt. 15.
[s] Hiſt. C. L. c. 2.

ſubjects.

ſubjects. But all the ſtrength that either the papal or imperial laws have obtained in this realm (or indeed in any other kingdom in Europe) is only becauſe they have been admitted and received by immemorial uſage and cuſtom in ſome particular caſes, and ſome particular courts; and then they form a branch of the *leges non ſcriptae*, or cuſtomary law: or elſe, becauſe they are in ſome other caſes introduced by conſent of parliament, and then they owe their validity to the *leges ſcriptae*, or ſtatute law. This is expreſſly declared in thoſe remarkable words of the ſtatute 25 Hen. VIII. c. 21. addreſſed to the king's royal majeſty. --- "This your grace's "realm, recognizing no ſuperior under God but only your grace, "hath been and is free from ſubjection to any man's laws, but "only to ſuch as have been deviſed, made, and ordained *within* "this realm for the wealth of the ſame; or to ſuch other as, by "ſufferance of your grace and your progenitors, the people of "this your realm have taken at their free liberty, by their own "conſent, to be uſed among them; and have bound themſelves "by long uſe and cuſtom to the obſervance of the ſame: not as "to the obſervance of the laws of any foreign prince, potentate, "or prelate; but as to the *cuſtomed* and antient laws of this realm, "originally eſtabliſhed as laws of the ſame, by the ſaid ſuffer-"ance, conſents, and cuſtom; and none otherwiſe."

BY the civil law, abſolutely taken, is generally underſtood the civil or municipal law of the Roman empire, as comprized in the inſtitutes, the code, and the digeſt of the emperor Juſtinian, and the novel conſtitutions of himſelf and ſome of his ſucceſſors. Of which, as there will frequently be occaſion to cite them, by way of illuſtrating our own laws, it may not be amiſs to give a ſhort and general account.

THE Roman law (founded firſt upon the regal conſtitutions of their antient kings, next upon the twelve tables of the *decemviri*, then upon the laws or ſtatutes enacted by the ſenate or people, the edicts of the praetor, and the *reſponſa prudentum* or opinions of learned lawyers, and laſtly upon the imperial decrees, or con-

ſtitutions

ſtitutions of ſucceſſive emperors) had grown to ſo great a bulk, or, as Livy expreſſes it[t], "*tam immenſus aliarum ſuper alias acervatarum legum cumulus*," that they were computed to be many camels' load by an author who preceded Juſtinian[u]. This was in part remedied by the collections of three private lawyers, Gregorius, Hermogenes, and Papirius; and then by the emperor Theodoſius the younger, by whoſe orders a code was compiled, *A.D.* 438, being a methodical collection of all the imperial conſtitutions then in force: which Theodoſian code was the only book of civil law received as authentic in the weſtern part of Europe till many centuries after; and to this it is probable that the Franks and Goths might frequently pay ſome regard, in framing legal conſtitutions for their newly erected kingdoms. For Juſtinian commanded only in the eaſtern remains of the empire; and it was under his auſpices, that the preſent body of civil law was compiled and finiſhed by Tribonian and other lawyers, about the year 533.

THIS conſiſts of, 1. The inſtitutes, which contain the elements or firſt principles of the Roman law, in four books. 2. The digeſts, or pandects, in fifty books, containing the opinions and writings of eminent lawyers, digeſted in a ſyſtematical method. 3. A new code, or collection of imperial conſtitutions, the lapſe of a whole century having rendered the former code, of Theodoſius, imperfect. 4. The novels, or new conſtitutions, poſterior in time to the other books, and amounting to a ſupplement to the code; containing new decrees of ſucceſſive emperors, as new queſtions happened to ariſe. Theſe form the body of Roman law, or *corpus juris civilis*, as publiſhed about the time of Juſtinian: which however fell ſoon into neglect and oblivion, till about the year 1130, when a copy of the digeſts was found at Amalfi in Italy; which accident, concurring with the policy of the Romiſh eccleſiaſtics[w], ſuddenly gave new vogue and authority to the civil law, introduced it into ſeveral nations, and occaſioned that

[t] *l.* 3. *c.* 34.
[u] Taylor's elements of civil law. 17.
[w] See §. 1. pag. 18.

mighty inundation of voluminous comments, with which this ſyſtem of law, more than any other, is now loaded.

THE canon law is a body of Roman eccleſiaſtical law, relative to ſuch matters as that church either has, or pretends to have, the proper juriſdiction over. This is compiled from the opinions of the antient Latin fathers, the decrees of general councils, the decretal epiſtles and bulles of the holy ſee. All which lay in the ſame diſorder and confuſion as the Roman civil law, till about the year 1151 one Gratian an Italian monk, animated by the diſcovery of Juſtinian's pandects, reduced the eccleſiaſtical conſtitutions alſo into ſome method in three books, which he entitled *concordia diſcordantium canonum*, but which are generally known by the name of *decretum Gratiani*. Theſe reached as low as the time of pope Alexander III. The ſubſequent papal decrees, to the pontificate of Gregory IX, were publiſhed in much the ſame method under the auſpices of that pope, about the year 1230, in five books entitled *decretalia Gregorii noni*. A ſixth book was added by Boniface VIII, about the year 1298, which is called *ſextus decretalium*. The Clementine conſtitutions, or decrees of Clement V, were in like manner authenticated in 1317 by his ſucceſſor John XXII; who alſo publiſhed twenty conſtitutions of his own, called the *extravagantis Joannis*: all which in ſome meaſure anſwer to the novels of the civil law. To theſe have been ſince added ſome decrees of later popes in five books, called *extravagantes communes*. And all theſe together, Gratian's decree, Gregory's decretals, the ſixth decretal, the Clementine conſtitutions, and the extravagants of John and his ſucceſſors, form the *corpus juris canonici*, or body of the Roman canon law.

BESIDES theſe pontificial collections, which during the times of popery were received as authentic in this iſland, as well as in other parts of chriſtendom, there is alſo a kind of national canon law, compoſed of *legatine* and *provincial* conſtitutions, and adapted only to the exigencies of this church and kingdom. The *legatine* conſtitutions were eccleſiaſtical laws, enacted in national ſynods, held

held under the cardinals Otho and Othobon, legates from pope Gregory IX and pope Clement IV, in the reign of king Henry III about the years 1220 and 1268. The *provincial* conſtitutions are principally the decrees of provincial ſynods, held under divers arch-biſhops of Canterbury, from Stephen Langton in the reign of Henry III to Henry Chichele in the reign of Henry V; and adopted alſo by the province of York[x] in the reign of Henry VI. At the dawn of the reformation, in the reign of king Henry VIII, it was enacted in parliament[y] that a review ſhould be had of the canon law; and, till ſuch review ſhould be made, all canons, conſtitutions, ordinances, and ſynodals provincial, being then already made, and not repugnant to the law of the land or the king's prerogative, ſhould ſtill be uſed and executed. And, as no ſuch review has yet been perfected, upon this ſtatute now depends the authority of the canon law in England.

As for the canons enacted by the clergy under James I, in the year 1603, and never confirmed in parliament, it has been ſolemnly adjudged upon the principles of law and the conſtitution, that where they are not merely declaratory of the antient canon law, but are introductory of new regulations, they do not bind the laity[z]; whatever regard the clergy may think proper to pay them.

THERE are four ſpecies of courts in which the civil and canon laws are permitted under different reſtrictions to be uſed. 1. The courts of the arch-biſhops and biſhops and their derivative officers, uſually called in our law courts chriſtian, *curiae chriſtianitatis*, or the eccleſiaſtical courts. 2. The military courts. 3. The courts of admiralty. 4. The courts of the two univerſities. In all, their reception in general, and the different degrees of that reception, are grounded intirely upon cuſtom; corroborated in the latter inſtance by act of parliament, ratifying thoſe charters which confirm the cuſtomary law of the univerſities.

[x] Burn's eccl. law, pref. viii.

[y] Statute 25 Hen. VIII. c. 19; revived and confirmed by 1 Eliz. c. 1.

[z] Stra. 1057.

The more minute conſideration of theſe will fall properly under that part of theſe commentaries which treats of the juriſdiction of courts. It will ſuffice at preſent to remark a few particulars relative to them all, which may ſerve to inculcate more ſtrongly the doctrine laid down concerning them[a].

1. AND, firſt, the courts of common law have the ſuperintendency over theſe courts; to keep them within their juriſdictions, to determine wherein they exceed them, to reſtrain and prohibit ſuch exceſs, and (in caſe of contumacy) to puniſh the officer who executes, and in ſome caſes the judge who enforces, the ſentence ſo declared to be illegal.

2. THE common law has reſerved to itſelf the expoſition of all ſuch acts of parliament, as concern either the extent of theſe courts or the matters depending before them. And therefore if theſe courts either refuſe to allow theſe acts of parliament, or will expound them in any other ſenſe than what the common law puts upon them, the king's courts at Weſtminſter will grant prohibitions to reſtrain and control them.

3. AN appeal lies from all theſe courts to the king, in the laſt reſort; which proves that the juriſdiction exerciſed in them is derived from the crown of England, and not from any foreign potentate, or intrinſic authority of their own. --- And, from theſe three ſtrong marks and enſigns of ſuperiority, it appears beyond a doubt that the civil and canon laws, though admitted in ſome caſes by cuſtom in ſome courts, are only ſubordinate and *leges ſub graviori lege*; and that, thus admitted, reſtrained, altered, new-modelled, and amended, they are by no means with us a diſtinct independent ſpecies of laws, but are inferior branches of the cuſtomary or unwritten laws of England, properly called, the king's eccleſiaſtical, the king's military, the king's maritime, or the king's academical, laws.

[a] Hale Hiſt. c. 2.

LET

LET us next proceed to the *leges ſcriptae*, the written laws of the kingdom, which are ſtatutes, acts, or edicts, made by the king's majeſty by and with the advice and conſent of the lords ſpiritual and temporal and commons in parliament aſſembled [b]. The oldeſt of theſe now extant, and printed in our ſtatute books, is the famous *magna carta*, as confirmed in parliament 9 Hen. III: though doubtleſs there were many acts before that time, the records of which are now loſt, and the determinations of them perhaps at preſent currently received for the maxims of the old common law.

THE manner of making theſe ſtatutes will be better conſidered hereafter, when we examine the conſtitution of parliaments. At preſent we will only take notice of the different kinds of ſtatutes; and of ſome general rules with regard to their conſtruction [c].

FIRST, as to their ſeveral kinds. Statutes are either *general* or *ſpecial*, *public* or *private*. A general or public act is an uni-

[b] 8 Rep. 20.

[c] The method of citing theſe acts of parliament is various. Many of our antient ſtatutes are called after the name of the place, where the parliament was held that made them; as the ſtatutes of Merton and Marlbridge, of Weſtminſter, Gloceſter, and Wincheſter. Others are denominated entirely from their ſubject; as the ſtatutes of Wales and Ireland, the *articuli cleri*, and the *prerogativa regis*. Some are diſtinguiſhed by their initial words; a method of citing very antient, being uſed by the Jews in denominating the books of the pentateuch; by the chriſtian church in diſtinguiſhing their hymns and divine offices; by the Romaniſts in deſcribing their papal bulles; and in ſhort by the whole body of antient civilians and canoniſts, among whom this method of citation generally prevailed, not only with regard to chapters, but inferior ſections alſo: in imitation of all which we ſtill call ſome of our old ſtatutes by their initial words, as the ſtatute of *quia emptores*, and that of *circumſpecte agatis*. But the moſt uſual method of citing them, eſpecially ſince the time of Edward the ſecond, is by naming the year of the king's reign in which the ſtatute was made, together with the chapter, or particular act, according to it's numeral order; as, 9 Geo. II. c. 4. For all the acts of one ſeſſion of parliament taken together make properly but one ſtatute; and therefore when two ſeſſions have been held in one year; we uſually mention ſtat. 1. or 2. Thus the bill of rights is cited, as 1 W. & M. ſt. 2. c. 2. ſignifying that it is the ſecond chapter or act, of the ſecond ſtatute or the laws made in the ſecond ſeſſions of parliament, held in the firſt year of king William and queen Mary.

verſal

verſal rule, that regards the whole community; and of this the courts of law are bound to take notice judicially and *ex officio*; without the ſtatute being particularly pleaded, or formally ſet forth by the party who claims an advantage under it. Special or private acts are rather exceptions than rules, being thoſe which only operate upon particular perſons, and private concerns; ſuch as the Romans intitled *ſenatus-decreta*, in contradiſtinction to the *ſenatus-conſulta*, which regarded the whole community [d]: and of theſe the judges are not bound to take notice, unleſs they be formally ſhewn and pleaded. Thus, to ſhew the diſtinction, the ſtatute 13 Eliz. c. 10. to prevent ſpiritual perſons from making leaſes for longer terms than twenty one years, or three lives, is a public act; it being a rule preſcribed to the whole body of ſpiritual perſons in the nation: but an act, to enable the biſhop of Cheſter to make a leaſe to A. B. for ſixty years, is an exception to this rule; it concerns only the parties and the biſhop's ſucceſſors; and is therefore a private act.

STATUTES alſo are either *declaratory* of the common law, or *remedial* of ſome defects therein. Declaratory, where the old cuſtom of the kingdom is almoſt fallen into diſuſe, or become diſputable; in which caſe the parliament has thought proper, *in perpetuum rei teſtimonium*, and for avoiding all doubts and difficulties, to declare what the common law is and ever has been. Thus the ſtatute of treaſons, 25 Edw. III. cap. 2. doth not make any new ſpecies of treaſons; but only, for the benefit of the ſubject, declares and enumerates thoſe ſeveral kinds of offence, which before were treaſon at the common law. Remedial ſtatutes are thoſe which are made to ſupply ſuch defects, and abridge ſuch ſuperfluities, in the common law, as ariſe either from the general imperfection of all human laws, from change of time and circumſtances, from the miſtakes and unadviſed determinations of unlearned judges, or from any other cauſe whatſoever. And this being done, either by enlarging the common law where it was too narrow and circumſcribed, or by re-

[d] Gravin. *Orig.* 1. §. 24.

ſtraining

ſtraining it where it was too lax and luxuriant, hath occaſioned another ſubordinate diviſion of remedial acts of parliament into *enlarging* and *reſtraining* ſtatutes. To inſtance again in the caſe of treaſon. Clipping the current coin of the kingdom was an offence not ſufficiently guarded againſt by the common law: therefore it was thought expedient by ſtatute 5 Eliz. c. 11. to make it high treaſon, which it was not at the common law: ſo that this was an *enlarging* ſtatute. At common law alſo ſpiritual corporations might leaſe out their eſtates for any term of years, till prevented by the ſtatute 13 Eliz. before-mentioned: this was therefore a *reſtraining* ſtatute.

SECONDLY, the rules to be obſerved with regard to the conſtruction of ſtatutes are principally theſe which follow.

I. THERE are three points to be conſidered in the conſtruction of all remedial ſtatutes; the old law, the miſchief, and the remedy: that is, how the common law ſtood at the making of the act; what the miſchief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this miſchief. And it is the buſineſs of the judges ſo to conſtrue the act, as to ſuppreſs the miſchief and advance the remedy [e]. Let us inſtance again in the ſame reſtraining ſtatute of the 13 Eliz. By the common law eccleſiaſtical corporations might let as long leaſes as they thought proper: the miſchief was, that they let long and unreaſonable leaſes, to the impoveriſhment of their ſucceſſors: the remedy applied by the ſtatute was by making void all leaſes by eccleſiaſtical bodies for longer terms than three lives or twenty one years. Now in the conſtruction of this ſtatute it is held, that leaſes, though for a longer term, if made by a biſhop, are not void during the biſhop's life; or, if made by a dean and chapter, they are not void during the life of the dean: for the act was made for the benefit and protection of the ſucceſſor [f]. The miſchief is therefore ſufficiently ſuppreſſed by vacating them after the death of the grantors; but the leaſes, du-

[e] 3 Rep. 7. Co. Litt. 11. 42.

[f] Co. Litt. 45. 3 Rep. 60.

ring

ring their lives, being not within the miſchief, are not within the remedy.

2. A STATUTE, which treats of things or perſons of an inferior rank, cannot by any *general words* be extended to thoſe of a ſuperior. So a ſtatute, treating of "deans, prebendaries, "parſons, vicars, *and others having ſpiritual promotion*," is held not to extend to biſhops, though they have ſpiritual promotion; deans being the higheſt perſons named, and biſhops being of a ſtill higher order [g].

3. PENAL ſtatutes muſt be conſtrued ſtrictly. Thus the ſtatute 1 Edw. VI. c. 12. having enacted that thoſe who are convicted of ſtealing *horſes* ſhould not have the benefit of clergy, the judges conceived that this did not extend to him that ſhould ſteal but *one horſe*, and therefore procured a new act for that purpoſe in the following year [h]. And, to come nearer our own times, by the ſtatute 14 Geo. II. c. 6. ſtealing ſheep, *or other cattle*, was made felony without benefit of clergy. But theſe general words, "or "other cattle," being looked upon as much too looſe to create a capital offence, the act was held to extend to nothing but mere ſheep. And therefore, in the next ſeſſions, it was found neceſſary to make another ſtatute, 15 Geo. II. c. 34. extending the former to bulls, cows, oxen, ſteers, bullocks, heifers, calves, and lambs, by name.

4. STATUTES againſt frauds are to be liberally and beneficially expounded. This may ſeem a contradiction to the laſt rule; moſt ſtatutes againſt frauds being in their conſequences penal. But this difference is here to be taken: where the ſtatute acts upon the offender, and inflicts a penalty, as the pillory or a fine, it is then to be taken ſtrictly: but when the ſtatute acts upon the offence, by ſetting aſide the fraudulent tranſaction, here it is to be conſtrued liberally. Upon this footing the ſtatute of 13 Eliz. c. 5. which avoids all gifts of goods, *&c*, made to defraud creditors

[g] 2 Rep. 46.

[h] 2 & 3 Edw. VI. c. 33. Bac. Elem. c. 12.

ditors *and others*, was held to extend by the general words to a gift made to defraud the queen of a forfeiture[i].

5. ONE part of a ſtatute muſt be ſo conſtrued by another, that the whole may (if poſſible) ſtand: *ut res magis valeat, quam pereat*. As if land be veſted in the king and his heirs by act of parliament, ſaving the right of A; and A has at that time a leaſe of it for three years: here A ſhall hold it for his term of three years, and afterwards it ſhall go to the king. For this interpretation furniſhes matter for every clauſe of the ſtatute to work and operate upon. But

6. A SAVING, totally repugnant to the body of the act, is void. If therefore an act of parliament veſts land in the king and his heirs, ſaving the right of all perſons whatſoever; or veſts the land of A in the king, ſaving the right of A: in either of theſe caſes the ſaving is totally repugnant to the body of the ſtatute, and (if good) would render the ſtatute of no effect or operation; and therefore the ſaving is void, and the land veſts abſolutely in the king[k].

7. WHERE the common law and a ſtatute differ, the common law gives place to the ſtatute; and an old ſtatute gives place to a new one. And this upon the general principle laid down in the laſt ſection, that "*leges poſteriores priores contrarias abrogant*." But this is to be underſtood, only when the latter ſtatute is couched in negative terms, or by it's matter neceſſarily implies a negative. As if a former act ſays, that a juror upon ſuch a trial ſhall have twenty pounds a year; and a new ſtatute comes and ſays, he ſhall have twenty marks: here the latter ſtatute, though it does not expreſs, yet neceſſarily implies a negative, and virtually repeals the former. For if twenty marks be made qualification ſufficient, the former ſtatute which requires twenty pounds is at an end[l]. But if both acts be merely affirmative, and the

[i] 3 Rep. 82.
[k] 1 Rep. 47.
[l] Jenk. Cent. 2. 73.

ſubſtance ſuch that both may ſtand together, here the latter does not repeal the former, but they ſhall both have a concurrent efficacy. If by a former law an offence be indictable at the quarter ſeſſions, and a latter law makes the ſame offence indictable at the aſſiſes; here the juriſdiction of the ſeſſions is not taken away, but both have a concurrent juriſdiction, and the offender may be proſecuted at either; unleſs the new ſtatute ſubjoins expreſs negative words, as, that the offence ſhall be indictable at the aſſiſes, *and not elſewhere* [m].

8. IF a ſtatute, that repeals another, is itſelf repealed afterwards, the firſt ſtatute is hereby revived, without any formal words for that purpoſe. So when the ſtatutes of 26 and 35 Hen. VIII, declaring the king to be the ſupreme head of the church, were repealed by a ſtatute 1 & 2 Philip and Mary, and this latter ſtatute was afterwards repealed by an act of 1 Eliz. there needed not any expreſs words of revival in queen Elizabeth's ſtatute, but theſe acts of king Henry were impliedly and virtually revived [n].

9. ACTS of parliament derogatory from the power of ſubſequent parliaments bind not. So the ſtatute 11 Hen. VII. c. 1. which directs, that no perſon for aſſiſting a king *de facto* ſhall be attainted of treaſon by act of parliament or otherwiſe, is held to be good only as to common proſecutions for high treaſon; but will not reſtrain or clog any parliamentary attainder [o]. Becauſe the legiſlature, being in truth the ſovereign power, is always of equal, always of abſolute authority: it acknowleges no ſuperior upon earth, which the prior legiſlature muſt have been, if it's ordinances could bind the preſent parliament. And upon the ſame principle Cicero, in his letters to Atticus, treats with a proper contempt theſe reſtraining clauſes which endeavour to tie up the hands of ſucceeding legiſlatures. "When you repeal the law it-

[m] 11 Rep. 63.
[n] 4 Inſt. 325.
[o] 4 Inſt. 43.

"ſelf,

"self, says he, you at the same time repeal the prohibitory "clause, which guards against such repeal [p]."

10. LASTLY, acts of parliament that are impossible to be performed are of no validity; and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. I lay down the rule with these restrictions; though I know it is generally laid down more largely, that acts of parliament contrary to reason are void. But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it: and the examples usually alleged in support of this sense of the rule do none of them prove, that where the main object of a statute is unreasonable the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government. But where some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it. Thus if an act of parliament gives a man power to try all causes, that arise within his manor of Dale; yet, if a cause should arise in which he himself is party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel [q]. But, if we could conceive it possible for the parliament to enact, that he should try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no.

THESE are the several grounds of the laws of England: over and above which, equity is also frequently called in to assist, to

[p] *Cum lex abrogatur, illud ipsum abrogatur, quo non eam abrogari oporteat. l. 3. ep. 23.*

[q] 8 Rep. 118.

moderate, and to explain them. What equity is, and how impoſſible in it's very eſſence to be reduced to ſtated rules, hath been ſhewn in the preceding ſection. I ſhall therefore only add, that there are courts of this kind eſtabliſhed for the benefit of the ſubject, to correct and ſoften the rigor of the law, when through it's generality it bears too hard in particular caſes; to detect and puniſh latent frauds, which the law is not minute enough to reach; to enforce the execution of ſuch matters of truſt and confidence, as are binding in conſcience, though perhaps not ſtrictly legal; to deliver from ſuch dangers as are owing to misfortune or overſight; and, in ſhort, to relieve in all ſuch caſes as are, *bona fide*, objects of relief. This is the buſineſs of our courts of equity, which however are only converſant in matters of property. For the freedom of our conſtitution will not permit, that in criminal caſes a power ſhould be lodged in any judge, to conſtrue the law otherwiſe than according to the letter. This caution, while it admirably protects the public liberty, can never bear hard upon individuals. A man cannot ſuffer *more* puniſhment than the law aſſigns, but he may ſuffer *leſs*. The laws cannot be ſtrained by partiality to inflict a penalty beyond what the letter will warrant; but, in caſes where the letter induces any apparent hardſhip, the crown has the power to pardon.

SECTION THE FOURTH.

OF THE COUNTRIES SUBJECT TO THE LAWS OF ENGLAND.

THE kingdom of England, over which our municipal laws have juriſdiction, includes not, by the common law, either Wales, Scotland, or Ireland, or any other part of the king's dominions, except the territory of England only. And yet the civil laws and local cuſtoms of this territory do now obtain, in part or in all, with more or leſs reſtrictions, in theſe and many other adjacent countries; of which it will be proper firſt to take a review, before we conſider the kingdom of England itſelf, the original and proper ſubject of theſe laws.

WALES had continued independent of England, unconquered and uncultivated, in the primitive paſtoral ſtate which Caeſar and Tacitus aſcribe to Britain in general, for many centuries; even from the time of the hoſtile invaſions of the Saxons, when the antient and chriſtian inhabitants of the iſland retired to thoſe natural intrenchments, for protection from their pagan viſitants. But when theſe invaders themſelves were converted to chriſtianity, and ſettled into regular and potent governments, this retreat of the antient Britons grew every day narrower; they were overrun by little and little, gradually driven from one faſtneſs to another, and by repeated loſſes abridged of their wild independence. Very early in our hiſtory we find their princes doing homage to the crown of England; till at length in the reign of Edward the firſt, who may juſtly be ſtiled the conqueror of Wales, the line of

of their antient princes was aboliſhed, and the king of England's eldeſt ſon became, as a matter of courſe, their titular prince: the territory of Wales being then entirely re-annexed (by a kind of feodal reſumption) to the dominion of the crown of England[a]; or, as the ſtatute of Rutland[b] expreſſes it, "*terra Walliae cum* "*incolis ſuis, prius regi jure feodali ſubjecta,* (of which homage "was the ſign) *jam in proprietatis dominium totaliter et cum inte-* "*gritate converſa eſt, et coronae regni Angliae tanquam pars corpo-* "*ris ejuſdem annexa et unita.*" By the ſtatute alſo of Wales[c] very material alterations were made in divers parts of their laws, ſo as to reduce them nearer to the Engliſh ſtandard, eſpecially in the forms of their judicial proceedings: but they ſtill retained very much of their original polity, particularly their rule of inheritance, *viz.* that their lands were divided equally among all the iſſue male, and did not deſcend to the eldeſt ſon alone. By other ſubſequent ſtatutes their provincial immunities were ſtill farther abridged: but the finiſhing ſtroke to their independency, was given by the ſtatute 27 Hen.VIII. c. 26. which at the ſame time gave the utmoſt advancement to their civil proſperity, by admitting them to a thorough communication of laws with the ſubjects of England. Thus were this brave people gradually conquered into the enjoyment of true liberty; being inſenſibly put upon the ſame footing, and made fellow-citizens with their conquerors. A generous method of triumph, which the republic of Rome practiſed with great ſucceſs; till ſhe reduced all Italy to her obedience, by admitting the vanquiſhed ſtates to partake of the Roman privileges.

IT is enacted by this ſtatute 27 Hen.VIII, 1. That the dominion of Wales ſhall be for ever united to the kingdom of England. 2. That all Welchmen born ſhall have the ſame liberties as other the king's ſubjects. 3. That lands in Wales ſhall be inheritable according to the Engliſh tenures and rules of deſcent. 4. That the laws of England, and no other, ſhall be uſed

[a] Vaugh. 400.
[b] 10 Edw. I.
[c] 12 Edw. I.

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