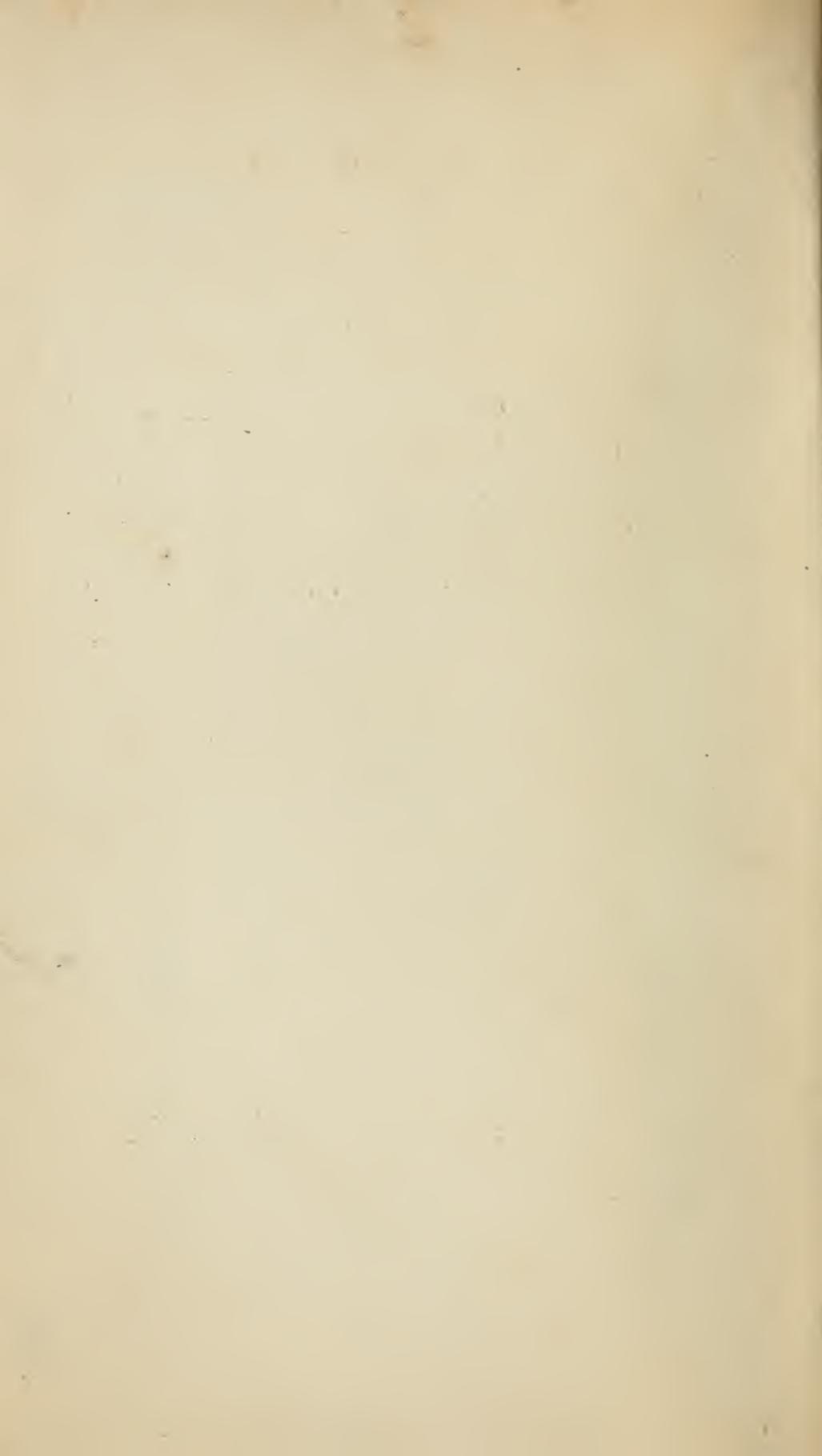


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*Butler*

HORÆ JURIDICÆ SUBSECIVÆ;

BEING A CONNECTED

SERIES OF NOTES

RESPECTING

THE GEOGRAPHY, CHRONOLOGY,

AND

LITERARY HISTORY

OF THE

PRINCIPAL CODES AND ORIGINAL DOCUMENTS

OF THE

GRECIAN, ROMAN, FEUDAL

AND

CANON LAW.

By CHARLES BUTLER, *Esq.*

OF LINCOLN'S-INN.

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Est quodam prodire tenus, si non datur ultra.

HOR.

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Quare quis tandem me reprehendat, si quantum cæteris ad festos dies ludorum celebrandos, quantum ad alias voluptates, et ad ipsam requiem animi et corporis conceditur temporis: quantum alii tempestivis conviviis, quantum aleæ, quantum pilæ, tantum mihi egomet, ad hæc studia recolenda, sumpsero.

CIC. PRO ARCHIA.

Le changement d'étude est toujours un delassement pour moi.

D'AGUESSEAU.



24554

TO  
THE RIGHT HONOURABLE  
JOHN LORD ELDON,  
THIS ESSAY  
IS,  
WITH HIS LORDSHIP'S PERMISSION,  
RESPECTFULLY DEDICATED.





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# THE GRECIAN LAW.

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## I.

WHEN the space, which Greece fills in history, is considered, it is impossible to view, without surprize, the small extent of its GEOGRAPHICAL LIMITS.

In the largest sense of the word, Greece denotes the territories between Illyricum and Mœsia, to the north; the Ionian Sea, to the west: the Cretan, to the south; and the Ægean, to the east. It is divided into the Regnum Macedonicum, which, in the time of Philip, consisted of Macedon, Thessaly, Epirus, and Thrace; and of the Græcia Vera, which was divided into three parts, Achaia, Peloponnesus, and the

Islands. It is highly probable that Greece was originally peopled by the Pelasgi, an Asiatic Horde, who, in successive emigrations, passed the Caucasus, the Don, the Neister, and the Danube, and spread themselves over a great part of Greece. At subsequent periods, it was peopled by various colonies from Ægypt and Phœnicia. For a considerable time, all its inhabitants lived in a wild and barbarous state. Afterwards its fabulous, heroic, and historical ages successively follow.

## II.

II. 1. ITS LEGISLATION may be traced to its *Fabulous Age*.

In the mythology of the Greeks, Chaos was the first of beings, and gave birth to Cœlum and Tellus, to Erebus and Nox: Cœlum and Tellus were the parents of Jusjurandum and Themis; Erebus and Nox were the parents of Nemesis. Jupiter had Astræa and Dicé by Themis;—when the

deities resided on earth, in the golden age, Astræa presided over the administration of justice; and when, in consequence of the vices of men, the deities fled to heaven, she was the last of them who remained on earth; but, at length, quitted it, and was translated into the sign Virgo, next to Libra, her balance. Ceres, the daughter of Saturn and Ops, taught mankind tillage, the worship of the Gods, the use and rights of separate property, respect to parents, and tenderness to animals: on this account, both in the Greek and Latin writers, she is called the law-bearing Ceres; and both in Greece and Rome, she was worshipped, and had temples dedicated to her, under that name.

The earliest account of the fabulous age, on which any reliance can be placed, commences about nineteen hundred and seventy years before Christ; when Argos, from which the north-eastern territory of Peloponnesus received its denomination, first

began to acquire political eminence. Before  
Christ.  
 It is said to have been founded by  
 Inachus, in . . . . . 1970

His descendants filled the throne,  
 till Gelanor, the 10th of them in suc-  
 cession, was expelled by Danaüs, a  
 prince of Ægypt. . . . . 1586

He is mentioned by some writers,  
 as the first legislator of the Greeks;  
 from him, the people of the penin-  
 sula, till then called Pelasgians, re-  
 ceived the name of Danaans, which  
 they retained in Homer's time.

II. 2. From that period, some ap-  
 pearance of real history being dis-  
 cernible in the accounts we have of  
 what is generally called the fabulous  
 age of Greece, it is supposed to verge  
 to a conclusion, and the *Heroic Age*  
 of Greece, is supposed to begin. The  
 regular history of Grecian legisla-  
 tion commences with Theseus, one of the

celebrated persons, from whom that age received its appellation.

In a military expedition to the kingdom of Crete, undertaken by him, to deliver the Athenians from an ignominious tribute, paid by them to the monarch of that island, he had become acquainted with the laws of Minos. The excellence of those laws is highly celebrated by the writers of antiquity: to us, they are chiefly known, as the foundation on which Theseus, and after him Lycurgus, built their respective systems of legislation. In the public education of the children, the public repasts of the people, at which the rich and poor promiscuously attended, the division of the inhabitants into freemen and slaves, and some other institutions of Minos, we trace the general system of legislation, adopted by the Spartan legislator. It is observable, that Minos was the first sovereign, to whom the splendid prerogative of the Dominion

of the Sea<sup>a</sup> was assigned; but probably it was confined to the Cretan and a small part of the Ægæan Seas. On his death it was assigned to the princes of Argos.

On the return of Theseus from Crete, he abolished private jurisdictions, and subjected the whole territory of Athens to one common system of legislation; he divided the commonwealth into nobility, husbandmen, and artificers; and established an uniformity of religious rites and sacrifices. To the nobility and husbandmen he appropriated the executive powers, with the superintendency of religion; but a share in the legislation was given to all; no distinction prevailed, as in every other Grecian province, and afterwards in the Roman world, between the people in the capital, and the rest of the people; all were united, under the general name of Athenians, in the enjoyment of every privilege of Athenian citizens, and the monarch was rather

<sup>a</sup> SEE APPENDIX, NOTE I.

their first magistrate than their sovereign. In consequence of these wise regulations, the Athenians seem to have acquired more civilized manners than the rest of the Greeks; they were the first who dropt the practice of going constantly armed, and thus introduced a civil dress in contradistinction from the military.

Before  
Christ.

The subject leads to the mention of nothing of importance before the taking of Troy. . . . . 1282

In his description of the shield of Achilles, Homer gives a striking account of a trial at law, in his times.

“ The people were assembled in the  
 “ market-place, when a dispute arose  
 “ between two men, concerning the  
 “ payment of a fine for man-slaughter:  
 “ one of them addressed himself to  
 “ the by-standers; asserted that he  
 “ had paid the whole; the other in-  
 “ sisted, that he had received nothing;

“ both were earnest to bring the dispute to  
“ a judicial determination. The people  
“ grew noisy in favour, some of the one,  
“ some of the other; but the heralds inter-  
“ fering, enforced silence; and the elders  
“ approaching, with scepters of heralds in  
“ their hands, seated themselves on the  
“ polished marble benches in the sacred  
“ circle. Before them, the litigants, ear-  
“ nestly stepping forward, pleaded by turns:  
“ while two talents of gold lay in the midst,  
“ to be awarded to him, who should sup-  
“ port his cause by the clearest testimony  
“ and the clearest argument.”

We find from Homer's writings, that, in his time, the rights of primogeniture were considerable; that, murder was punished rather by private revenge than public justice; that, conjugal infidelity, on the woman's part, was esteemed an heinous offence; that, on the man's, it was little regarded; and that, the breach of virgin honour was scarcely thought a crime.

It is observable that Homer makes no mention either of a pure republic, or of the absolute rule of one man: he is supposed to have been favourable to monarchical government; but it is said to be discoverable from his works, that, when he wrote, the general tendency of the public mind of Greece was democratic.

In the course of time, democracy obtained a complete victory over monarchy, in every part of Greece. The Heraclidæ, having acquired a settlement in Doris, invaded and made themselves masters of all Peloponnesus, except Arcadia. At first, they established a limited monarchy in the different provinces they conquered; but, having quarrelled among themselves, and confusion universally prevailing, monarchy was almost every where abolished, and the words, Tyrant and King, became synonymous.

II. 3. Here the heroic age of the history

of Greece draws to a conclusion, and we perceive the dawn of its *Historical Æra*.

From this time, Greece must be considered as formed of a multitude of independent states, exercising complete sovereignty within their respective territories; bound together by no federal union, but connected by language, by their notion of a descent from a common stock, by a similitude of religious belief, and by frequent meetings at public games.

But nothing contributed to this general union more than the council of the Amphictyons: it is supposed to have been instituted by Amphictyon, the son of Deucalion. It met sometimes at Thermopylæ, sometimes at Delphi; the members of it were chosen by the principal cities of Greece. The object of the institution was to decide the differences, which happened among the Grecian states. Their determinations were always held in great venera-

tion; and their influence is supposed to have continued till the reign of Antoninus Pius. Before  
Christ.

During the whole of the historical æra of Greece, except when some singular event raises a particular state into notice, Lacedæmon and Athens alone engage the attention of the historian or civilian.

### III.

THE æra of Grecian legislature begins with the LAWS OF LYCURGUS, the most singular institution recorded in history. . . . . 926

He established two Kings, and a Senate of twenty-eight members, appointed for life; the Kings were chosen by the people, were hereditary senators, high priests of the nation, and commanders of their armies; but they were controuled, in the exercise of their power, by five Ephori,

created annually. With the senate, all laws were to originate; the general assembly of the people had the power of confirming them; but public debate was wholly forbidden the general assembly. Lycurgus effected an equal division of land among all the citizens; he abolished the use of gold and silver; and ordained, that all children should be educated in public: every citizen was to be a soldier; all sedentary trades, and even agriculture, were forbidden them; the ground was cultivated by the Helotæ, a kind of slaves, whom the Lacedæmonians treated with the greatest cruelty.

Thus, Lycurgus effected a total revolution of law, property, and morals, throughout the whole of the Spartan territory: no legislator ever attempted so bold a plan. It has been observed, that, if he had merely been a legislator in speculation, his scheme would have been thought more visionary than Plato's; it may be added, that, if the

existence and continuance of his institutions were not proved, beyond argument, by the highest degree of historical evidence, the relations of them would be pronounced a fiction, on account of, what would be termed, their evident impracticability. Yet, the first establishment of them was attended with little resistance, and with no political convulsion; they remained in vigour longer than any political institution of antiquity known to us, and were respectable even in their decay.

Before  
Christ.

#### IV.

1. DRACO was the first legislator of ATHENS: of his laws, we know little more, than that their extreme severity was proverbial. . . . . 624

He made all crimes capital, on the ground, that a breach of any positive law was a treason to the state.

Solon framed for his countrymen, Before  
Christ.  
a new and milder system of law. . . 594

Mr. Tytler's Elements of Ancient History, 1st vol. 49—52, give us the following concise and clear view of *Solon's Legislation*.

“ Solon, an illustrious Athenian, of  
 “ the race of Codrus, attained the  
 “ dignity of Archon 594 B. C.; and  
 “ was intrusted with the care of fram-  
 “ ing, for his country, a new form of  
 “ government, and a new system of  
 “ laws. He possessed extensive know-  
 “ ledge, but wanted that intrepidity of  
 “ mind, which is necessary to the cha-  
 “ racter of a great statesman. His  
 “ disposition was mild, and tempo-  
 “ rising, and, without attempting to  
 “ reform the manners of his country-  
 “ men, he accommodated his system  
 “ to their prevailing habits and pas-  
 “ sions.

“ The people claimed the sove-

“ reign power, and they received it: the  
“ rich demanded offices and dignities: the  
“ system of Solon accommodated them to  
“ the utmost of their wishes. He divided  
“ the citizens into four classes, according to  
“ the measure of their wealth. To the three  
“ first, (the richer citizens,) belonged the  
“ offices of the commonwealth. The fourth,  
“ (the poorer class,) more numerous than all  
“ the other three, had an equal right of  
“ suffrage with them, in the public assem-  
“ bly, where all laws were framed, and  
“ measures of state were decreed. Conse-  
“ quently the weight of the latter decided  
“ every question.

“ To regulate, in some degree, the pro-  
“ ceedings of their assemblies, and balance  
“ the weight of the popular interest, Solon  
“ instituted a senate of 400 members, (after-  
“ wards enlarged to 500 and 600,) with  
“ whom it was necessary that every mea-  
“ sure should originate, before it became

“ the subject of discussion in the assembly  
“ of the people.

“ To the court of Areopagus he com-  
“ mitted the guardianship of the laws, and  
“ the power of enforcing them, with the  
“ supreme administration of justice. To  
“ this tribunal belonged, likewise, the cus-  
“ tody of the treasures of the state, the care  
“ of religion, and a tutoral power over all  
“ the youth of the republic. The number  
“ of its judges was various, at different pe-  
“ riods, and the most immaculate purity of  
“ character was essential in that high office.

“ The authority of the Senate and Areo-  
“ pagus imposed some check on the popu-  
“ lar assemblies; but, as these possessed  
“ the ultimate right of decision, it was ever  
“ in the power of ambitious demagogues  
“ to sway them to the worst of purposes.  
“ Continual factions divided the people,  
“ and corruption pervaded every depart-  
“ ment of the state. Their public mea-

“sures, the result of the interested schemes  
“of individuals, were often equally absurd  
“as they were profligate. Athens often saw  
“her best patriots, the wisest and most vir-  
“tuous of her citizens, shamefully sacrificed  
“to the most depraved and most aban-  
“doned.

“The particular laws of the Athenian  
“state were more deserving of encomium  
“than its form of government. The laws  
“relating to debtors were mild and equit-  
“able, as were those which regulated the  
“treatment of slaves. But the vassalage  
“of women, or their absolute subjection to  
“the control of their nearest relation, ap-  
“proached near to a state of servitude.  
“The proposer of a law, found on experi-  
“ence impolitic, was liable to punishment;  
“an enactment apparently rigorous, but  
“probably necessary in a popular govern-  
“ment.

“One most iniquitous and absurd pecu-  
“liarity of the Athenian, and some other

“ governments of Greece, was the practice  
“ of the ostracism, or a ballot of all the  
“ citizens, in which each wrote down the  
“ name of the person in his opinion most  
“ obnoxious to censure; and he was thus  
“ marked out by the greatest number of  
“ voices, and, though unimpeached of any  
“ crime, was banished for ten years from  
“ his country. This barbarous and dis-  
“ graceful institution ever capable of the  
“ grossest abuse, and generally subservient  
“ to the worst of purposes, has stained the  
“ character of Athens with many flagrant  
“ instances of public ingratitude.” A full  
account of the laws of Athens may be found  
in Archbishop Potter’s *Archæologia Græca*,  
B. I. The fragments of them were pub-  
lished by Petitus, with an excellent com-  
mentary. A splendid edition of this work,  
with his own notes and those of Palmerius,  
Salvinus, and Duker, was published by  
Wesseling, in 1742.

IV. 2. This may be considered a suc-

cinct view of the constitution of Athens, as it was established by Solon. The following is a short account of their *Forensic Proceedings* in the civil administration of justice.

All cases, respecting the rights of things, belonged to the jurisdiction of the Archon: he had six inferior magistrates, of the same name for his assessors. The person who sought redress in a court of justice, denounced the name of his adversary, and the cause of his complaint to the sitting magistrate; and, if the sitting magistrate thought the cause of action maintainable, he permitted the complainant to summon the defendant: if the defendant disobeyed the summons, he was declared infamous; if he obeyed it, the parties were confronted, and were at liberty to interrogate one another. If the magistrate thought there was a probable cause of action, he admitted the cause into court; here the pleadings began, and were continued till the parties came to some fact, or some point of law, asserted on one

side, and denied by the other; this brought them to issue: then, all the pleadings and evidence in the causes were shut up in a vessel, which was carried into court. The Archon then assigned the judges to try the cause, and they decided not only upon the fact, but upon the law of the case.

One mode of process in use at Athens, bears a resemblance to the modern practice of trying the title to the freehold by ejectment. That, in its original state, was an action brought by a lessee for years, to repair the injury done him by dispossessing him of his term. To make it serve as a legal process for recovering the freehold, the law now supposes, that the party dispossessed has entered on the land; that he has executed a lease of it; and that his lessee has been dispossessed; for this injury, the lessee brings his action of ejectment to recover the term granted by the lease: now, to maintain his title to the lease, he must shew a good title in his lessor; and thus

incidentally and collaterally the title to the freehold is brought before the court. In the jurisprudence of Athens, the guardian and ward were so far identified, that the latter could not maintain an action against the former; so that, for any injury done to his property, the ward, during the term of pupilage, was without remedy. For his relief, the law authorized the Archon to suppose a lease had been executed by the ward to a stranger; then, the stranger, a kind of next friend, was to bring his action against the guardian, for the injury done to his property during the term; and, if he recovered, he became trustee of what he recovered for the ward. Thus, in each case, a fictitious lease was used as a legal process for bringing the real merits of the case to trial.

Sir Matthew Hale, in his *History of the Common Law*, and Sir William Jones, in the *Notes to his translation of Isæus*, make particular mention of the law of succession at Athens. It is observable, that, though a

general equality of property was one of the principal objects of Lycurgus's legislation, he assigned to the eldest son almost the whole of his parent's property, with an obligation of providing for his sisters and younger brothers.

Before  
Christ.

### V.

WITH the death of Solon, the æra of Grecian legislation finishes, and the æra of her military glory begins. But, early in this brilliant period of her history, THE DECLINE OF THE LAWS OF ATHENS AND LACEDÆMON is discernible. 490

With respect to *Athens*, it has been mentioned, that, by the laws of Solon, the lowest class of citizens had been excluded from offices of state. These, on the motion of Themistocles, were opened to them: this lessened the general dignity of the magistrature, and introduced venality and disorder into

every department of the administration. Here, however, the mischief did not rest. As the poor were under a necessity of giving almost the whole of their time to the labour, on which their daily sustenance depended, they had scarcely any opportunity of attending the public assemblies of the people; but, on the motion of Pericles, every Athenian, who assisted at a public assembly, received three oboli for his attendance: this increased the tumult and corruption of the public assemblies; and this was not the only instance in which Pericles sacrificed much of Solon's law to the caprice of the people.

In respect to *Lacedæmon*, the victories of Lysander and Agesilaüs carried the Spartans into foreign countries, and brought the wealth of foreign countries into Sparta. The consequence was, that what the Lacedæmonians gained by their military successes, they lost in consequence of the decline, which those very successes occasioned,

of the principles and habits of heroic virtue, which the legislation of Lycurgus had inculcated among them, and which had made them the wonder of Greece.

Before  
Christ.

Insensibly the glory of Athens and Lacedæmon expired. At the battles of Leuctra and Mantinæa, they received a check, from which they never recovered.

At the battle of Cheronæa, king Philip of Macedon obtained a complete triumph over the Athenians; and, by degrees, the laws of Solon fell into disuse.

337

By the direction of Antipater, to whom the general superintendence of the affairs of Greece was committed by Alexander the Great, when he set out on his expedition to Persia, they were restored, with some modifications, by Demetrius Phalareus, and continued in that state, while Greece

was subject to Alexander's succes- Before  
sors. . . . . Christ.  
280

When the Romans conquered Greece, they allowed to the different states the use of their laws; insensibly the Romans acquired a taste for the arts and literature of Greece, and this particularly recommended the Athenians to them.

On a complaint by the Athenians, that too many changes had been made in the laws of Solon, the Emperor Adrian accepted the office of Archon, and restored the ancient law. . . . . 130

The Emperor Constantine was not so favourable to the Athenians;—in the Emperor Julian, they had a zealous friend. . . . . 360

By an edict of the Emperor Justinian, the schools of Athens were shut up: this is generally assigned as the æra of the extinction of Paganism, and of the absolute decline of

the philosophy and jurisprudence of Athens. . . . . After  
Christ.  
529

With the history of the decline of the Laws of Lycurgus, we are less acquainted. Though in a state of decay, their appearance was venerable in the time of Polybius: perhaps they suffered less than the Laws of Athens, during the Macedonian influence in Greece; and probably they engaged less of the attention of the Romans; but we have no reason to suppose they long survived the Athenian Law.

On the division of the empire between the sons of Theodosius, Greece was allotted to the Emperor of the East: it suffered much from the incursions of the Goths under Alaric. 395

In the twelfth century, the emperor Manuel divided Peloponnesus among his seven sons: before this time, from the resemblance of its shape to that of a mulberry tree, 1100

called Morea in Greek, and Morus in Latin, it had received the appellation of the Morea. In the next century, 1200 when Constantinople was taken by the Western Princes, the maritime cities of Peloponnesus, with most of the islands, submitted to the Venetians. In the fifteenth century, the 1460 whole Morea fell an easy prey to Mahomet II, after his conquest of Constantinople. Towards the close of the seventeenth century, the Ottomans were expelled from it by the Venetians, and it was formally ceded to them by the Porte, at the treaty of Carlowitz: but, about fifteen years 1699 afterwards, it was regained by the Porte, and now forms a part of their empire, under the appellation of the Beglerbeg of Greece. It is governed by a military officer, called a Sangiac, who resides at Modon.

After  
Christ.

Such have been the rise, progress, and decline of the Laws of Greece.

The great influence of the Roman Law on the jurisprudence of modern nations is strikingly discernible, in every part of their laws:—if it be true, that Rome derived her law from the Athenian code, the “*Græcia capta ferum victorem cepit,*” is as applicable to the legislation as it is to the arts of Greece.<sup>b</sup>

<sup>b</sup> THIS article is principally extracted from *Ubbo Emmius's Vetus Græcia Illustrata*, 3 vol. 8vo, the best geographical account of Greece, which has yet appeared; from *Archbishop Potter's Antiquities of Greece*, a work of great learning; from *Bruning's Compendium Antiquitatum Græcarum; Francofurti ad Mœnum*, 1 vol. 8vo. 1735, an useful abridgment of the Archbishop's work; from various treatises of Meursius, particularly his *Themis Attica*; from *Mr. Mitford's and Doctor Gillies's Histories of Greece*; and from *Sir William Jones's Translation of Iseus*, a lasting monument of his industry, and his wonderful quickness in the acquisition of accurate and extensive knowledge, even of the abstrusest kind.

# THE ROMAN LAW.

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## I.

THOSE, who wish to trace the ROMAN LAW to its origin, almost immediately find themselves obliged to form an opinion on a point which has been the subject of much discussion, and a decision upon which is not very easy, *the degree of credit due to the histories, which have reached us, of the five first ages of Rome.* The credibility of them was ingeniously attacked by M. de Pouilly, and as ingeniously defended by L'Abbé de Salier, in their dissertations on this subject, in the *Mémoires de l'Académie.* In his discourses, *Sur l'incertitude des cinq premiers siècles de l'histoire Romaine,* M. de Beaufort seems to have determined the question. By a variety of arguments,

drawn from the scantiness of the materials, from which these histories appear to have been framed, from the romantic nature of several of the exploits recorded in them, the improbability of many, and evident falsehood of some of their relations, and from the contradictions and absurdities, with which they frequently abound, he shews that, at least, where they descend into particulars, they should be read with a considerable degree of distrust. What they mention of the populousness of Rome, which, before the end of her second century, contained, by their accounts, 500,000 persons, appears incredible: but a smaller number would not have sufficed to construct the public works, with which, even then, Rome abounded. This circumstance has struck some modern writers so forcibly, that, to account for it, they have supposed, that Rome was raised on the ruins of a city, which, though now wholly forgotten, was once populous and magnificent, and the

seat of a powerful empire. In pursuing this research, some have found such an empire among the Hetruscans. With the particulars of the history of that people, we are little acquainted; but we have certain information, that, long before the æra of the foundation of Rome, they were a flourishing state, excellent in arts and arms.\*

\* SEE the Appendix to the ancient Universal History, vol. 18. p. 187, and Maffei's Verona Illustrata, B. I. The expression of Livy, B. I. c. 2, is very strong, "Tanta opibus Etruria, ut  
 " jam non terras solum, sed mare etiam per  
 " totam Italiæ longitudinem, ab Alpibus ad  
 " fretum Siculum, famâ nominis sui implesset." On the other hand, the silence of Herodotus may be thought a strong argument against the existence of such a city in his time.

## II.

THE first object in the study of the Roman Law, is to obtain an accurate view of the LIMITS OF THE COUNTRIES, in which it prevailed, before the dismemberment of the empire. They may be

divided into Italy, the conquests of the Romans in the other parts of Europe, and their conquests out of Europe.

II. 1. *Italy* lies 7. 19. East long. and 38. 47. North lat.: the Alps divide its northern part from France, Switzerland and Germany; on every other side, it is washed by the Mediterranean. Its natural separation is into its northern, central, and southern divisions. Its northern division contains the modern Lombardy and the territories of Venice and Genoa, and reaches on every side to the Alps, from a line which may be supposed to be drawn from the Rubicon on the eastern, to the Macra on the western side of Italy.<sup>d</sup>

Its central division extends from the Rubicon to the Trento, near the Fortori, on the eastern sea, and from the Macra to the Silaro, on the western; and comprises Etruria, Umbria, Picenum, Sabinia, La-

<sup>d</sup> SEE APPENDIX, NOTE II.

tium, Lavinium, and Campania, or Tuscany, the Ecclesiastical State, and the territory of Naples: its southern part contains the remainder of Italy, the Marsi, the Samnites, the Apulians, and the Lucanians. Before the Roman conquests of it, the northern division of Italy had been occupied by a colony of Gauls: on that account, it was known to the Romans, by the name of Gallia Cisalpina; and, from its being intersected by the Po, the northern division, made by that river, was called by them the Transpadanan, the southern was called the Cispadanan Gaul. The southern part of Italy was peopled by colonies from Greece; on that account it was called Magna Græcia, by the Romans:—the part between Gallia Cisalpina and Magna Græcia, was called Italia Propria, or Proper Italy. The part of the Mediterranean, on the eastern side of the peninsula, was called the Higher, and afterwards the Hadriatic Sea;

the part on its western side, was called the Lower or Tyrrhenean Sea.

With respect to its Antient State, it is probable, that the greatest part of Italy was in possession of the Hetruscans, when, about the year 964 before Christ, Evander arrived in Latium, and built a small town called Palantium. It is supposed, that Latinus reigned there, about the time of the Trojan war; that, in his reign, Æneas landed in Italy, married Lavinia his daughter, and built Lavinium; that Ascanius, the son of Æneas, built Alba; that Romulus descended from him, and laid the foundation of Rome 753 years before Christ.

The monarchical government of Rome subsisted about 250 years; during the whole of this time, Rome was engaged in war with her neighbours; and perhaps the utmost extent of her conquests did not exceed a circumference of fifteen miles. In the next 250 years, the Romans conquered the re-

maining part of Italy, from the Alps to its southern extremity: then the conflict between her and Carthage commenced. From the destruction of Carthage, the æra of her foreign conquests may be dated; in the reign of Augustus, they reached the Atlantic, on the west; the Euphrates, on the east; the Rhine and the Danube, on the north; and Mount Atlas and the Cataracts of the Nile, on the south: under Domitian, they were carried to the Frith of Forth and the Clyde; and, under Trajan, over the Danube into Dacia, and over the Euphrates, into Mesopotamia and Armenia.

II. 2. *The European part of this spacious conquest* contained Hispania, or the kingdoms of Spain and Portugal:—Gaul, which comprised the whole country between the Pyrenees, the Ocean, the Rhine, and the Alps, or the present territory of France, with the addition of Switzerland:—Britannia, which comprised all England, Wales, and the lowland parts of Scotland, up to the

Frith of Forth and the Clyde:—the Rhœtian and Vindelician provinces, which nearly comprised the Grisons, the Tyrolese, and a part of Bavaria:—the Norican, Pannonian and Dalmatian provinces, which, under the general name of Illyricum, filled the country between the Danube and the Hadriatic, up to ancient Greece:—Mœsia, which comprised Servia and Bulgaria:—and Dacia, which comprised Temeswar and Transylvania, the only part of the Roman territory beyond the Danube; and Thrace, Macedonia, and Greece, the Roumelia of the Turks.

II. 3. *The Roman Conquests out of Europe* reached over Minor Asia, Syria, Phenicia, and Palestine; over Ægypt, as far as Syene; and over the whole northern frontier of Africa. It should be added, that the countries on the northern shores of the Euxine, from the Danube on the west to Trebizond on the east, were tributary to the Romans,

received their kings from Rome, and had Roman garrisons.<sup>c</sup>

<sup>c</sup> THIS article is chiefly extracted from the second chapter of the first volume of Mr. Gibbon's history; the geography of that work is unquestionably entitled to the highest praise.

### III.

THESE were the limits of the Roman empire; her subjects may be classed under the following divisions.

III. 1. The highest class of subjects was that of Roman citizens, or those who had the *Jus Civitatis*.

At a distance of about fourteen miles from the sea, the city of Rome stands on a cluster of small hills, contiguous to each other, rising out of an extensive plain, washed by the Tiber. At first, it was confined to the Palatine Hill: the Capitol was added to it by Titus Tatius; the Quirinal, by Numa; the Celian, by Tullus Hostilius; the Aventine, by Ancus Martius; and the

Viminal and Esquinal by Servius Tullius. The city was surrounded by a wall; a slip of ground, on each side of it, was called the Pomœrium; the walls and Pomœrium were sacred: whoever extended the limits of the empire, had a right to extend the walls of the city: its last and greatest extension, was in the time of the Emperor Aurelian: he inclosed the Mons Pincius and Campus Martius within its walls. In 850, Pope Leo added to it the Mons Vaticanus. At first, it was divided into four districts or regions; Augustus divided them into fourteen; modern Rome is divided into the same number; but the scites of the ancient and modern districts or regions, considerably differ.

At first, all who fixed their residence in any part of the Roman territory, had the Jus Civitatis, or the rights of Roman citizens: afterwards the Jus Civitatis was conferred on few, and generally with limitations; in the course of time, it was granted

to all of the Latin name. After the civil war, it was conferred on all the inhabitants of Italy, south of the Rubicon and Lucca: then it was granted to the Cisalpine Gaul, which, from this circumstance, was called *Gallia Togata*: finally, Caracalla communicated it to all the inhabitants of the Roman world.

The *Jus Civitatis* attached to those, who possessed it, the public rights and obligations attending the census, or enrolment in the censors' books; the *Militia*, or serving in the army; the *Tributa*, or taxation; the *Suffragium*, or voting in the different assemblies of the people; the *Honores*, or public offices of the state; and the *Sacra*, or a participation in the sacred rites of the city: it conferred on them the private rights and obligations of liberty, family, marriage, parental authority, legal property, making a will, succeeding to an inheritance, and tutelage or wardship.

The citizens of Rome were divided into

Patricians or nobles, and Plebeians or inferior persons, and the middle order, called the Equites. At an immeasurable distance beneath the Plebeians, were the slaves: their masters might set them free, they were then called freed-men; but, even after they were set free, their masters retained some rights over them.

The Romans were divided into gentes or clans; their clans into families; their families into individuals. Each individual had a prænomen, by which he was distinguished from others; a nomen, which denoted his clan; and a cognomen, which denoted his family; sometimes an agnomen was added, to denote the branch of the family to which he belonged. Thus, in respect to Aulus Virginius Tricostus Cœlimontanus,—Aulus, the prænomen, denoted the individual; Virginius, the nomen gentilitium, denoted that he was of the Virginian clan; Tricostus, the cognomen, denoted, that he was of the Tricostan family of that clan; and Cœ-

limontanus, the agnomen, denoted, that he was of the Cœlimontan branch of that family: sometimes a further name was acquired, as Cunctator by Fabius, and Africanus by Scipio, in consequence of an illustrious deed.

III. 2. Next to the Citizens of Rome, were the Latins, or those who had the *Jus Latii*. Ancient Latium contained the Albani, Rutuli, and Æqui; it was afterwards extended to the Osci, Ausones, and Volsci: the difference between the right of the city and the right of Latium is not precisely ascertained: the principal privilege of the Latins seems to have been, the use of their own laws, and their not being subject to the edicts of the Prætor; and that they had occasional access to the freedom of Rome, and a participation in her sacred rites.

III. 3. The Italians, or those who had the *Jus Italicum*, followed. All the country, except Latium, between the Tuscan and Hadriatic seas, to the rivers Rubicon

and Macra, was, in this sense of the word, called Italy: the Italians had not access to the freedom of Rome, and did not participate in her sacred rites; in other respects, they were nearly on a footing with the Latins.

III. 4. Those countries were called *Provinces*, which the Romans had conquered, or, in any other way, reduced to their power, and which were governed by magistrates, sent from Rome. The foreign towns, which obtained the rights of Roman citizens, were called *Municipia*. The cities or lands, which the Romans were sent to inhabit, were called *Coloniæ*; some consisted of Citizens, some of Latins, and some of Italians, and had therefore different rights.

*Præfecturæ*, were conquered towns, governed by an officer called a Præfect, who was chosen in some instances by the people, in others by the Prætors.

*Civitates Fæderatæ*, were towns in alliance with Rome, and considered to be free. All

who were not Citizens, Latins, or Italians, were called *Peregrini* or foreigners; they enjoyed none of the privileges of Citizens, Latins, or Italians.<sup>f</sup>

<sup>f</sup> THIS article is extracted from the first Appendix to *Heineccius's Antiquitatum Romanarum Syn-  
tagma*; and *Gravina's work, De Ortu et pro-  
gressu Juris Civilis*, and his *Liber singularis de  
Romano Imperio*:—it will be found difficult to  
mention many works, which a practical lawyer,  
who wishes to relieve his mind from his pro-  
fessional labours by the perusal of a work of  
taste, on a subject connected with them, will  
read with so much pleasure as these three trea-  
tises:—and from *Spanheim's Orbis Romanus*.

#### IV.

SUCH were the limits of the Roman em-  
pire, and the different classes of Roman  
subjects;—with respect to its GOVERN-  
MENT AND FORM OF LEGISLA-  
TION:

The ROMAN LAW, in the most ex-  
tensive import of those words, denotes the  
system of jurisprudence, by which the Ro-

man empire was governed, from its first foundation by Romulus, to its final subversion in the East, in consequence of the taking of Constantinople by Mahomet II. THE CIVIL LAW denotes that part of the Roman Law, which consists of the body of law, compiled by the orders of the Emperor Justinian, and of the laws subsequently enacted by him, and called his Novells.

The writers on the History of the Roman Law, generally divide it into three æras,—the *Jurisprudentia Antiqua*, *Media*, and *Nova*. The first commences with the foundation of Rome, and extends to the æra of the twelve tables; the second extends to the reign of the emperor Adrian; the third to the reign of the emperor Justinian.

IV. 1. *As it was constituted by Romulus*, the Roman government consisted of an elective King; a Senate or Council, first of one hundred, and afterwards of two hundred nobles; and a general assembly of the

people. The command of the army, the administration of justice, the superintendence of religious concerns, with the office of high priest, belonged to the King; the Senate deliberated on all public business, and prepared it for the people; to them, the right of final determination upon it belonged. The number of Senators was successively increased, to three hundred, by Tarquinius Priscus; to six hundred by Sylla; to nine hundred by Julius Cæsar; Augustus reduced it to six hundred. That, during the monarchy, the King had the right of appointing the Senators, is clear: how they were chosen during the æra of the republic, has been the subject of much dispute: some, with M. de Vertot, M. de Beaufort, and Lord Hervey, contend that, as the Consuls succeeded to the royal power, they enjoyed the royal prerogative of filling up the Senate, till the creation of the Censors, to whom it then devolved: others, with Dr. Middleton, and Dr. Chapman, con-

tend that the Kings, Consuls, and Censors, only acted in these elections, ministerially and subordinately to the supreme will of the people; with whom the proper and absolute power of creating Senators always resided.

The people were divided by Romulus into three Tribes, and each tribe into three Curiaë. Their public assemblies were called the *Comitia Curiata*: every member had an equal right of voting at them; and the votes were reckoned by the head. Thus, the issue of all deliberations depended on the poor, as they formed the most numerous portion of the community. To remedy this, Servius Tullius, the sixth King, divided the people into six classes, according to a valuation of their estates, and then subdivided the classes into an hundred and ninety-three centuries, and threw ninety-eight of the centuries into the first class; twenty-two, into the second; twenty, into the third; twenty-two, into the fourth; thirty, into the fifth; and the re-

maining part of the citizens into the sixth. The first class consisted of the richest citizens; the others followed in a proportion of wealth; the sixth consisted wholly of the poorest citizens. Each century, except the last, was obliged to furnish an hundred men in the time of war; the sixth was exempt from all taxes; and, to compensate this privilege to the rich, Servius enacted that, in the assemblies of the people, they should no longer count the votes by head, but by centuries, and that the first century should have the first vote. This arrangement, while it seemed to give every citizen an equal right of suffrage, as all voted in their respective centuries, virtually gave the richer classes the sole authority: but it was generally acceptable, as it conferred power on the rich, and immunity from taxes and the other burdens of the state, on the poor. These assemblies were called the *Comitia Centuriata*. For some purposes, however, particularly for the choice of inferior ma-

gistrates, and, in the time of the republic, for vesting military power in the Dictator, the Consuls, and the Prætors, the Comitia Curiata continued necessary.

On the expulsion of the last Tarquin, the Senate seems to have been permitted to retain, for some time, the constitutional power, under the regal state, of the monarchs whom they had dethroned: and to have used all means within their reach to perpetuate it in themselves.—During this period, the form of Roman legislation appears to have been, 1st, that the Senate should convene the Assembly, whether of Curiæ, or Centuriæ; 2dly, that the Consul should propound to them the matter to be discussed; 3dly, that the Augur should observe the omens, and declare whether they were favourable or unfavourable;—in the last case the assembly was dissolved; 4thly, that the assembly should vote; 5thly, that the Consul should report the resolution of

the people to the Senate; and, 6thly, that the Senate should confirm or reject it.

IV. 2. These were the rights of the Consuls, the Senate, and the people, at the commencement of the republic; *several alterations successively took place*, in favour of the people, at the expence of the Consuls and the Senate.

With respect to the *Consuls*, their dignity and power were, by degrees, parcelled out among various magistrates:—thus their power of deciding in civil matters was assigned to the Prætors; their power of setting criminal prosecutions on foot was assigned to the Public Accusers; their care of the police, to the Ediles; their general superintendence of morals and manners, to the Censors. After this, little more remained to the Consuls, than their right to assemble the Senate, convene the Comitia, and command the armies of the republic. The Consuls and higher magistrates were chosen by the people; at first, their choice was confined to

the Patrician order; after much contest, it was extended to the people.

The influence of the Patricians on the deliberations of the *Comitia Centuriata* was soon thought a grievance by the people: hence, upon every occasion which offered, they endeavoured to bring the business before the *Comitia Curiata*: but with this, they were not satisfied; for, as a patrician magistrate only could preside at the *Comitia Curiata*, and before the assembly proceeded to business, the omens were to be consulted, and none but Patricians were admitted to the rank of Augur, the *Comitia Curiata*, though in a less degree than the *Comitia Centuriata*, were still subject to Patrician influence. To make the people entirely independent of the Patricians, at their general assemblies, the Tribunes insisted, that the public deliberations should be brought before the assemblies of the tribes, at which every Roman citizen had an equal right to vote, and at which neither

the presence of a magistrate, nor the taking of the omens was essential. To this, the Senate and Patricians found it necessary to submit. At first, they contended that they were not bound by the laws passed at these assemblies, but they were soon forced to acknowledge their authority. These assemblies were called the *Comitia Tributa*.

Some important privileges, however, still remained to the *Senate*: they had the direction of all concerns of religion, the appointment of ambassadors, of governors of the provinces, of the generals and superior officers of the army, the management of the treasury, and, speaking generally, they had the direction of all the religious, civil, and military concerns of the state, subject to the controul of the people, and subject also to the controul of any tribune of the people, who, by his *Veto*, might, at any time, prevent the resolution of the Senate from passing into a decree: but, when the people did not interfere, the *Senatus-Consulta* gene-

rally were obeyed; and it seldom happened that, in matters of weight, the people enacted a law, without the authority of the Senate. Thus the constitutional language of ancient Rome was, that the Senate should decree, and the People order. By the senators themselves, it was deemed an heinous offence, that any of their body, without their leave, should propose a measure to the people: but, in the decline of the Republic, the leading men of Rome and their creatures, paid no attention to this notion, and frequently obtained from the people, what they knew would be refused them by the Senate. The writings of Cicero abound with complaints against this practice. The determination of the people, at the Comitia Centuriata, Comitia Curiata, or Comitia Tributa, was equally *Lex*, or a Law of the state; but when it passed in the Comitia Tributa, as it originated with the people, it was called *Plebiscitum*: the decrees of the Senate, were called *Senatus-Consulta*.

IV. 3. *The laws were distinguished*, sometimes by the name of the person who proposed them, as the law *Æmilia*: sometimes, by the names of the Consuls, if they were proposed by both the Consuls, as the law *Papia Poppæa*: and sometimes, a mention of the nature of the law was added, as the *Lex Fannia Sumptuaria*.<sup>5</sup>

\* SEE *M. de Beaufort, La Republique Romaine; Paris, 1767, 6 vol. 8vo. Letters between Lord Hervey and Dr. Middleton concerning the Roman Senate; London 1778, 4to. and the 12, 13, 14, and 15 Chapters of Montesquieu, l. 11.*

## V.

FOR obtaining an exact view of the HISTORY OF THE ROMAN LAW, it may be divided into nine periods, severally beginning with the following epochs; 1st, the foundation of Rome; 2d, the Twelve Tables; 3d, the abolition of the Decemvirs; 4th, the reign of Augustus; 5th, the reign of Hadrian; 6th, the reign of Constantine the

Great; 7th, the reign of Theodosius the Second; 8th, the reign of Justinian; 9th, the reign of his successors, till the fall of the Empire of the East; and 10th, the revival of the study of the civil law, in consequence of the discovery of the Pandects at Amalphi. A short view should be had of the principal schools in which the civil law has been taught, and a short account of its influence on the jurisprudence of the modern states of Europe.

Before  
Christ. Anno  
Urbis  
Con-  
ditæ.

### V. 1.

V. 1. THE FIRST OF THESE PERIODS contains the state of Roman jurisprudence from the foundation of Rome, till the æra of the Twelve Tables. As Rome was a colony from Alba, it is probable that her laws originated in that city. Several of them are actually traced to her first kings; particular mention is made of

753

1

laws enacted by Romulus, Numa, and Servius Tullius. Historians ascribe to Romulus the primitive laws of the Romans, respecting marriage, the power of the father over his child, and the relation between patron and client: to Numa, their primitive laws respecting property, religion and intercourse with foreign states; to Servius Tullius, their primitive laws respecting contracts and obligations. It is supposed that, in the reign of the last of these kings, a collection of their laws was promulgated by public authority. The scanty materials which have reached us, of the regal jurisprudence of Rome, lead to a conjecture that the Romans had attained a high degree of legislative refinement before the abolition of royalty.

Before Anno  
Christ. Urbis  
Con-  
ditæ.

Tarquin, the last king of Rome, was expelled in . . . . .  
Not long before or after his expul-

509 245

sion, a body of the Roman law, as it then stood, was collected by Papyrius, and from him was called *Jus Civile Papyrianum*. The president Terasson, in his *Histoire de la Jurisprudence Romaine*, Paris, 1750, in folio, p. 22—73, professes to restore the original of this compilation, as far as the materials, which have reached us, allow: he has given us thirty-six laws,—fifteen of them as original texts, and twenty-one as the substance or sense of texts which are lost.

## V. 2.

THE SECOND PERIOD OF THE HISTORY OF THE ROMAN LAW, is the æra of the Twelve Tables.

During the first half century which followed the expulsion of the Tarquins, the civil government of the Romans was in great confusion: on their expulsion, much of the ancient law was abrogated or fell into disuse, and some new laws were enacted by the Consuls.

The arbitrary and undefined power of the Consuls in framing laws growing very odious, three persons were sent into Greece, and probably to some of the most civilized states of Magnà Græcia or Lower Italy, to obtain copies of their laws and civil institutions. . . . .

Before  
Christ. Anno  
Urbis  
Con-  
ditæ.

453 301

They returned in the third year after their mission. Ten persons, called from their number Decemvirs, were then appointed to form a code of law for the government of the state, both in private and public concerns. This they effected, and divided their code into ten distinct tables: two were added to them in the following year. They were a mixture of the laws of other nations, and of the old Roman law, adapted to the actual circumstances of the state of the people. . . .

451 303

They were inscribed on twelve tablets of brass; and, from that circum-

stance, were called the *Laws of the Twelve Tables*. The twelve tablets were exposed to the view of every person, in a public part of the market place. In the sack of Rome, by the Gauls, they perished: immediately after the expulsion of the Gauls, they were restored, and the whole text of them was extant in the time of Justinian: fragments only of them have reached us. Gothofred's edition of these fragments, in his work intituled *Fontes Quatuor Juris Civilis*, Geneva, 1653, in octavo, has obtained the universal applause of the learned: the fragments of them have also been published by the president Terasson; and Pothier has inserted them in his *Pandectæ Justinianæ*, with an interpretation, and an excellent commentary.

The legislative wisdom of the Twelve Tables has been highly praised; but it has been thought, in some instances, immoderately severe. Thus, in respect to an insolvent debtor,—after the debt was proved

or admitted, they allowed him thirty days to raise the money, or find surety for its payment: at the end of the thirty days, the law delivered him into the power of his creditor, who might confine him for sixty days in a private prison, with a chain of fifteen pounds weight on a daily allowance of one pound of rice: during the sixty days, he was to be thrice exposed in the market place, to raise the compassion of his countrymen: at the end of sixty days, if he was sued by a single creditor, the creditor might sell him for a slave beyond the Tyber; if he was sued by several, they might put him to death, and divide his limbs among them, according to the amount of their several debts. Nothing can be urged in defence of this savage provision, if, as appears to be its true construction, the division, which it directs to be made, is to be understood literally of the body, and not of the price of the debtor: but if, before the Twelve Tables, an insolvent debtor became

*See the page 2 of the 1st Vol. of the Roman Law  
as the law of the 1st of the 12 Tables  
where the law is more completely  
explained -*

the slave of the creditor, so that his liberty and life were immediately in the power of the creditor, the ultimate severity of the provisions of the Twelve Tables should be ascribed to the harsh spirit of the people, and the intermediate delays in favour of the debtor should be ascribed to the humane policy of the Decemvirs. It may be added, that about two hundred years afterwards, the Petilian law provided that the goods, and not the body of the debtor, should be liable to his creditor's demands; and that, at a subsequent period, the Julian law provided, in favour of the creditor, the *Cessio Bonorum*, by which the debtor, on making over his property to his creditors, was wholly liberated from their demands. Upon the whole, if we consider the state of society, for which the laws of the Twelve Tables were formed, we shall find reason to admit both their wisdom and their humanity.

The journey of the Decemvirs into Greece has been questioned by M. Bonamy, *Mem.*

*de l'Academie*, vol. xii. p. 27, 51, 75; and his doubts have been adopted by Mr. Gibbon; but the fact is either related or alluded to by almost every Roman author, whose works have come down to us: and some writers have professed to track the jurisprudence of Greece, even in the legislative provisions of the Prætors, Consuls, and Emperors.

### V. 3.

V. IN proportion as Rome increased in arms, arts and the number of her citizens, the insufficiency of the laws of the Twelve Tables was felt, and new laws were passed. This insensibly produced, during the remaining part of the period of the republic, which forms **THE THIRD PERIOD OF THE HISTORY OF THE ROMAN LAW**, that immense collection of laws, from which the civil law, as the Justinianean body of law is called, was extracted,

and which, on that account, deserves particular consideration.

It was divided, like the law of Greece, into the written and unwritten law. The written comprehended the *Leges*, *Plebis-cita*, and *Senatus-Consulta*, which have been mentioned.

1. The first, and most important branch of the unwritten law of Rome was the *Jus Honorarium*, the principal part of which was the *Edictum Prætoris*. During the regal government of Rome, the administration of justice belonged to the king: on the establishment of the republic, it devolved to the Consuls, and from them, to the Prætor. At first, there was but one Prætor; afterwards, their number was increased to two; the Prætor Urbanus, who administered justice among citizens only; and the Prætor Peregrinus, who administered justice between citizens and foreigners, or foreigners only: the number of Prætors was afterwards increased, for the administration of justice

in the provinces and colonies. When the Prætor entered on his office he published an edict, or system of rules, according to which he professed to administer justice for that year. In consequence of his often altering his edicts, in the course of the year, laws were passed, which enjoined him not to deviate from the form, which he should prescribe to himself, at the beginning of his office. All magistrates who held the offices, which were ranked among the honours of the state, had the same right of publishing edicts; and, on this account, that branch of the law, which was composed of the edict of the Prætor, and the edicts of those other magistrates, was called the *Jus Honorarium*: but the edicts of the Prætor formed by far the most important part of this branch of the Roman law. Such were his rank and authority in Rome, and such the influence of his decisions on Roman jurisprudence, that several writers on the Roman law mention his edicts in terms, which seem to im-

port that he possessed legislative, as well as judicial power; and make it difficult to describe with accuracy, what is to be understood by the Prætor's edict. Perhaps the following remarks on this subject will be found of use, and shew an analogy between some parts of the law of which the honorary law of Rome was composed, and some important branches of the law of England.—1st. By the Prætor's edict, as those words apply to the subject now under consideration, civilians do not refer to a particular edict, but use the words to denote that general body of law, to which the edicts of the Prætors gave rise.—2dly. It is to be observed, that the legislative acts of any state, form a very small proportion of its laws: a much greater proportion of them consists of that explanation of the general body of the national law, which is to be collected from the decisions of its courts of judicature, and which has, therefore, the appearance of being framed by the courts.

A considerable part of the law, distinguished by the name of the Prætor's edict, was of the last kind; and, as it was a consequence of his decisions, received the general name of his law. In this respect, the legal policy of England is not unlike that of Rome; for, voluminous as is the statute book of England, the mass of law it contains bears no proportion to that, which lies scattered in the volumes of reports, which fill the shelves of an English lawyer's library: and perhaps it would be difficult to find, in any edict of a Prætor, a more direct contradiction of the established law of the land, than the decisions of the English judges, which, in direct opposition to the spirit and language of the statute *de donis*, supported the effect of common recoveries in barring estates tail.—  
3dly. Experience shews, that the provisions of law, on account of the general terms, in which they are expressed, or the generality of the subjects to which they are applicable, have frequently an injurious operation.

in particular cases, and that circumstances frequently arise, for which the law has made no provision. To remedy these inconveniences, the courts of judicature of most countries, which have attained a certain degree of political refinement, have assumed to themselves a right of administering justice in particular instances, by certain equitable principles, which they think more likely to answer the general ends of justice, than a rigid adherence to law; and, where law is silent, to supply its defects by provisions of their own. These privileges were allowed the Prætor by the law of Rome; in virtue of them, he pronounced decrees, the general object of which had sometimes a corrective, and sometimes a suppletory operation on the subsisting laws. They were innovations; but it may be questioned, whether any part of the Prætor's law was a greater innovation on the subsisting jurisprudence of the country, than the decisions of English courts of equity on the statute

of frauds.—4thly. The laws of every country allow its courts a considerable degree of power and discretion in regulating the forms of their proceedings, and carrying them into effect; further than this, the Prætor's power of publishing an edict, signifying the rules by which he intended the proceedings of his courts should be directed, does not appear to have extended.—These observations may serve to explain the nature of the Prætor's jurisdiction, and to shew that the exercise of his judicial authority was not so extravagant or irregular as it has sometimes been described.<sup>d</sup>

2. A second source of the unwritten law of Rome was, the *Actiones Legis*, and *Solemnes Legum Formulæ*, or the Actions at Law, and Forms of Forensic proceedings, and of transacting legal acts. These, for some time, were kept a profound secret by the Patricians; but, Appius Claudius having made a collection of them for his pri-

\* SEE APPENDIX, NOTE III.

vate use, it was published by Cnæus Flavius, his secretary. The Patricians then devised new forms, and those were made public by Sextus Ælius. These publications were called the Flavian and Ælian Collections; all we have of them is to be found in Brisson's celebrated work, *De Formulis et Solemnibus Populi Romani Verbis*.

3. A third source of the unwritten law of Rome was derived from the *Disputationes Fori*, and the *Responsa Prudentum*. Mention has been made of the relation introduced by Romulus between patron and client;—to give his client legal advice was among the duties of the patron; insensibly, it became a general practice, that those, who wanted legal assistance, should apply for it to the persons of whose legal skill they had the greatest opinion. This was the origin of the *Jurisconsulti* or *Civilians* of Rome; they were, generally, of the Patrician order; and, from succeeding to this branch of the duty of patronage, received

the name of patrons, while those, by whom they were consulted, were called clients. The patron received his client with a solemnity bordering on magisterial dignity; and generally delivered, in a few words, his opinion on the case which was submitted to his consideration; but he sometimes accompanied it with his reasons. These consultations usually took place at an early hour in the morning: the broken slumbers of the Civilians are mentioned by every Roman poet whose muse has led him to describe the inconveniences which attend distinction and fame. Legal topics were often subjects of the conversations of Civilians; and the forum, from their frequent resort to it, being the usual scene of these friendly disputations, gave its name to them. They also published treatises on legal subjects. Their opinions and legal doctrines were highly respected; but, till they were ratified by a judicial decision, they had no other weight than what they derived from

the degree of public estimation, in which the persons who delivered them were held. The Civilians are commonly divided into three classes; those, who flourished between the æra of the Twelve Tables, and the age of Cicero; those who flourished from the age of Cicero, to the reign of Severus Alexander; and those who flourished from the beginning of his reign, to that of the Emperor Justinian. The second, is the golden period of Antejustinianean jurisprudence. From the fragments which have reached us, of the works of the Civilians who flourished during that period, modern writers have thought themselves justified in describing them as men of enlarged minds, highly cultivated understandings, and great modesty. In their judicial studies they availed themselves of the learning and philosophy of the Greeks, carried the disputes of the schools of Athens into the Forum; and, early in the period of which we are speaking, branched into two sects, whose opposite tenets were

founded on principles, not unlike those, which gave rise to the distinctive doctrines of the disciples of Zenon and Epicurus. Antistius Labeo was the founder of the former sect; Ateius Capito of the latter: from Proculus and Pegasus, two eminent followers of Labeo, the former were called Proculeians or Pegasians; from Masurius Sabinus and Cassius Longinus, two eminent followers of Capito, the latter were called Sabinians or Cassians. The former contended for a strict adherence to the letter and forms of the law; the latter for a benign interpretation of it, and for allowing great latitude in the observance of its forms. Attempts were made to compromise the difference between them: they gave rise to a third sect, the Jurisconsulti Erciscundi, or Miscalliones. Something of the difference which subsisted between the disciples of Labeo and Capito, has long subsisted in the jurisprudence of England; but the good sense of the English bar has prevented the main-

tainers of the different opinions from forming themselves into sects. Till the reign of Augustus every person was at liberty to deliver judicial opinions; Augustus confined this privilege to particular persons, with a view, it is supposed, of their propagating those doctrines of law, which were favourable to his political system: the Emperor Adrian restored the general liberty; the Emperor Severus Alexander assigned it the limits within which it had been circumscribed by Augustus.

These are the materials of which the written and unwritten law of Rome was principally formed,

#### V. 4.

THE FOURTH PERIOD OF THE HISTORY OF THE ROMAN LAW, is that which fills the space between the time when Julius Cæsar was made perpetual Dictator, and the reign of the Emperor Adrian.

Before  
Christ. Anno  
Urbis  
Con-  
ditæ.

46 708

The power of Julius Cæsar, in consequence of his perpetual dictatorship, placed him above law; but it does not appear that he made many innovations, of a general nature, in the Roman jurisprudence. That was left to Augustus, his heir and successor. At different periods of his reign, the people conferred on Augustus the various titles of Perpetual Tribune, Consul, Proconsul, Censor, Augur, and High Priest: thus, in effect, he acquired both the civil and military power of the state; but, as he professed to exercise it in virtue of those offices, his acts had the appearance of being the acts of the different magistrates, whose offices had been conferred on him. Finally, in the year of the city, 735, power was given him to amend or make whatever laws he should think proper. This was the completion of the *Lex Regia*, or of those

Before  
Christ.

Anno  
Urbis  
Con-  
ditæ.

16 735

successive laws, which, while they permitted much of the outward form of the republic to remain, invested the emperor with absolute power.

During the whole of Augustus's reign, the forms of the *Leges* and *Senatus-consulta*, those vestiges of dying liberty, as they are called by Tacitus, were preserved.

For the Senate, Augustus uniformly professed the greatest deference; he attended their meetings, seemed to encourage their free discussion of every subject, which came before them; and, when a law was approved of by them, he permitted it, agreeably to the ancient forms of the republic, to be referred to the people. The reference of laws to the people was abolished by Tiberius; so that, from his time, the laws of Rome originated and were completed in the senate. At first their deliberations had an appearance of free discussion: by degrees, even that vanished, and insensibly the Senate served for little more than a nominal

council of the Emperor, an office to register his ordinances, and a court of judicature for great public causes.

### V. 5.

THIS memorable revolution in the functions of the Senate, with which even the forms of Roman liberty expired, must be dated from the Emperor Adrian, and forms the FIFTH PERIOD OF THE HISTORY OF THE ROMAN LAW. He was the first of the Emperors who exercised, without disguise, the plenitude of legislative power. With him therefore, the *Imperial Constitutions*, under the various names of Rescripta, Epistolæ, Decreta, Edicta, Pragmaticæ Sanctiones, Orationes and Annotationes, originated; they had the force of law in every part of the Roman state. Under his reign, Julian, a lawyer of great eminence, digested the Prætor's edicts, and other parts of the Jus Honorarium, into a regular system of law, in fifty books. This

compilation was much esteemed; it was referred to as authority, and obtained the title of *Edictum Perpetuum*; all the remains of it, which have come down to us, are the extracts of it in the digest; they have been collected with great attention, by Simon Van Leeuwen, at the head of the Digest, in his edition of Gothofred's *Corpus Juris Civilis*, Lugd. Batav. 1663.

After  
Christ.

120

It was a remarkable effect of the *Edictum Perpetuum*, to put an end to the legal schism of the Sabinians and Proculians. By countenancing the former, in the *Edictum Perpetuum*, the Emperor Adrian terminated the dispute.

After this came the *Codex Gregorianus*; a collection of Imperial constitutions, from Adrian to Dioclesian, by Gregorius or Gregorianus, Prætorian Præfect to Constantine the Great. . . . . , . . . . 284

This was succeeded by the *Codex Hermogenianus*, a continuation of the former code, by Hermogenes, a contemporary of Gregorius or Gregorianus. After Christ.

## V. 6.

THE SIXTH PERIOD OF THE ROMAN LAW extends from the reign of Constantine the Great to that of the Emperor Theodosius the Second. It is particularly remarkable for having furnished many new articles of great importance to the jurisprudence of Rome. . . . . 306

They chiefly arose from the foundation of Constantinople, the new forms of civil and military government introduced by Constantine, the legal establishment of Christianity, and the division of the empire between the sons of Theodosius the

Great. 'To the first may be referred After  
Christ. numerous laws, respecting the privileges and police of the imperial city; to the second, an abundance of legal provisions, respecting the various officers of the empire, and the ceremonial of the Byzantine court; to the third, a succession of imperial edicts, by which Christianity was first tolerated, then legalized, and afterwards became the established religion of the state.

The division of the empire between the sons of Theodosius, in 395, was attended with still more important effects on Roman jurisprudence. . . 395

### V. 7.

THE variety of laws, principally occasioned by the circumstances which have been mentioned, introduced a considerable degree of confusion into the Roman jurisprudence. To remedy

it, Theodosius the Second, the Emperor of the East, published, in 438, the celebrated code of law, called from him the *Theodosian Code*, which forms **THE SEVENTH PERIOD OF THE HISTORY OF THE ROMAN LAW**. It comprises all the imperial constitutions from 312, the year in which Constantine was supposed to have embraced Christianity, to the time of its publication. It has not reached us entire: an excellent edition of the remains of it was published by James Gothofred, at Lyons, in 1668, in six volumes folio, generally bound in four. It is accompanied with Prolegomena, introductory chapters, a perpetual commentary and notes; the labour of thirty years; and no one, as Doctor Jortin justly remarks, ever thought the time thrown away. No work perhaps can be mentioned, which contains more informa-

After  
Christ.

438

tion on the antiquities of the early After  
Christ.  
ages of the lower empire. In addition to the Theodosian Code, it comprises the subsequent novells of the Emperors Valentinian, Martian, Majorian, Severus and Anthemius.

Immediately after the publication of the Theodosian Code in the eastern empire, it was received into the empire of the west, by an edict of Valentinian the Third. In the east, it retained its force, till it was superseded by the Justinianean collection.

It retained, but indirectly, its authority longer in the west. The Barbarians, who invaded the empire, permitted the Romans to retain the use of their laws. In 506 Alaric, king of the Visigoths in Gaul, ordered a legal code to be prepared, in which the Roman and Gothic laws and usages should be formed into one body of law, for the general use of all his sub- 506

jects; this was accordingly done in the twenty-second year of his reign; and from Anianus, his Referendary, or Chancellor, by whom it was either compiled or published, it was called the *Breviarium Aniani*. It is an extract from the Gregorian, Hermogenian, and Theodosian Codes, the novells of the subsequent Emperors, the sentences of Paullus, the Institutes of Gaius, and the works of Papinian. It superseded the use of the former laws so far, that, in a short time, they ceased to be cited in the courts, or by writers on subjects of law; and Anianus's collection, under the name of the Roman or Theodosian law, became the only legal work of authority.<sup>h</sup>

To this period also, must be ascribed the celebrated *Collatio Mosaicarum et Romanarum Legum*: the object of it is to shew the resemblance between the Mosaical institutions and the Roman law: the best edition of it is F. Desmare's in 1689.

<sup>h</sup> SEE the learned *Prolegomena ad Codicem Theodosianum* of Gothofred.

## V. 8.

THE EIGHTH, AND MOST After Christ.  
 IMPORTANT, PERIOD, of the  
 history of the Roman law, comprises  
 the time in which the body of law,  
 compiled by the direction of the Em-  
 peror Justinian, was framed.

1. By his order, Trebonian, and  
 nine other persons of distinction, in  
 the first year of his reign, made a col-  
 lection of the most useful laws, in the  
 Codex Theodosianus, the two earlier  
 codes of Gregorius and Hermogenes,  
 and the constitutions of some suc-  
 ceeding emperors. It was immedi-  
 ately published by Justinian, and is  
 called the *Codex Justinianus Primæ  
 Prælectionis*. . . . . 528

2. But his great work is his *Digest  
 or Pandects*. By his direction, Tre-  
 bonian, with the assistance of sixteen  
 persons, eminent either as magistrates

or professors of law, extracted from the works of the former civilians, a complete system of law, and digested it into fifty books. . . . . 533

After  
Christ.

3. Previously to its publication, an elementary treatise, comprising the general principles of the system of jurisprudence, contained in it, was promulgated, by the Emperor's direction, in four books. From its contents, it was called *The Institutes*.

Thus the Digest, and Institutes were formed into a body of law, by the authority of the Emperor. He addressed them, as imperial laws, to his tribunals of justice, and to all the academies, where the science of jurisprudence was taught: they were to supersede all other law, and to be the only legitimate system of jurisprudence throughout the empire.

4. In the following year, he published a corrected edition of the code,

under the title *Codex Repetitæ Prelectionis*. This wholly superseded the first code; and, except so far as it has been preserved in the latter, it is wholly lost. . . . . 534

After  
Christ.

5. The edicts which he promulgated, after the new edition of the Codex, were collected into one volume, in the last year of his reign, and published under the name of *Novellæ*. . . . . 566

6. Most of the *Novellæ* were written in the Greek language. In the last year of Justinian's life, a Latin translation was made of them; and, by the fidelity with which it was executed, obtained the appellation of the *Volumen Authenticum*. . . . . 568

Other translations of the *Novellæ* have appeared: that, published at Marburgh, in 1717, by John Frederick Hemburgh, has the character of being extremely well executed, and is

accompanied with a valuable commentary and notes.

7. In most editions of the *Corpus Juris Civilis*, the Novells are followed by the *Books of Fiefs*, the *Constitutions of Conrade the Third*, and the *Emperor Frederick*, under the title of *Decima Collatio*, and some other articles. But these make no part of what is called the *Corpus Juris Civilis*: that consists solely of the Pandects, the Institutes, the *Codex Repetitæ Prælectionis* and the Novells.

8. On the *general merit of Justinian's Collection*, as a body of written law, able judges have differed: the better opinion seems to be that it is executed with great ability, but that it is open to much objection, the *Responsa Prudentum* sometimes being unfaithfully given in it, contradictory doctrines having found their way into it, its style being often too flowery, and its innovations on the old law, sometimes being injudicious. Heineccius, whose testimony, in this case,

is of the greatest weight, at first judged of it unfavourably: but afterwards changed his opinion: he mentions, in high terms of commendation, the defence of it by Huberus and the Cocceii, and asserts that the cause must now be considered as decided in its favour. *Hist. Juris Romani, Lib. I. §. cccc.*

The very attempt to lessen, by legislative provisions, the bulk of the national law of any country, where arts, arms and commerce flourish, must appear preposterous to a practical lawyer, who feels how much of the law of such a country is composed of received rules and received explanations. What could an act of the Imperial Parliament substitute in lieu of our received explanations of the rule in *Shelly's Case*? The jurisprudence of a nation can only be essentially abridged by a judge's pronouncing a sentence which settles a contested point of law, on a legal subject of extensive application, as Lord Hardwicke did by his

decree in the case of Willoughby versus Willoughby; or by a writer's publishing a work on one or more important branches of law, which, like the *Essay on Contingent Remainders*, has the unqualified approbation of all the profession.

One circumstance, however, may be urged, as an unquestionable proof of the Justinianean Collection's possessing a very high degree of intrinsic merit. Notwithstanding the different forms of the governments of Europe, and the great variety of their political and judicial systems, the civil law has obtained either a general or a partial admittance into the jurisprudence of almost all of them: and, where it has been least favourably received, it has been pronounced a collection of written wisdom: this could not have happened, if it had not been deeply and extensively grounded on principles of justice and equity, applicable to the public and private concerns of mankind, at all times, and in every situation.

## V. 9.

9. THE fate of this venerable body of law, promulgated with so much pomp, and possessing so much intrinsic merit, is singular, and forms THE NINTH PERIOD OF THE HISTORY OF THE ROMAN LAW. The reign of the third successor of Justinian, was the last, in which it maintained its authority in the west. After that time, all law and regular government were rapidly destroyed by the Barbarians who invaded and overturned the Roman empire. The Exarchate of Ravenna, the last of their Italian victories, was conquered by them in 753; and that year is assigned as the æra of the final extinction of the Roman law in Italy. . . . 753

It lingered longer in the east: in strictness even, it cannot be said to

have wholly lost its authority, in that part of the empire, till the taking of Constantinople, by Mahomet the Second. In the life time of Justinian, the Pandects were translated into Greek by Thaleleus; a translation of the Code was made, perhaps, by the same hand, and the Institutes were translated by Theophilus.

The successors of Justinian published different laws, some of which have reached us. In the reign of Basilius the Macedonian, and his sons Leo the philosopher, and Constantine Porphyrogeneta, an epitome, in sixty books, of Justinian's Code, and of the constitutions of succeeding emperors, was framed, under the title of *Basilica*. 906

Forty-one of the sixty books were splendidly published by Fabrotti, at Paris, in 1647, in seven tomes in folio; four more have been published in Meerman's Thesaurus.

After  
Christ.

That the *Basilica* superseded, in the eastern empire, the immediate authority of the Justinianean collection, is true; but, that the Justinianean collection formed a considerable part, and was, in fact, the ground-work of the *Basilica*, is unquestionable. Thus, through the medium of the *Basilica*, the code of Justinian, in a great degree, directed or influenced the jurisprudence of the eastern empire, to the latest moment of its existence.<sup>1</sup> 1453

After  
Christ.

<sup>1</sup> SEE APPENDIX, NOTE IV.

## V. 10.

THE text of the *Pandects* being almost wholly lost, accident led, sometime about the year 1137, to the discovery of a complete copy of them, at Amalphi, a town in Italy, near Salerno. This forms the TENTH PERIOD OF THE HISTORY OF

THE ROMAN LAW. From Amalphi the copy found its way to Pisa; and Pisa having submitted to the Florentines, in 1406, the copy was removed in great triumph to Florence. 1406

After Christ.

By the direction of the magistrates of the town, it was immediately bound, in a superb manner, and deposited in a costly chest. This copy of it is generally called the Florentine Pandects. Formerly they were shewn only by torch light, in the presence of two magistrates, and two Cistercian monks, with their heads uncovered. They have been successively collated by Politian, Bolognini, and Antonius Augustinus; an exact copy of them was published, in 1553, by Franciscus Taurillus; for its accuracy and beauty, this edition ranks high among the ornaments of the press: it should be accompanied, with the treatise of Antonius Augustinus, on the proper

names in the Pandects, published by him at Tarragona, in 1579. About the year 1710, Henry Brenckman, a Dutchman, was permitted, at the earnest solicitation of our George the First, to collate the manuscript. He employed ten years upon it, and in the investigation of various topics of literature connected with the Justinianean Code. His elegant and curious *Historia Pandectarum*, published at Utrecht, in 1712, gives an interesting account of his labours; and shews, like the labours of Wetstein and Mill, that great fire of imagination, exquisite taste, minute and patient investigation, and the soundest judgment, may be found in the same mind.—Some have supposed that the Florentine manuscript, is the autograph of the Pandects; for this opinion there is no real ground or authority; but Brenckman refers it to the sixth century, a period not very remote from the æra of Justinian. Brenckman's work forms a small part of an original design, and is so ably

executed that all must lament his having left any part of his design unfinished.—See *Georgii Christiani Gebaveri Narratio de Henrico Brenkmanno, & de Manuscriptis Brenkmanianis, Gottingæ 1764*. The possession of Brenckman's Manuscripts would be a valuable acquisition to a Public Library.

Three editions of the Pandects are particularly distinguished,—the Norican Edition published by Holoander, at Nuremburgh, in 1529, in three volumes, quarto: the Florentine, published by Taurellus, at Florence, in 1553, in two volumes folio, often bound in three; and the Vulgate, under which name every edition is comprised, which is not taken from the Norican or Florentine edition. The best editions for general use appear to be Pothier's *Pandectæ Justinianæ*, published at Lyons in 1782, in three volumes folio; and that of Dionysius Gothofred, published by Simon Van Leeuwen at Leyden in 1663, in one large volume, generally bound in two:—It contains the

Institutes, the Digest, the Code, the Fasti Consulares, Freher's Chronologia Imperii Utriusque, Gothofred's Epitome of the Novells of Justinian, various other edicts and novell constitutions, Frederici II. Imp. Extravagantes, Liber de Pace Constantiæ, Gothofred's Epitome of the books of the Fiefs, an extensive synopsis of Civil Law, the fragments of the Twelve Tables, the Tituli of Ulpian, and the opinions of Paulus, with notes, and copious indexes to the whole.<sup>m</sup>

<sup>m</sup> THIS article is extracted from *Pomponius's short treatise de Origine Juris et omnium magistratum et successione prudentum, Dig. Tit. 2; the Preface to the Institutes; the first, second, and third Prefaces to the Pandects; the first and second Prefaces to the Code; Heineccius's Historia Juris Civilis Romani ac Germanici, Lug. Bat. 1740, 8vo. the Antiquitatum Romanarum Syntagma, of the same author, Strasburgh 1724, 8vo.*—The writings of Heineccius are a striking proof of the truth of Mr. Gibbon's observation, vol. 4. 395, note 160, "that the universities of Holland and Brandenburgh, in the beginning of the last century, appear to have studied the civil law on the most just and liberal principles:"—*the works of Gravina, on the Civil Law,*

## VI.

THESE lead to an inquiry respecting THE  
PRINCIPAL SCHOOLS, IN WHICH

*Leipsiæ* 1717, in three volumes 4to. particularly his *Origines Juris Civilis*; Gravina's account of the *Leges* and *Senatus Consulta* is particularly interesting: *Brunquellus's Historia Juris Romano-Germanici*, *Ams.* 1730, 8vo. perhaps the completest historical account extant of the civil law; *Struvius's Historia Juris Romani*, *Jenæ*, 1718, 4to. *Pothier's Prolegomena* to his *Pandectæ Justinianæ*, *Lyons*, 3 vols. fol. *Terasson's Histoire de la Jurisprudence Romaine*, *Paris*, 1750, said by Mr. Gibbon, 4th vol. note 9, to be "a work of more promise than performance;" *Thomasius's Delineatio Historiæ Juris Romani et Germanici*, *Erfordia*, 1750, 8vo. and his *Nævorum Jurisprudentiæ Romanæ Libri duo*, *Halæ Magdeburgicæ*, 1707, 8vo.—they contain a severe attack on the Justinianean collection, the emperor, and all other persons concerned it: *Montesquieu's Esprit des Loix*, a work entitled to all the praise it has received; no one, who has not travelled through the *Corpus Juris* and the *Capitularies*, can form an idea of the comprehensive brevity and energy with which it is written. *Dr. Bever's History of the Legal Polity of the Roman State*, *Lond.* 1781, 4to. *Dr. Taylor's Elements of the Civil Law*, *Camb.* 1755, 4to.

## THE CIVIL LAW HAS BEEN TAUGHT since its revival in Europe.

In the early days of the republic, it was usual for such as desired to gain a knowledge of the laws of their country, to attend on those, who were consulted on legal subjects, at the hours, in which these consultations generally took place. Tiberius Coruncanius is said, by Cicero, to have been the first among the Romans, who professed

a work, if we acquiesce in Mr. Gibbon's opinion of it, 4th vol. note 132, "of amusing, though various reading; but which cannot be praised for philosophical precision;" *The four Books of Justinian, translated by the late Dr. Harris, with notes and a preface*; the translation is excellent, and it is much to be lamented, that the preface is not longer, and the notes more copious; *Ferriere's Histoire du Droit Romaine, Paris, 1783, 8vo.* *Beaufort's Republique Romaine, Paris, 1767, 6 vols. 8vo.* an excellent constitutional history of the Roman Government:—*The 44th Chapter of the 4th Volume of Mr. Gibbon's History*; *M. Bouchaud's Recherches Historiques sur les Edits des Magistrats Romains, Quatrieme Memoire, Mem. de l'Academie, 41st Vol. p. 1,* and *Mr. Schomberg's Elements of Roman Law, London, 1786, 8vo.*

to give regular instructions on legal subjects. Afterwards, public schools of jurisprudence were established; the most celebrated were those at Rome and Constantinople; Justinian founded a third at Berytus, and used all means in his power, to promote its success: he gave the professors large salaries, and advanced some of them to offices of high distinction in the state;—as the authority of his law decreased, they fell into decay.

With the discovery of the Pandects at Amalphi, the study of the civil law revived:—it was introduced into several universities, and exercises were performed, lectures read, and degrees conferred in this, as in other branches of science, and several nations of the continent, adopted it, as the basis of their several constitutions. From this time, there has been a regular succession of civil lawyers, distinguished by some circumstance or other into different

classes, or as it is usually expressed, into different schools.

1. The first, is *the school of Irnerius*, a learned German, who had acquired his knowledge of the civil law, at Constantinople. He taught it at Bologna, with great applause: the legal schism which had divided the Sabinians and Proculians, was revived, in some degree, among his scholars: one of them, was the celebrated Azo, a Proculian, whose writings, Montesquieu is said to have preferred to all other on the subject of civil law. A more important subject, the contest between the emperors and popes, produced a more serious warfare between the disciples of Irnerius. The German emperors, who pretended to succeed to the empire of the Cæsars, claimed the same extent of empire in the west, and with the same privileges, as it had been held by the Cæsars; to this claim, the spirit and language of the civil law being highly favourable, the emperors encouraged the civi-

lians; and, in return for it, had their pens at command. The popes were supported by the canonists, and the canonists found, in the decree of Gratian, as much to favour the pretensions of the popes, as the civilians found, in the law of Justinian, to favour the pretensions of the emperors. Thus, generally speaking, the civilians were Ghibelins, the name given to the partisans of the emperors, and the canonists were Guelphs, the name given to the partisans of the popes. But this distinction did not prevail so far, as to prevent many canonists from being Ghibelins, or many civilians from being Guelphs; those among the civilians, who sided with the canonists in these disputes, were called from the decree of Gratian, *Decretistæ*, in opposition to the rest of the body, who assumed the appellation of *Legistæ*, from their adherence to the supposed Ghibelin doctrines of the civil law.

2. *A new school began with Accursius:—his*

Gloss is a perpetual commentary on the text of Justinian: it was once considered as legal authority, and was therefore usually published with the text:—it is even now respected as an useful commentary. Accursius had many disciples, whose glosses had great celebrity in their day, but are now wholly forgotten.

3. *Bartolus, and Baldus his disciple and rival, gave rise to a new school, famous for copious commentaries on Justinian's text; for the idle subtleties with which they abound, and their barbarous style.*

4. Andrew Alciat was the first who united the study of polite learning and antiquity, with the study of the civil law: he was the founder of a *new school which is called the Cujacian* from Cujas, the glory of civilians. Of him, it may be said truly, that he found the civil law of wood, and left it of marble. That school has subsisted to the present time; it has never been without writers of the greatest taste, judgment and erudition;



the names of Cujacius, Augustinus, the Gothofredi, Heineccius, Voetius, Gravina, and Pothier, are as dear to the scholar, as they are to the lawyer. An Englishman however, must reflect with pleasure, that his countryman, Mr. Justice Blackstone's Commentaries on the Laws of England, will not suffer in a comparison with any foreign work of jurisprudence;—perhaps it will be difficult to name one of the same nature, which will bear a comparison with it.<sup>n</sup>

<sup>n</sup> THIS article is chiefly taken from the cited works of *Gravina* and *Brunquellus*.

## VII.

It remains to give some account of THE INFLUENCE OF THE CIVIL LAW ON THE JURISPRUDENCE OF THE MODERN STATES OF EUROPE.

On the degree of its influence on the law of Germany, the German lawyers are not agreed: but it is a mere dispute of words;

all of them allow that more causes are decided in their courts, by the rules of the civil law, than by the laws of Germany; and that, where the laws of Germany do not interfere, the subject in dispute must be tried by the civil law; after these concessions, it is not material to inquire, whether, to use the language of the German lawyers, the civil law be the dominant law of Germany, or subsidiary to it.

The same may be said of its influence in Bohemia, Hungary, Poland and Scotland.

At Rome, and in all the territories of the pope, it is received without limitation; in most other parts of Italy, including Naples and the two Sicilies, it has nearly the same influence; except where the feudal policy intervenes.

Its influence in Spain and Portugal is more qualified; but it appears to be admitted, that where the law of the country does not provide the contrary, the civil law shall decide: and it is the settled practice,

that no person shall be appointed a judge or received an advocate in any of the courts of law, who has not been a student in some academy of civil or canon law for ten years.

The provinces of France, which lie nearest to Italy, were the first conquered by the Romans, and the last conquered by the Franks. At the time of the conquest of them by the Franks, they were wholly governed by the Roman law: they are the provinces of Guyenne, Provence, Dauphiné, and speaking generally, all the provinces, under the jurisdiction of Toulouse, Bordeaux, Grenoble, Aix, and Pau; the Lyonnais, Forez, Beaujolois, and a great part of Auvergne. Their Francic conquerors permitted them to retain the Roman law; where it has not been altered, they are still governed by it: and, from this circumstance, they are known under the general name of the Pays du Droit Ecrit. The remaining part of France is governed by the

different laws and customs of the provinces of which it is composed, and from this circumstance, is called, Pays Coutumier.

The Venetians have always disclaimed the authority of the civil law.

It was introduced into England by Theobald, a Norman Abbot, who was elected to the see of Canterbury. He placed Roger, surnamed Vacarius, in the university of Oxford:—students flocked to him in such abundance, as to excite the jealousy of government, and the study of the civil law was prohibited by King Stephen. It continued, however, to be encouraged by the clergy, and became so favourite a pursuit, that almost all, who aspired to the high offices of church or state, thought it necessary to go through a regular course of civil law, to qualify themselves for them:—it became a matter of reproach to the clergy, that they quitted the canon for the civil law; and pope Innocent prohibited the very reading of it by them. Notwithstand-

ing this opposition, the study of the civil law has been encouraged in this country:— in each of our universities there is a professor of civil law, and, by general custom and immemorial usage, some of the institutions of the civil law have been received into our national law. In the spiritual courts, in the courts of both the universities, the military courts, and courts of admiralty, the rules of civil law, and its form of legal proceeding greatly prevail. But the courts of common law have a superintendency over these courts, and from all of them, an appeal lies to the King in the last resort. “ From these strong marks and en-  
“ signs of superintendency it appears be-  
“ yond doubt,” says Mr. Justice Blackstone,  
“ that the civil and canon laws, though ad-  
“ mitted in some cases by custom, and in  
“ some courts, are only subordinate and  
“ *leges sub graviore lege.*”—The short but very learned treatise of Arthur Duck, *de*

*Usu et Auctoritate juris civilis in Dominiis principum christianorum*, conveys, in elegant language and a pleasing manner, complete information on the nature and extent of the influence of the civil law, on the jurisprudence of the modern states of Europe.

## THE FEUDAL LAW.

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AN attempt will be made in the following sheets to give some account, I. Of the original territories of the nations by whom **THE FEUDAL LAW** was established; II. Of their first progress and chief settlements in the Roman territories; and III. Of the principal written documents of the Feudal Jurisprudence of foreign countries. It is principally taken from a note of the Editor, in that part of the 14th edition of Coke upon Littleton, which was executed by him.—That note contains also some observations on the peculiar marks and qualities of the feudal law; some account of the principal events in the early history of the feuds of foreign countries; and of the revolutions of the feud in England. But, as the researches which gave rise to that note

were chiefly made with a view to the law of real property, the observations in it are principally directed, through every branch of the inquiry, to the influence of the feud on *that* species of property, particularly where the writer treats of the feudal jurisprudence of England. Under that head some general observations are offered, on the time when feuds may be supposed to have been first established in England; on the fruits and incidents of the feudal tenure; and on the feudal polity of this country, with respect to the inheritance and alienation of land: under this head an attempt is made to state the principal points of difference between the Roman and feudal jurisprudence in the articles of heirship, the order of succession, and the nature of feudal estate; an attempt is then made to shew the means by which some of the general restraints upon the alienation of real property, introduced by the feud, have been removed; some account is then given of

entails, and of the means by which the restraints created by entails were eluded or removed. Having thus treated of that species of alienation, which, being the act of the party himself, is termed voluntary alienation, notice is taken of that species of alienation, which, being forced on the party, is termed involuntary. Under that head are briefly considered the attachment of lands for debt; first, in regard to its effect upon them, while they continue in the possession of the party himself; then, in respect to its effect upon them, when in possession of the heir or devisee; and afterwards, in respect to the prerogative remedies for the recovery of Crown debts. Some observations are then offered on testamentary alienation; and an account of some of the principal circumstances in the history of the decline and fall of the feud in England.

## I.

IN respect to the *ORIGINAL TERRITORIES* of the nations who introduced the feudal law;—they may be considered under the names of Scythians, Sarmatians, Scandinavians, Germans, Huns and Sclavonians, which they acquired as they extended their conquests. 'Till lately, the inhabitants of the shores of the Baltic were considered to be their parent stock: subsequent researches seem to have traced it to the spot where the common stock of all nations is found,—the Plain of Sennaar.

I. 1. For the early state of the Northern nations we must look to Herodotus. Of the north-western parts of Europe, he seems to have had little knowledge: the word Germany does not occur in his writings: *Scythia* is a general name given by him to the north-eastern parts of Europe, and to all he knew of the north-western parts of Asia, till he reached the Issedones, a nation

who, by Major Rennel's account, occupied the present seat of the Oigur or Eluth Tartars.

The European part of this extensive territory lies on the western, its Asiatic part on the eastern side of the Volga. On the south, the European Scythia extended to the Carpathian mountains and the mouths of the Danube; and the Asiatic Scythia to the Caspian and the country on its east. As it was intersected by the great chain of mountains called the Imaus or Caff, the Asiatic Scythia was distinguished into the Scythia within, and the Scythia without the Imaus.

I. 2. Under the general denomination of *Celts*, Herodotus included all the parts of Europe which were not occupied by the Scythians.

I. 3. In the course of time, the name of Scythia was applied to the eastern part only of the original Scythia; but the division of it into the part within and the part

without the Imaus was preserved; the western Scythia, or the part of the original Scythia, which lies on the western side of the Volga, then received the name of *Sarmatia*, and was divided into the European and Asiatic Sarmatia; the former contained the country between the Vistula and the Tanais or Don, the latter extended from the Tanais to the Volga.

I. 4. Of the countries on the north of the Baltic, Herodotus seems to have known nothing; to the Romans they were known by the name of *Scandinavia*.

I. 5. The tribes who occupied the country between the Baltic and the Danube, the Rhine, and the Vistula, were equally unknown to Herodotus; to the Romans they were known by the name of *Germans*.

I. 6. At a very early period, a division of Scythians had advanced to the eastern shore of the central part of Asia, and established themselves in the present country of the Mongous: by the Chinese writers,

they are called Hiongnous, by the Romans, to whom they were long unknown, they are called *Huns*.

1. 7. At a later period, several tribes of these nations spread themselves over different territories, in the European and Asiatic parts of Modern Russia, and over Bohemia, Poland, Servia, Bosnia, Croatia and Slavonia: by the historians of the fall of the Roman empire, they are called *Slavi* or *Slavones*.<sup>a</sup>

<sup>a</sup> Major Rennel's *Geographical System of Herodotus*, Lond. 4to. 1803; D'Anville, *Etats formés en Europe après la chute de l'empire Romain*, 4to. Paris, 1771; and his *Geographie ancienne abrégée*, Paris, 3 vol. 8vo. 1768. Cellarius, *Geographia Antiqua*, Leipsiæ, 2 vol. 4to. 1758; —*Observations Historiques et Géographiques sur les peuples barbares qui ont habité les bords du Danube & du Pont Euxin*. Par. M. de Peyssonneli Paris, 4to. 1765. *Modern Universal History*, vol. 4, p. 313—379, and Mr. Pinkerton's *Dissertation on the Origin and Progress of the Scythians or Goths*, 8vo. 1787. Some of his facts, arguments or conclusions, may be denied, but neither his learning nor his ingenuity can be disputed.—There is not, perhaps, in geogra-

## II.

THE GRADUAL EXTENSION AND DATES OF THE PRINCIPAL CONQUESTS MADE BY THESE NATIONS next come under consideration.

In the reign of Augustus they were powerful enemies to the Romans; they had not, however, made any impression on their

phy, a word, which denotes so large a surface of the globe as Slavonia, in its largest sense; or which, as it is variously applied, denotes so many portions of general territory. 1. In its least extensive sense, it denotes the modern Slavonia, or the country between Croatia and Belgrade, bounded by the Drave and the Danube on the north, and the Save on the south: 2. In a more extensive sense, it denotes the country between the Hadriatic and the Danube, and the countries between the Vistula, the Carpathian mountains, the Nieper and the Black sea: 3. In a more extensive sense, it extends to the Irtish: 4. That seems the utmost boundary on the east, which can justly be assigned to it, but some authors suppose the whole northern front of Asia is filled by Slavonnic tribes.

territory, when Tacitus wrote; but he pronounced them, “ more formidable enemies  
“ than the Samnites, Carthaginians, or Par-  
“ thians.” He seems to intimate an apprehension, that the preservation of the Roman empire depended on the quarrels of the Barbarians among themselves. “ The Bruc-  
“ teri,” these are his remarkable expressions,  
“ were totally extirpated by the neighbour-  
“ ing tribes, provoked by their insolence,  
“ allured by their hopes of spoil, and per-  
“ haps inspired by the tutelar deities of the  
“ empire. Above sixty thousand Barba-  
“ rians were destroyed: not by the Roman  
“ arms, but in our sight; and for our en-  
“ tertainment. May the nations, enemies  
“ of Rome, ever preserve this enmity to  
“ each other! We have now attained the  
“ utmost verge of prosperity, and have no-  
“ thing left to demand of fortune, except  
“ the discord of the Barbarians.” In the reign of Marcus Antoninus, all the nations of Germany and Sarmatia, entered into a

league against the Romans; he dissipated it.—In less than a century the Germans invaded the empire in every part of its territory, on the Rhine and the Danube.

Of all the tribes, who invaded the empire, the Goths are the most remarkable. The universal tradition of the nations of the north, and the universal language of their ancient writers, place the Goths, as early as general history reaches, among the nations on the Baltic, and assigns the denomination of Visigoths or western Goths, to those tribes of them, which inhabited that part of Scandinavia which borders on Denmark, and the denomination of Ostrogoths or eastern Goths, to those, which inhabited the more eastern parts of the Baltic. In all their emigrations and settlements, they preserved their names, and the same relative situation. Towards the end of the first century of the Christian æra, a large establishment of them is found on the Vistula, and numerous tribes of the same origin, but known by the appellation of Vandals,

are found on the Oder.—History then shews their emigrations to the Euxine, the settlements of the Ostrogoths in the southern parts of Asia Minor, and the settlements of the Visigoths in Thrace. At the battle of Adrianople, the Goths obtained over the emperor Valens, a victory, from which the empire of the west never recovered.

After  
Christ.

The irruptions of the northern nations, which ended in their permanent settlements in the territories of the Roman empire, may be traced to the final division of the empire, between Arcadius and Honorius, the sons of Theodosius the great, in 395. The empire of the east, comprising Thrace, Macedonia, Greece, Dacia, Asia Minor, Syria, and Ægypt, was assigned to the former; the empire of the west, comprising Italy, Africa, Gaul, Spain, Noricum, Pannonia, Dalmatia, and Mœsia, was assigned to the latter . . . 395

In the year 406, the Vandals, Suevi, <sup>After</sup> and Alani, who inhabited the coun- <sup>Christ.</sup> 406  
tries bordering on the Baltic, made an  
irruption into Gaul; from Gaul they  
advanced into Spain, about the year  
415; they were driven from Spain  
by the Visigoths, and invaded Africa,  
where they formed a kingdom. . . . 415

About the year 431, the Franks,  
Alemanni and Burgundians pene-  
trated into Gaul. Of these nations,  
the Franks became the most power-  
ful, and having either subdued or ex-  
pelled the others, made themselves  
masters of the whole of those exten-  
sive provinces, which from them, re-  
ceived the name of France. . . . . 431

Pannonia and Illyricum, were con-  
quered by the Huns; Rhætia, Nori-  
cum, and Vindelicia, by the Ostro-  
goths; and these were some time after-  
wards conquered by the Franks.

In 449, the Saxons invaded Great 449

Britain. The Herulians marched into Italy, under the command of their King Odoacer; and in 476 overturned the empire of the west. . . . . 476

After  
Christ.

From Italy, in 493, they were expelled by the Ostrogoths. . . . . 493

About the year 568, the Lombards, issuing from the Marck of Brandenburg invaded the Higher Italy, and founded an empire, called the kingdom of the Lombards. After this, little remained in Europe of the Roman empire, besides the Middle and Inferior Italy. These, from the time of the emperor Justinian's conquest of Italy by the arms of Belisarius and Narses, belonged to the emperor of the east, who governed them by an Exarch, whose residence was fixed at Ravenna, and by some subordinate officers, called Dukes. . . . . 568

In 752, the Exarchate of Ravenna, and all the remaining possessions of

the Emperor in Italy, were conquered After  
Christ.  
by the Lombards. This, as it was the  
final extinction of the Roman empire  
in Europe, was the completion, in  
that quarter of the globe, of those  
conquests which established the law  
of the feud . . . . . 752

The nations by whom these conquests were made, came, it is evident, from different countries, at different periods, spoke different languages, and were under the command of separate leaders; yet appear to have established, in almost every state, where their polity prevailed, nearly the same system of law. This system is known by the appellation of the Feudal Law. — Modern researches have shown that something very like feudalism has immemorially prevailed in India.

## III.

THE principal written documents, which are the sources from which the learning of foreign feuds is derived, may be divided into Codes of Laws, Capitularies, and Collections of Customs.

With respect to FEUDAL LEARNING in general, it was long after the first revival of letters in Europe, that the learned engaged in the study of the laws or antiquities of modern nations. When their curiosity was first directed to them, the barbarous style in which they are written, and the rough and inartificial state of manners they represent, were so shocking to their classical prejudices, that they appear to have turned from them with disgust and contempt. In time, however, they became sensible of their importance. They were led to the study of them, by those treatises

on the feudal laws, which are generally printed at the end of the Justinianean Collection. These are of Lombard extraction, and naturally gave rise to the opinion, that fiefs appeared first in Italy, and were introduced by the Lombards. From Italy, the study of jurisprudence was exported into Germany; and this opinion accompanied it thither. At first, it appears to have universally prevailed: but, when a more extensive knowledge of the antiquities of the German empire was obtained, there appeared reason to call it in question. Many thought the claims of other nations, to the honour of having introduced the feudal polity, were better founded: some ascribed them to the Franks; others, denying the exclusive claim of any particular nation, ascribed them to the German tribes in general, and asserted, that the outline of the law of feuds is clearly discoverable in the habits, manners, and laws of those nations, while still inhabitants of the Her-

cynian wood. The time, when feuds first made their appearance, has equally been a subject of controversy. The word itself is not to be found in any public document of authenticity before the eleventh century.

### III. 1.

THE most ancient, and one of the most important, CODES OF LAW, in use among the feudal nations, is the *Salic Law*. It is thought to derive its appellation from the Salians, who inhabited the country from the Leser to the Carbornarian wood, on the confines of Brabant and Hainault. It was probably written in the Latin language, about the beginning of the fifth century, by Wisogastus, Bodogastus, Salogastus and Windogastus, the chiefs of the nation. It received considerable additions from Clovis, Childebert, Clotaire, Charlemagne, and Lewis the Debonnaire. There are two editions of it: they differ so considerably,

that they have been sometimes treated as distinct codes.

2. The Franks, who occupied the country upon the Rhine, the Meuse, and the Scheldt, were known by the name of the Ripuarians, and were governed by a collection of laws, which from them was called the *Ripuarian Law*. They seem to have been first promulgated by Theodoric, and to have been augmented by Dagobert. The punishments inflicted by the Ripuarian are more severe than the punishments inflicted by the Salic law; and the Ripuarian law mentions the trial by judgment of God, and by duel.

Theodoric also appears to have first promulgated *the law of the Alemanni*, a people, who came originally from the country, near the sources of the Danube; and who, some time before the reign of the emperor Caracalla, incorporated themselves with the Suevi of Tacitus. They were joined by other German tribes, and from their union, the

general body of them acquired the appellation of Alemanni, from two Teutonic words, Al, and mann, which signify, a multitude of persons. The country inhabited by them was called Alemannia. A supposed line from Spire to Ratisbon divided it from the Francia Orientalis, on the north; it was bounded by the Rhine, on the west, by the Lech on the east, and by the country between Bâsle, and the sources of the Lech, on the east. It nearly corresponded with the Roman Alemannia, and the modern Circle of Suabia.

3. *The law of the Burgundians* is supposed to have been promulgated about the beginning of the fifth century; that nation occupied the country which extends itself from Alsace to the Mediterranean, between the Rhone, and the Alps. This was the most flourishing of the Gallic provinces invaded by the Germans; they established themselves in it, with the consent of the emperor Honorius. An alliance subsisted

a considerable time, between them and the Romans; and some parts of their law appear to be taken from the Roman law.

4. One of the most ancient of the German codes is that by which the *Angliones* and the *Werini* were governed. The territories of these nations were contiguous to those of the Saxons; and the Angliones are generally supposed to be the nation known in our history by the name of Angles.

A considerable portion of the *Law of the Saxons* has reached us.

The Goths also had their laws, which were promulgated by the Ostrogoths in Italy; by the Visigoths in Spain.

5. The Goths were dispossessed of their conquests in Italy by the Lombards. No ancient code of law is more famous than the *Law of the Lombards*; none discovers more evident traces of the feudal polity. It survived the destruction of that empire by Charlemagne, and is said to be in force even now, in some cities of Italy.

These were the principal laws, which the foreign nations, from whom the modern governments of Europe date their origin, first established in the countries, in which they formed their respective settlements. Some degree of analogy may be discovered between them and the general customs, which, from the accounts of Cæsar and Tacitus, we learn to have prevailed among them, in their supposed aboriginal state. A considerable part also of them is evidently borrowed from the Roman law, by which, in this instance, we must understand the Theodosian code. This was the more natural, as, notwithstanding the publication of the Ripuarian and Salic codes, the Roman subjects in Gaul were indulged in the free use of the Theodosian laws, especially in the cases of marriage, inheritance, and other important transactions of private life. In their establishments of magistrates and civil tribunals, an imitation of the Roman polity is discoverable among the Franks; and, for

a considerable time after their first conquests, frequent instances are to be found, in their history, of a deference, and, in some instances, even of an acknowledgment of territorial submission to the emperors of Rome.

### III. 2.

IN the course of time, all these laws were, in some measure at least, superseded by the **CAPITULARIES**. The word Capitulary is generic; and denotes every kind of literary composition, divided into chapters.—Laws of this description were promulgated by Childebert, Clotaire, Carloman, and Pepin: but no sovereign seems to have promulgated so many of them as Charlemagne. That monarch appears to have wished to effect, in a certain degree, an uniformity of law throughout his extensive dominions. With this view, it is supposed, he added many laws, divided into small chapters or

heads, to the existing codes, sometimes to explain, sometimes to amend, and sometimes to reconcile or remove the difference between them. They were generally promulgated, in public assemblies, composed of the sovereign and the chief men of the nation, as well ecclesiastics as secular. They regulated, equally, the spiritual and temporal administration of the kingdom. The execution of them was intrusted to the bishops, the counts, and the *missi regii*. Many copies of them were made, one of which was generally preserved in the royal archives. The authority of the Capitularies was very extensive; it prevailed in every kingdom, under the dominion of the Franks, and was submitted to in many parts of Italy and Germany.

The earliest collection of the Capitularies is that of Angers, abbot of Fontenelles. It was adopted by Lewis the Debonnaire and Charles the Bald, and was publicly approved of, in many councils of France

and Germany. But, as Angesise had omitted many Capitularies in his collection, Benedict, the Levite or Deacon of the church of Mentz, added three books to them. Each of the collections was considered to be authentic, and of course appealed to as law. Subsequent additions have been made to them. The best edition of them is that of Baluze in 1697: a splendid republication of this edition was begun by M. de Chiniac in 1780; he intended to comprise it in four volumes. Two only have yet made their appearance.

In the collection of ancient laws, the capitularies are generally followed by the *Formularia*, or forms of forensic proceedings and legal instruments. Of these, the formulare of Marculphus is the most curious. The formularia generally close the collections of ancient laws. With the Merovingian race, the Salic, Burgundian and Visigothic laws expired. The capitularies remained in force in Italy longer than in Germany; and in France, longer than in Italy. The incur-

sions of the Normans, the intestine confusion and weakness of government under the successors of Charlemagne, and, above all, the publication of the Decretum of Gratian, which totally superseded them in all religious concerns, put an end to their authority in France.

### III. 3.

They were in some measure succeeded by the CUSTOMARY LAW.

1. It is not to be supposed, that the codes of law, of which we have been speaking, entirely abrogated the usages or customs of the countries in which they were promulgated. Those laws only were abrogated by them, which were abrogated by the regulations they established. In other respects, the codes not only permitted, but, in some instances, expressly directed, that the *Ancient Customs* should remain in force. Thus, in all the countries governed by the ancient codes, there existed at the same

time, a written body of law, sanctioned by public authority, and usages or customs, admitted to be of public authority, by which those cases were frequently governed, for which the written body of law contained no provision. After the ancient codes and capitularies fell into desuetude, these customs were multiplied.

2. By degrees *Written Collections* of them were made by public authority; others, by individuals, and depended therefore, for their weight, on the private authority of the individuals, by whom they were made, and the authority which they insensibly obtained in the courts of justice.

Collections of this nature committed to writing by public authority form a considerable part of the law of France, and are a striking feature of the jurisprudence of that kingdom. The origin of them may be traced to the beginning of the Capetian race. The monarchs of that time, in the charters by which they granted fiefs, prescribed the

terms upon which they were to be held. These, they often abridged, enlarged and explained, by subsequent charters: they also published charters of a more extensive nature. Some of them contained regulations for their own domain; others contained general regulations for the kingdom at large. In imitation of their monarch, the great vassals of the crown granted their charters for the regulation of the possessions held of them. In the same manner, when allodial land was changed to feudal, charters were granted for the regulation of the fiefs; and, when villeins were enfranchised, possessions were generally given them, and charters were granted to regulate these possessions. Thus, each seignory had its particular usages. Such was their diversity, that throughout the whole kingdom, there could hardly be found two seignories, which were governed, in every point, by the same law.

3. With a view more to ascertain than

to produce an uniformity in these usages, though the latter of these objects was not quite neglected, Charles the seventh and his successors caused to be reduced to writing the different local customs. In 1453, sometime after Charles the Seventh had expelled the English from France, he published an ordonnance, by which he directed that all the customs and ordonnances should be committed to writing, and verified by the practitioners of each place, then examined and sanctioned by the great council and parliament; and that the customs, thus sanctioned, and those only, should have the force of laws. Such were the obstacles in the way of this measure, that forty-two years elapsed before the customs of any one place were verified. From that time, the measure lingered, but it was resumed in the reign of Lewis XII, and about the year 1609, was completed. The customs of Paris, Orleans, Normandy, and some other places, were afterwards reformed.

Those of Artois and St. Omer were reformed within the last hundred years.

The manner of proceeding, both in reducing the customs and reforming them, was, generally speaking, as follows. The king, by his letters patent, ordered an assembly of the three states of each province. When this assembly met, it directed the royal judges, greffiers, maires and syndics, to prepare memoirs of all the customs, usages, and forms of practice, they had seen in use, from of old. On receiving these memoirs, the states chose a certain number of notables, and referred the memoirs to them, with directions to put them in order, and to frame a cahier or short minute of their contents. This was read at the assembly of the states; and it was there considered, whether the customs were such as they were stated to be in the cahier:—at each article, any deputy of the state was at liberty to mention such observations as occurred to him:—the articles were then

adopted, rejected, or modified, at the pleasure of the assembly, and, if they were sanctioned, were taken to parliament and registered. The customs of each place, thus reduced to writing and sanctioned, were called the *Coutumier* of that place:—they were formed into one collection, called the *Coutumier de France*, or the *Grand Coutumier*. The best edition of it is Richebourgh's, in four volumes, in folio. It contains about one hundred collections of the customs of provinces, and two hundred collections of the customs of cities, towns, or villages. Each *coutumier* has been the subject of a commentary: five and twenty commentaries, (some of them voluminous), have appeared on the *coutumier* of Paris. Of these commentaries, that of Dumoulin has the greatest celebrity. *Les Etablissements de St. Louis*, hold a high rank for the wisdom with which they are written, and the curious matter they contain. The *Coutumier de Normandie*, for its high antiquity,

and the relation it bears to the feudal jurisprudence of England, is particularly interesting to an English reader: Basnage's edition, and his learned commentary upon it, are well known.

4. These are the principal sources of the Feudal Jurisprudence of France; it remains to take some notice of the *chief compilations, by which the feudal policy of other kingdoms is regulated.* The most curious of all collections of feudal law is that entitled *Assizes de Jerusalem.* In 1099, the object of the first crusade was effected by the conquest of Jerusalem. Godfrèy of Bouillon, who was elected king of Jerusalem, but refused the title, called an assembly of the states of his new kingdom. The patriarch, the chief lords, their vassals, and their arriere-vassals attended. With general consent, the collection in question was formed, under the title of "*Les Loix, Statuts, & Coutumes, accordées au Royaume de Jerusalem, par Godefroi de Bouillon, l'an 1099; par l'avis du*

“*Patriarche et des Barons.*” As this collection was made at a general assembly of feudal lords, it may naturally be supposed to contain some of the wisest and most striking rules, by which the feudal polity of Europe was then regulated. But, as the principal personages who engaged in that crusade came from France, it may be considered as particularly descriptive of the laws and usages of that country.

5. The next to these, in importance, are *the Books of Fiefs*, which, probably in the reign of Frederick the Second, Hugolinus, a Bononian lawyer, compiled from the writings of Obertus of Otto, and Gerhardus Niger, and the various customary laws then prevailing in Italy; they are sometimes added, under the title *Decima Collatio*, to the *Novells*; and are to be found in most of the editions of the *Corpus Juris Civilis*. In the edition of Cujas they consist of five books; the first, contains the treatises of Gerhardus Niger; the second and third,

those of Obertus of Otto; the fourth, is a selection from various authors; the fifth, is a collection of constitutions of different emperors respecting feuds. To these, the Golden Bull of the emperor Charles the Fourth is often added. Authors are by no means agreed, either as to the order, or the division of this collection. Several editions have been made of it.

6. In that published by Joannes Calvinus or Calvus, at Frankfort, in 1611, there is a collection of *every passage in the canon law, that seems to relate to the law of feuds.* As this edition is scarce, and it may happen, that some English reader may be desirous of seeing all these passages, the following short account of Calvinus or Calvus's selection of them, is transcribed from Hoffman's *Dissertatio de Unico Juris Feudalis Longobardici Libro.* — “ Jurisprudentiam feuda-  
 “ lem, sex libris comprehensam, sive potius  
 “ consuetudines feudorum, secundum dis-  
 “ tributionem Cujacianam, edidit, et sub

“ titulo libri feudorum VI. addidit, quidquid  
 “ alicujus de hac materia momenti, in uni-  
 “ verso corpore juris canonici expressum  
 “ invenerat; hoc est totum titulum decre-  
 “ talium Gregorii IX, sive capitula, Insinu-  
 “ atione 1. Et ex parte tua 2. X. de feudis  
 “ porro cap. cæterum, 5. et novit; 13 de  
 “ Judiciis, cap. Quæ in Ecclesiarum, 7 de  
 “ Constitutionibus, cap. Ad duces, 10 in  
 “ quibusdam, 12 et Gravem, 53 de Sent.  
 “ excomm. cap. Ex transmissa, 6 et verum,  
 “ 7 de foro competente eorumque sum-  
 “ maria.”

7. The next treatise to be mentioned is, the Treatise *de Beneficiis*, generally cited under the appellation of *Auctor vetus de Beneficiis*. It was first published by Thomasius at Halle, 1708, with a dissertation on its author, and the time when it was written. He considers it to be certain that it was written after the year 800, and before the year 1250, and conjectures that it was not written before the emperor Otho, and

that it was written before the emperor Conrad the Second. To these must be added, the *Jus Feudale Saxonicum*, which seems to be a part of, or an appendix to, a treatise of great celebrity in Germany, intitled the *Speculum Saxonicum*. The *Jus Feudale Saxonicum*, is said by Struvius to have been translated by Goldastus from the German into the Latin language, for the benefit of the Poles. It is supposed to have been published between the year 1215 and the year 1250. The *Speculum Suevicum* seems to have been composed, in imitation of the *Speculum Saxonicum*, probably between the year 1250 and the year 1400. To this is added the *Jus Feudale Alemanicum*, composed about the same time, and probably by the same author. But none of these collections acquired the same authority as the Books of the Fiefs. Those were known by the name of the Lombard Law: by degrees they were admitted as authority by most of the courts, and taught in most of the academies of Italy and Germany.

8. Like the civil and canon law, they became the subject of innumerable *Glosses*. Those of Columbinus were so much esteemed, that no one, it is said, published any after him. About the end of the thirteenth century, James of Ardezene published a new edition of the gloss of Columbinus, and added, under the title of *Capitula Extraordinaria*, a collection of adjudged cases on feudal matters. This is inserted in some of the latter editions of the *Corpus Juris*. About the year 1430, Mincuccius de Prato veteri, a Bononian lawyer, by the orders of the emperor Sigismond gave a new edition of the books of the fiefs, with the gloss of Columbinus. These were confirmed by the emperor Sigismond, and afterwards by the emperor Frederick the Third, and publicly taught in the university of Bologna.<sup>o</sup>

<sup>o</sup> This article is extracted from the *Historia Juris Romano-Germanici* of Brunquellus; the *Historia Juris Civilis Romani et Germanici* of Heineccius, already cited; from Lindenbrogius's *Prolegomena* to his *Codex Legum Antiquarum*,

*Frankforti*, 1 vol. fol. 1613; *Baluzius's Preface to his Capitularia Regum Francorum*, 1677 and 1780; the *Thesaurus Feudalis of Jenichen*, published at Frankfort on the Main, 3 vol. 4to. 1750; *Struvius's Historia Juris*, Jenæ, 4to. 1728; *Selecta Feudalia of Thomasius*, Halle, 8vo. 1728; *Fleury's Histoire du Droit Français*, Paris, 2 vols. 8vo. generally prefixed to the *Institution au Droit Français d'Argou*; and the article, *Coutume*, sent by M. Henrion to the *French Encyclopedia*.

## THE CANON LAW.

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THE following sheets, after some introductory matter respecting, I. the religious worship and hierarchy of Pagan Rome; II. respecting the rise and progress of Christianity, from its being the most persecuted sect, to its becoming the established church of the Roman empire; and III. respecting the principal orders of the Christian hierarchy; will contain, IV. a mention of the general materials, and V. an historical account of the particular documents, of which the CANON LAW is composed.

### I.

I. 1. It seems generally understood that the ANCIENT RELIGION OF ROME was of Celtic extraction, without images,

without temples, and with few religious rites; that Numa established many ceremonies, and built a temple for sacrifices to the one eternal God; that, in other respects, he left the religion of Rome in its original simplicity; and that Tarquinius Priscus introduced into it the superstitions of the Greeks and Hetruscans.

I. 2. THE GODS, whom the Romans worshipped, were divided into the *Dii Majorum Gentium*, or the great cœlestial deities, with the *Dii Selecti*, and the *Dii Minorum Gentium*, or the inferior gods. The cœlestial deities were twelve in number: Jupiter, the king of gods and men; Juno, his sister and wife; Minerva, the goddess of wisdom; Vesta, the goddess of fire; Ceres, the goddess of corn and husbandry; Neptune, the god of the sea; Venus, the goddess of love and beauty; Vulcan, the god of fire; Mars, the god of wār; Mercury, the god of eloquence and trade; Apollo, the god of music, poetry, medicine and augury; and

Diana, the goddess of the woods. The *Dii Selecti* were Saturn, the god of time; Janus, the god of the year, and Rhea his wife; Pluto, the king of the infernal regions; Bacchus, the god of wine; Sol, the sun; Luna, the moon; and Genius, each man and each place's tutelary god. The *Dii Minorum Gentium* were the *Dii Indigetes*, or heroes ranked among the gods on account of their heroic virtues, as Hercules, Castor and Pollux, Æneas and Romulus; the *Dii Semones*, or Semihomines, less than gods and greater than men, as Pan, Pomona, Flora, Terminus, the Nymphs.

I. 3. To the service of these gods *several colleges of priests* were dedicated:—Fifteen Pontiffs, whose office it was to judge and determine on all sacred things; fifteen Augurs who, from the flight, chirping or feeding of birds, and fifteen Aruspices who, from the entrails of victims, derived omens of futurity; the Quindecemviri, who had the care of the Sibylline books; the Septemviri,

who prepared the sacred feasts; the *Fratres Ambarvales*, who offered up sacrifices for the fertility of the grounds; the *Curiones*, who officiated in the *Curiaë*; the *Feciales*, or sacred persons employed in declaring war and making peace; the *Sodales Titii*, whose office it was to preserve the sacred rites of the Sabines; and the *Rex Sacrorum*, to whom that title was given from his performing certain sacred rites, which could only be performed by royal hands.

In addition to these, each god had his *Flamines*, or particular priests. The six vestal virgins had the care of the sacred fire in the temple of *Vesta*, and the secret pledges of the eternal duration of Rome were intrusted to them. Every part of the empire abounded with temples and statues, and in every temple and statue a divine something was supposed to reside.

When we consider the general absurdity of the pagan creed, we find it difficult to suppose, that any rational mind could

seriously believe its doctrines, or that it should become the national religion of a great and sensible people. Those doubts increase on us, when we see how often the religious prejudices of the Romans were used by the leading men of Rome, as an engine for political purposes; when we consider the ridicule with which the less and even the greater deities were treated by their poets, philosophers, and historians; and when we read the passages in the works of Cicero and other writers, in which, often indirectly, and sometimes in the most direct terms, they deliver it as their opinion, that, in religion there are many truths, which it is not expedient the vulgar should know; and many falsehoods, which it is useful for the people to receive as truths. But there is reason to believe, that till the Greek philosophy found its way into Rome, the general body of the Romans was sincere in the worship of their gods; and that, even after the introduction of the Greek philosophy,

the number of those who gave up the whole of the national creed was very small. A freedom, even from the lowest kind of superstition, is often mentioned by their writers as a great effort of the human mind: and the writings of Cicero demonstratively prove, that those who rejected the popular superstition, had no settled system of religious belief to substitute in its place. The total extirpation of pagan superstition, which pagan philosophy could not effect, it is the triumph of Christianity to have accomplished; and to have introduced at the same time, a simple and sublime religion, accommodated to all persons, all times, and all circumstances, on which the weak and the strong may equally rely.<sup>n</sup>

<sup>n</sup> Beaufort, Rep. Rom. l. 1. Adams's Roman Antiquities, 281—303.

## II.

By the law of Athens, the act of introducing foreign deities was punished with

death. The law of Rome was not so severe: Mosheim and Bynkershoek seem to prove, that though the Romans would not allow any change to be made in the religions which were publicly professed in the empire, nor any new form of worship to be openly introduced, yet that, except when it threatened danger to the state, they granted a **FREE TOLERATION OF FOREIGN WORSHIP**, not only to individuals but to bodies of men.

The Christians, whose mild, unassuming, and benevolent morality entitled them to universal good will, were alone denied the benefit of this general toleration. From the reign of Nero, till the triumph of Constantine the Great over his rival Licinius, they were always treated with harshness, and repeatedly suffered the severest persecutions.

The favour of Constantine to them was, immediately after his first successes, shown by his repealing of the laws enacted against

them. By the edict of Milan he restored them to all their civil and religious rights, and allowed them, in common with the rest of his subjects, the free choice and exercise of their religion. In the general dispensation of his favours, he held, with an impartial hand, the balance between his christian and heathen subjects. His successors, except during the short interval of Julian's reign, strongly encouraged christianity and discountenanced heathenism; and finally, by the edicts of Theodosius, the ancient worship of Rome was proscribed, and christianity became the established religion of the empire. Till those edicts, the spirit of polytheism, had lingered among the principal nobility of Rome; after them, it lingered among the Grecian philosophers: but by his edict in 529, Justinian silenced the schools of Athens; and to that æra, the final extinction of Paganism is always assigned.<sup>p</sup>

<sup>p</sup> *Francis Balduinus, Commentarius ad edicta Imperatorum in Christianos, Edit. Gudling; Byn-*

## III.

IN respect to the CHRISTIAN HIERARCHY, the Roman empire, at the time when Christianity obtained in it a legal establishment, under Constantine the great, had reached its utmost limits. It was divided into four Præfectures: the Eastern, which comprised the country between Thrace and Persia, the Caucasus and the Cataracts of the Nile; the Præfecture of Illyricum, which comprised Pannonia, Dacia, Macedonia, and Greece; the Præfecture of Italy, which comprised Italy, Rhœtia, the Islands of the Mediterranean, and

*kershoek, Dissertatio de Cultu Peregrinæ Religionis apud Romanos, in Opusculis, Lugd. Bat. 1719. Mosheim, de Rebus Christianorum ante Constantinum Magnum, Commentarii, Helmstadii, 4to. 1753, c. 1. sect. 8; Seculum primum, 27—32. In his Six Letters on Intolerance, London, 1791, Sir Geo. Colebrooke has collected many curious facts to show, that the religious toleration of the Romans was by no means so perfect as is generally thought.*

the part of Africa from the westernmost mouth of the Nile to Tingitana; and the Præfecture of the Gauls, which comprised Spain, Britain, and the part of Africa from Tingitana to the western ocean. Each præfecture was divided into several dioceses; each diocese into several provinces; and in each province there was one, and sometimes more than one mother-town, on which other towns depended. The dioceses were thirteen in number, the provinces one hundred and twenty.

In the establishment of her hierarchy, the Christian church, particularly in the east, appears to have conformed very much to this model. Before the translation of the seat of the Roman empire to Constantinople, the church had the three Patriarchates of Rome, Antioch, and Alexandria; after its translation, the bishops of Constantinople acquired importance; by degrees they obtained ecclesiastical jurisdiction over Thrace, Asia, and Pontus, and were ele-

vated to the rank of patriarch: afterwards, the same rank was conferred on the bishop of Jerusalem: and, according to Mr. Gibbon's observation, (vol. vi. p. 378), the Roman bishop was always respected as the first of the five patriarchs. Thus, speaking generally, the patriarchs corresponded in rank with the prefects; in each diocese there was a primate; in each province, one or more than one metropolitan; and each metropolitan had under him a certain number of suffragan bishops. Regular funds, proportioned to their respective ranks, were appropriated for their support: except in cases of singular enormity they were exempted from the civil jurisdiction of the magistrate; and, in many other important articles a distinction between the clergy and the laity, wholly unknown in the law of heathen Rome, was admitted into the Codes of the Christian emperors.<sup>1</sup>

<sup>1</sup> *Frederici Spanhemii, Geographia Sacra, Distributio Diæceson et Provinciarum, inde a Tempori-*

## IV.

THE liberty of holding ecclesiastical assemblies was one of the most important privileges of the dignified members of the clergy. Occasional assemblies were convened of all the bishops in the Christian world, or of all the bishops within the limits of a patriarchate: and, generally in the spring and autumn of every year, the metropolitan convened the bishops of his province to debate on its religious concerns. From Concilium, which, among the Romans, denoted a select meeting in contradistinction to Comitia, which they used to denote general meetings, these assemblies received, in the Latin church, the ap-

*bus Constantini Magni in orbe utroque, orientali et occidentali; inter Opera Omnia, Lugduni Batavorum, fol. 1 vol. 75—204; Bingham's Antiquities of the Christian Church, London, 1726, fol. 2 vol. lib. 9; Du Pin, de Antiquâ Ecclesiæ Disciplinâ, Par. 1686; Petrus de la Marca, Concordia Sacerdotii atque Imperii, fol. Paris, 1704.*

pellation of councils; in the Greek church they were called synods; at a subsequent time, the word council still retaining its original import, the word synod was used, in the Latin church, to denote the assembly of a bishop and his clergy. The Scripture is the first, the decrees of the councils are the second source, from which **THE MATERIALS OF THE CANON LAW** are drawn. The decrees and decretals of the popes are the third; the works of the fathers and other respectable writers are the fourth. By the decrees of the popes are meant their decrees in the councils held by them in Italy; the decretals are their answers to questions proposed to them on religious subjects.

## V.

THOSE, who profess to give an **HISTORICAL ACCOUNT OF THE CANON LAW**, divide it into three periods: the ancient, the middle, and the modern:—the

ancient, begins with the first, and ends with the eighth century, when Isidore Mercator's collection of canons made its appearance; the middle, begins with that century, and ends with the council of Pisa, in 1409; the modern, begins with that council, and extends to the present time.

## V. 1.

THE ANCIENT PART OF THE HISTORY OF THE CANON LAW is remarkable for several Collections of Canons.

### 1. Some are *CANONS OF THE GENERAL CHURCH.*

The first collection of these canons is called the *Apostolic Canons*. They have been ascribed to the apostles; and it has been said, that St. Clement, the immediate successor of St. Peter, was the collector of them. If the apostles had really promulgated them, it is difficult to assign a reason

for their not having been admitted to a place in the writings which form the New Testament; but, of the ancient fathers, St. John Damascene alone has done them that honour. From their being omitted in the canon of the New Testament, from the universal silence of the fathers of the three first ages respecting them, from the mention in them of many offices and customs, which there is every reason to suppose of a later origin, from no appeals having been made to them in the controversies which arose in times subsequent to them, and on which their language is decisive, and from no mention having been made of them in the synod held at Rome in 496, which mentions all the writings of the Old and New Testament, they are now considered to have been fabricated. Bishop Beveridge, who has published them with learned notes, supposes they were framed under the sanction of bishops, who held the sees founded by the apostles, and that they were collected

towards the end of the second or beginning of the third century. The first regular mention of them is found in the second council of Constantinople. After Christ.

The Greek church, at least since the synod in Trullo, in 692, has singularly respected them, and considered the 85 first of them as authentic: the Latin church seems to have admitted the 50 first of them. They were first printed at Venice in 1563, in 4to, and have often been reprinted . . . . 200

*The Apostolic Constitutions* are of high antiquity, have been much interpolated, and are of no authority. It is supposed that they first appeared in the fourth century . . . . 300

2. Hitherto, the canons spoken of are the canons of the general church: there also are *CANONS OF PARTICULAR CHURCHES*.

In respect to the *Greek Church*, the

first collection of canons which has come down to us from the Greek church, is the *Codex Ecclesie Orientalis*. It is supposed to have been first published in . . . . . 385

After  
Christ.

This collection contains 165 canons: 20 of them are canons of the general council of Nice; 24, are canons of the council of Ancyra; 14, are of the council of Neocesarea; 20, of the council of Gangris; 25, of the council of Antioch; 59, of the council of Laodicea; and three of the first council of Constantinople. The council of Chalcedon mentions this collection with approbation.

The second collection of canons of the Greek church is, the *Codex Ecclesie Universæ*. . . . . 451

It comprises the canons in the preceding collection, with the addition of some omitted canons of the council of Constantinople, some of the

council of Ephesus, and some of the council of Chalcedon. After Christ.

Both these collections are confined to the canons of the councils of the oriental churches; but they by no means include all the canons of all the councils of those churches.

About the middle of the sixth century, John, then a priest of Antioch, afterwards patriarch of Constantinople, published a collection of the Greek canons, digested under fifty heads, according to the subjects of them. He afterwards published an abridgment of it: the first is called his *Collection of Canons*; the second his *Nomo-Canon*: he is generally called Joannes Scholasticus. . . . . 560

We know little more of the canons of the Greek church till the *Synod in Trullo*. By that synod, a code was formed of the canons framed at it, of those framed at the synods of Car-

thage, and at the council of Constanti-  
 nople, held by Nectarius, and of some  
 writings of the fathers. To those were  
 added the twenty-two canons of the  
 second council of Nice, and the fourth  
 council of Constantinople . . . . 692

After  
 Christ.

Here, before the schism, which se-  
 parated the Greek from the Latin  
 church, the code of the Greek canon  
 law rested. Under Photius, two coun-  
 cils were held at Constantinople: the  
 canons of those councils were re-  
 ceived by the schismatic churches of  
 the east, and were published by Pho-  
 tius in his *Nomo-Canon*, or modern  
 collection of canons, in . . . . 883

With the *Commentaries of Balsamon, Zonaras, and Aristenus*, and other cu-  
 rious articles, and with a learned pre-  
 face, all these collections of canons  
 were published, at Oxford, by Dr.  
 Beveridge, afterwards Bishop of St.  
 Asaph, under the title, "*Pandectæ*

“ *Canonum Sanctorum Apostolorum et Conciliorum ab Ecclesiâ Græcâ receptorum.*”  
“ Those,” says Van Espen, “ who will read  
“ with attention, the notes of the learned  
“ editor, will find much very learned expo-  
“ sition of the canon law, and much in-  
“ structive matter on other subjects, con-  
“ nected with the learning of the canons.”  
“ Bishop Beveridge’s works,” says L’Advocat,  
“ are written with so much dignity,  
“ majesty, learning, and modesty, that he  
“ is thought, with reason, to be one of the  
“ greatest and most learned men whom  
“ England has produced.” An epistolary  
correspondence was carried on between him  
and Bossuet.

3. In the *LATIN CHURCH*, frequent mention is made of the *Vetus Canonum Latinorum Editio*. It was superseded by the collection made by *Dionysius Exiguus*, about the beginning of the sixth century. That collection was afterwards enlarged by the decrees of Pope Symmachus, Pope Hor-

misdas, and Pope Gregory the Second. This collection was of great authority both in the Greek and the Latin churches.

4. Other Churches had their Collections of Canons. The *CHURCH OF AFRICA* had hers: the *Breviatio Canonum of Fulgentius Ferrandus*, and the *Breviarium and Concordia Canonum of Cresconius* are added to it.

The *CHURCH OF SPAIN* also had her collection of canons. It is attributed to St. Isidore, Bishop of Seville; from his diocese, he is frequently distinguished by the appellation of Hispalensis.

In 790, Pope Adrian presented Charlemagne with a collection of canons. It was composed of the collection of Dionysius Exiguus, and the epistles of several popes.

At the council held at Canterbury in 873, a book of canons was produced and approved of; but we do not know what canons it contained.

## V. 2.

1. The MIDDLE PERIOD OF THE HISTORY OF THE CANON LAW commences with the ninth century, at the beginning of which, or towards the end of the preceding century, *the collection of Isidore Peccator or Mercator* probably made its appearance . . . . . 760

After  
Christ.

It was brought from Spain into Germany by Riculphus, the bishop of Mayence. Who the compiler of it was, and why he assumed the name of Peccator or Mercator, are merely matters of conjecture. It sets out with describing the manner in which a council should be held; then, the fifty first of the canons of the apostles follow: “ Deinde,” says the author, “ quarumdam epistolarum decreta virorum apostolicorum inseruimus, id est, Clementis, Anacleti,

“ Evaristi, et cæterorum apostolico-  
 “ rum, quas potuimus hactenus repe-  
 “ rire, epistolas usque ad Sylvestrem  
 “ Papam.”

After  
 Christ.

These are the celebrated decretals, concerning which, since the beginning of the sixteenth century, there has been so much dispute among the learned. They seem to have made their first appearance in Germany: afterwards, to have been received in France, and, by degrees, in every part of the western church. For seven centuries after their first appearance, neither their authenticity nor their authority appears to have been questioned.

They were first attacked by Mar- cilus of Padua, then, by Cardinal Nicholas of Cusa, during the Coun- cil of Basil, and afterwards by Eras- mus. In the celebrated Centuriators of Magdeburgh, in Blondel, and, last-

ly, in Van Espen, they have met with most powerful adversaries: in the author of the celebrated treatise, “*Quis est Petrus,*” they have found both a zealous and an able advocate: but he seems to concede, that so much spuriousness is proved on them as to make them, when they stand alone, of no authority.

After  
Christ.

They were followed by what are called the *Capitularies of Adrian* . . . 845

The tenth century was famous for the *Collection of Rheimon, Abbot of Prumia* . . . . . 906

The eleventh, for the collection of Burchardus, bishop of Wormes, entitled *Magnum Decretorum seu Canonum Volumen* . . . . . 1000

The twelfth, for the collection of St. Ivo, the good lawyer. Two works are attributed to him: the *Decretum Canonum*, certainly belongs to him;

his right to the second, the *Panomia*, After  
Christ.  
is uncertain . . . . . 1100

2. We now come to the celebrated *Decretum Gratiani*, or the *Concordia Discordantium Canonum*. Gratian was a Benedictine monk, in a monastery of Bologna. His work is an epitome of Canon Law, drawn from the decrees of councils, the letters of pontiffs, and the writings of ancient doctors. Pope Eugenius the third was extremely satisfied with the work: and it was soon adopted in every part of the western church . . . . . 1150

It is divided into three parts: the first contains 101 distinctions or heads, and treats of the origin and different kinds of law, and particularly of the sources of ecclesiastical law, of persons in holy orders, and the hierarchy. The second contains thirty-six causes, as they are called, or particular cases,

on which questions of difficulty arise: the third is divided into five distinctions, and contains a collection of canons relating to the consecration of churches, the sacraments, and the celebration of the divine office. The whole contains about 3000 canons or capitularies. Some are intitled *Paleœ*, the meaning of which word is not yet ascertained by the learned.

This celebrated collection abounds with errors. Towards the middle of the sixteenth century, Antonius Demochares and Antonius Contius, the former a divine, the latter a canonist, published a corrected edition of it.

A more correct edition of it we owe to the council of Trent. By a decree of that council, it was ordered that correct editions of missals, breviaries, and other books relating to ecclesiastical matters should be published.

In consequence of this decree, pope Pius the fourth engaged several learned

men in the correction of the decree of Gratian. The work was continued through the pontificate of Pius the fifth. Gregory the thirteenth, the immediate successor of Pius the fifth, when a cardinal, had been employed on the work: under his auspices, it was finally published about the year 1580

After  
Christ.

Several faulty passages still remain in the work. Many of them have been pointed out by Antonius Augustinus, the Archbishop of Tarra-  
gon, in his learned and entertaining dialogues on the Emendation of Gratian.

Such is the celebrated decree of Gratian, which for 800 years, has, in every country in Christendom, been considered a valuable repository of Canon Law.—To the compilations of Isidore and Gratian, one of the greatest misfortunes of the church, the claim of the popes to temporal

power by divine right, may in some measure be attributed. That a claim so unfounded and so impious, so detrimental to religion, and so hostile to the peace of the world, should have been made, is strange—stranger yet, is the success it met with.

After  
Christ.

It was soon observed, that the author had omitted in his collection several important articles. This gave rise to subsequent collections. The principal of them are the *Breviarium of Bernardus Papiensis*, and the *Collections of Johannes Galensis* and *Peter Beneventanus*. Of these, the last only was formally approved by the see of Rome. Pope Innocent the third published a collection of his own decretal epistles. His example was followed by Honorius the third, his immediate successor.

From these five collections, and from some decretals of his own, pope

Gregory the ninth commissioned St. Raymond of Pennafort, a Dominican, to form a new collection of canons. He executed the work greatly to the satisfaction of his holiness; and, under his auspices, it was published about the year 1230, under the title *Libri quinque Decretalium Gregorii Noni*. It contains all the decrees of the council of Lateran, and the decisions of many popes on particular cases. It is divided into five books 1230

After  
Christ.

A further addition to the code of Canon Law was made by pope Boniface the eighth. It contains the decretals of all the popes, subsequent to Gregory the ninth, and the decretals of that pope. It is called *Liber Sextus Decretalium*, and was published in . . . . . 1298

On account of the differences between pope Boniface and Philip the Fair, it was not received in France.

The *Liber Sextus Decretalium* is followed by the collection, called sometimes *Liber Septimus Decretalium*, and sometimes *Clementis Papæ Constitutiones*. It was framed by pope Clement the fifth; and consists of his own decretals, particularly the canons of the council of Vienne, at which he presided. He promulgated it in . . . . . - . . . 1313

After  
Christ.

The last article in the code of Canon Law is the *Extravagantes*. At first, every collection of Canon Law, except the decree of Gratian, was ranked among the *Extravagantes*. In the course of time, that name remained only to the collection of which we are now speaking. It is divided into two articles, the *Extravagantes Joannis XXII.* or the decretals of that pope, published by him about the year . . . . . 1340 .

And the *Extravagantes Communes*, After  
Christ.  
consisting of the decrees of popes  
from Urban the sixth to Sixtus the  
fourth. It was published about the  
year . . . . . 1483

Neither of them is considered to  
be of authority. The first, (published  
under the name of pope John the  
twenty-second,) was never formally  
approved of or sanctioned by him,  
and the author of the latter collection  
is wholly unknown.

*A collection by Peter Matthæi* was  
published in . . . . . 1590

In some modern editions of the  
Corpus Juris Canonici, it is inserted  
under the title of the *Liber Septimus  
Decretalium*.

With these, what is called the Cor-  
pus Juris Canonici and the middle  
period of the history of the Canon  
Law closes.

But mention should also be made of the *Institutiones Juris Canonici*, a compendium of Canon Law, published by Lancellot, a lawyer of Perugia, in 1563. By the direction of pope Pius the fifth, but without any confirmation of it by him, it was subjoined to the *Corpus Juris Canonici*, and has been published with it. “The Roman pontiffs,” says Arthur Duck, (*de Auctoritate Juris Civilis*, lib. 1. c. 6. tit. 8.) “effected that, in the church, which Justinian effected in the Roman empire: they caused Gratian’s Decree to be published in imitation of the Pandects; the Decretals, in imitation of the Code; the Clementinæ and Extravagantes, in imitation of the Novells; and to perfect the work, Paul the fourth ordered Lancellot to compose the Institutes; and under Gregory the thirteenth, they were published at Rome, and added to the *Corpus Juris Canonici*.” In the edition of the *Institutions* of Lancellot, published in 1584,

and in several subsequent editions, it is accompanied with a perpetual gloss, and followed by a commentary, written by Lancelot, which gives an account of the rise and progress of the work; and by a comparison of the Civil and Canon Law, also written by him.

### V. 3.

*THE MODERN PERIOD OF THE CANON LAW* begins with the Council of Pisa, and extends to the present time.

The principal articles of canonical learning, which have appeared during this period, are,

1. The various *Transactions and Concordats between Sovereigns and the See of Rome*;— a succinct and impartial history of them is wanting: the papal arrangements with Bonaparte would not be the least curious parts of such a work.

2. *The Councils of Basil, Pisa, Constance, and Trent.*

Separate histories have been written of the councils of Basil, Pisa and Constance, by M. L'Enfant, a Lutheran minister: that of the council of Constance is the best written; it contains an account of a fact of importance to the English nation, but not generally mentioned by her historians,—that the French ambassadors contended, before the council of Constance, that Christendom was divided into the four great nations of Europe. Italy, Germany, France, and Spain; and that all the lesser nations, among which they reckoned England, were comprehended under one or other of them; but the English asserted, and their claim was allowed by the council, that the British Islands should be considered a fifth and co-ordinate nation, and entitled to an equal vote with the others.—In the different atmospheres of Venice and Rome, the history of the council of Trent has been written by

the celebrated Fra Paolo, (the translation of whose work, with notes by Dr. Courayer, is more valued than the original), and by cardinal Pallavicini. The Cardinal does not dissemble, that some of the deliberations of the council were attended with intrigues and passion, and that their effects were visible in various incidents of the council: but he contends, that there was an unanimity in all points which related to doctrine, or the reformation of manners: and Dr. Courayer, in the Preface to his translation, concedes, “ that, in what regarded discipline, several excellent regulations were made according to the ancient spirit of the church;” and observes, that, “ though all the disorders were not reformed by the council, yet, if we set aside prejudice, we may with truth acknowledge, they are infinitely less than they were before.” The classical purity and severe simplicity of the style in which the decrees of the council are expressed,

are universally admired, and are greatly superior to the language of any part of Justinian's law. In what concerns faith or morals, the decrees of the council of Trent have been received, without any restriction, by every Roman Catholic kingdom: all its decrees have been received by the Empire, Portugal, the Venetians, and the Duke of Savoy, without any *express* limitation; they have been received by the Spaniards, Neapolitans, and Sicilians, with a caution, as to such points of discipline as might be derogatory to their respective sovereignties: but the council was never published in France. No attempt has ever been made to introduce it into England. Pope Pius the Fourth, sent the acts of the council to Mary Queen of Scots, with a letter dated the thirteenth of June 1564, urging her to have the decrees of the council published in her dominions; but nothing appears to have been done in consequence of it. See *Histoire de la Reception du Concile du Trente*,

*dans les différens Etats Catholiques; Paris, 2 vol. 8vo. 1766.*

3. *The Bullarium*, or the collections which have been made of the Bulls of Popes;—the best of these collections is that printed at Luxenburgh or Geneva in 1771. It extends to the year 1753.

4. To these are to be added, *Regulæ Cancellariæ Romanæ*, or the Rules of the Roman Chancery, a court instituted by the see of Rome, for preparing and transmitting the receipts and letters of the pope; *the sentences and ordinances of the various congregations of cardinals at Rome; and the decisions of the Rota*, the supreme tribunal of justice at Rome, both for its spiritual and its temporal concerns.

5. These complete the body of the Canon Law.—It should be observed, that, in addition to it, every nation in Christendom has its own national Canon Law, composed of *Legantine, Provincial, and other Ecclesiastical Constitutions*. The Legantine Con-

stitutions of England are the ecclesiastical laws enacted in national synods, held under the cardinals Otho and Othobon, in the reign of Henry the Third. The Provincial Constitutions are principally the decrees of provincial synods, held under divers Archbishops of Canterbury, and adopted by the province of York, in the reign of Henry the Sixth. “ At the dawn of the Reformation,” (Sir William Blackstone, Comm. 1 vol. Inst. sec. 3.), “ in the reign of King Henry the Eighth, it was enacted in parliament 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 the First, in the year 1603,  
“ and never confirmed in parliament, it has  
“ been solemnly adjudged, upon the prin-  
“ ciples of law, and the constitution, that  
“ where they are not merely declaratory of  
“ the ancient Canon Law, but are intro-  
“ ductory of new regulations, they do not  
“ bind the laity ; whatever regard the  
“ clergy may think proper to pay them.”

## VI.

With respect to the **AUTHORITY OF THE CANON LAW**, from which, in the present case, the part of it anterior to Gratian's decree, and subsequent to the *Extravagantes Communes*, must be excluded ; it is composed of texts out of the Bible, passages from the writings of the fathers, the canons of general and particular councils, the decrees and rescripts of popes, and various other insertions and ex-

tracts. In each of these particulars, it possesses all the authority which the extract itself has; besides which, it possesses all the weight and authority, which it has acquired, by its having been so much adopted by courts, appealed to in disputes, taught in the schools, and praised and commented upon by the learned men of every state of Christendom. With more or less limitation, it forms the basis of the ecclesiastical law of every country, where the Roman Catholic religion is professed; and, speaking generally, in protestant countries, it has the force of law, when it is not repugnant to the law of the land.<sup>a</sup>

<sup>a</sup> The works, principally used in framing this account are, *Fleury's Institutions du Droit Ecclesiastique*; his *Discours sur l'Histoire Ecclesiastique*; bishop Gibson's learned but very high-church Preface to his *Codex Juris Ecclesiastici Anglicani*; lord Hardwicke's argument in the case of *Middleton v. Crofts*, 2 *Atk.* 650; Pehem's *Prælectiones in Jus Ecclesiasticum Universum, Lovanii*, 4 vol. 8vo. 1787; Boehmer, *Jus Ecclesiasticum Protestantium, Halæ Magdeburgicæ*,

6 vol. 4to, 1756; *Gerhard Von Mastricht Historia Juris Ecclesiastici et Pontificii, Duisburgii ad Rhenum, Oct.* 1676; *Doujat's Histoire du Droit Canonique, Paris, 8vo.* 1677; *Van Espen's Jus Ecclesiasticum Universum, Lovanii, 6 vol. fol.* 1753, a work, which, for depth and extent of research, clearness of method, and perspicuity of style, equals any work of jurisprudence which has issued from the press; but which, in some places, where the author's dreary Jansenism prevails, must be read with disgust:— a methodical and learned work with this title, “*Quis est Petrus? Seu Qualis Petri Primus? Liber Theologico-Canonico Catholicus. Editio secunda, correctior et emendatior, cum Approbatione, Ratisbonæ, 1791;*” the ablest work, in support of the papal prerogatives against the doctrines of the Sorbonne, which has come to the writer's knowledge. The account, given in it, of Isidore's Decretals is particularly interesting. *The Religionis Naturalis et Revelatæ Principia of Doctor Hooke, Paris, 3 vols. 8vo.* 1774; the third volume of this work is, perhaps, the best treatise extant, on the ecclesiastical polity of the church, according to the notions of the Sorbonnists. It deserves to be more known in this country; it must have given the French divines an high opinion of the perspicuity and precision of English writing.

## APPENDIX.

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### NOTE I.

THE EXCLUSIVE DOMINION AND PROPERTY OF THE BRITISH SEAS is one of the most splendid and valuable prerogatives of the Crown of England.—The following account of it is taken from a note to that part of the 14th edition of Coke upon Littleton, which was executed by the present writer.

“ The *JUS MARIS* of the king may be considered under the two-fold distinction, of the *right of jurisdiction*, which he exercises by his admiral, and his *right of propriety or ownership*.

WITH RESPECT TO THE RIGHT OF JURISDICTION, the subject is elaborately discussed by Mr. Selden, in his *Mare Clausum*, a noble exertion of a vigorous mind, fraught with profound and extensive erudition. In the first part of it, he attempts to prove, that the sea is susceptible of separate dominion. In this, he has to combat the opposite opinion of almost all civilians, and

particularly the celebrated declaration of one of the Antonines, (L. 9. D. De Lege Rhodiâ) "*Ego quidem mundi dominus, lex autem maris, &c.*" by which the emperor has been generally considered to have disclaimed any right to the dominion of the sea. For a different interpretation of this law, Mr. Selden argues with great ingenuity. In this, he is followed, in some measure, by Bynkershooek, in his treatise *De Lege Rhodiâ de Jactu, Liber Singularis*, in the 2d vol. of the edition of his works published by Vicat, Col. Allob. 1761.—Mr. Selden, in the second part of his work, attempts to shew, that in every period of the British History, the kings of Great Britain have enjoyed the exclusive dominion and property of the British seas, in the largest extent of those words, both as to the passage through and the fishing within them.—He treats his subject methodically, and supports his position with the greatest learning and ingenuity.—The reader will probably feel some degree of prepossession against the extent of this claim; but he will find it supported by a long and forcible series of arguments, not only from prescription, from history, from the common law, and the public records of this country, but even from the treaties and acknowledgments of other nations. Here he is opposed by Bynkershooek, in his

Dissertatio de Dominio Maris, also published in the second edition of his works. But it will be a great satisfaction to the English reader to find, how much of the general argument used by Mr. Selden, is conceded to him by Bynkershoock. Even on the most important part of the argument, the acknowledgment of the right by foreign princes, Bynkershoock makes him considerable concessions: "Plus momenti," says he, "adferre videntur gentium tesimonia, quæ illud Anglorum imperium agnovere. De confessionibus loquor non injuria extortis, sed libere et sponte factis. Esse autem hujusmodi quædam confessiones, neutiquam negari poterit."—After this acknowledgment, corroborated as it is by other arguments used by Mr. Selden, many will think his positions completely established. The chief objection made by Bynkershoock to the right of the crown of England to the dominion of the sea is, the want of uninterrupted possession, as he terms it, of that dominion. "So long as a nation has possession of the sea, just so long," says Bynkershoock, "she holds its dominion. But to constitute this possession, it is necessary that her navies should keep from it the navies of all other nations, and should themselves completely and incessantly navigate it ayowedly in the act or for the purpose of asserting her sovereignty to it." This

he contends, has not been done by the English; on this ground therefore he objects to the right of dominion of the English sea; and on the same ground he objects to the right of the Venetians to the dominion of the Adriatic, and to the right of the Genoese to the dominion of the Ligustic. But this seems carrying the matter too far. If it be admitted, (of which there unquestionably are many instances), that the sovereign power of a state may restrain her own subjects from navigating particular seas, she may also engage for their not doing it, in her treaties with other nations. It can never be contended, that after such a treaty is entered into, the acts of possession mentioned by Bynkershoock are necessary to give it effect and continuance, unless this also make a part of the treaty. It is sufficient, if the acts of possession are so often repeated, as is necessary to prevent the loss of the right, from the want of exercise of it. In those cases, therefore, where the treaty itself, establishing the exclusive dominion we are speaking of, is produced, the continued and uninterrupted possession mentioned by Bynkershoock cannot be necessary. But public rights, even the most certain and incontestible, depend often on no other foundations than presumption and usage. The boundaries of territories by land, frequently depend on no other title. Then, if Bynkershoock

be right in his position, that the sea is susceptible of dominion, should not mere prescription and usage in this, as in any other case, be sufficient to constitute a right? Upon what ground are the continued and uninterrupted acts of possession, mentioned by Bynkershooch, required to constitute a title in this, more than in any other case of public concern?—If this be thought a satisfactory answer to the objection made by Bynkershooch, the remaining difference between him and Mr. Selden, respecting the right of the British monarch to this splendid and important royalty will be inconsiderable.—It is to be added, that Mr. Selden's treatise was thought so important to the cause, in support of which it was written, that a copy of it was directed to be deposited in the Admiralty. Those who wish to procure it, in an English translation, should prefer the translation published in 1633, by a person under the initials of J. H. to that by Marchemont Needham. On this subject (with the exception of Sir Philip Medows) subsequent writers have done little more than copy from Selden. The subject, however, is far from being exhausted. The system adopted by Sir Philip Medows, in his *Observations concerning the Dominion and Sovereignty of the Seas*, printed in 1689, is more moderate than Mr. Selden's.—He calls in question, at least indirectly, a material part of

Mr. Selden's positions, and places the right of the kings of England to the dominion of the sea upon a much narrower ground. He confines it to a right of excluding all foreign ships of war from passing upon any of the seas of England, without special licence for that purpose first obtained; to the sole marine jurisdiction, within those seas; and to an appropriate fishery. He denies that the salutation at sea, by the flag and top-sail, has any relation to the dominion of the sea; and he asserts, that, it was never covenanted in any of the public treaties, except those with the United Netherlands, and never in any of these till the year 1654; he contends it is not a recognition of sovereignty, but at most an acknowledgment of pre-eminence. His treatise is deservedly held in great estimation."

## NOTE II.

THE ALPS begin with Col del Angentera, which lies to the west of a supposed line from Monaco to the Mons Visulus, or Monte Viso. Thence, they proceed, in a semicircular line of about 500 miles, first on the south-eastern limits of France, afterwards on the southern limits of Swisserland, the Grisons, and the Tyrol, and then on the western limits of Styria, Carinthia and Carniola to the Sinus Flanaticus, or the Gulph of Cornero on the Hadriatic.

1. The *Alpes Maritimæ* take their name from the sea of Genoa, and extend from it up to Mons Visulus or Monte Viso. The most noted mountains in this part of the Alps are the Camellon and the Tendé.

2. The *Cottian Alps* reach from Monte Viso to Mount Cenis; they received their appellation from a territory of that name, of which Suza was the metropolis; they contain the Mons Matrona, or the Mont Genevre, where the river Durance springs.

3. The *Alpes Graiæ* extend over Le Petit St. Bernard, the scene of the martyrdom of the Theban legion, to the Mons Jovis, or Le Grand St. Bernard. Hitherto the direction of the Alps is to the north.

4. On the northern side of that part of the Rhone, which flows over the Valais into the lake of Geneva, are the *Alpes Helveticæ*; on its southern side are the *Alpes Penninæ*, the eastern chain of which is called *Alpes Lepontinæ*: they extend to the Mons Summus, or Mont St. Gothard.

5. The *Alpes Rhæticiæ* extend from Mont St. Gothard over the Mons Adula, or the Adule, where the two fountains of the Rhine arise, to the source of the Drave. A mountainous country to the south of them, where the town of Trent lies, was called the *Alpes Tridentinæ*.

6. The *Alpes Noricæ* lie on the north of the Drave, and extend over parts of Austria, Styria, and Carinthia; not far from the close of them the *Alpes Pannonicæ* or Kahlemburgh mountains rise. The *Alpes Bastarnicæ* are the Carpathian mountains, the boundary of Hungary on the north and east.

7. The *Alpes Carnicæ* lie on the south of the Drave, and reach to Nauportus or Leyback, where the Alpine heights of Italy properly close. Two ranges of mountains proceed from them; the *Alpes Venetæ*, which extend into the Venetian possessions on the Terra Firma, and the *Alpes Julicæ*, which are spread over the country from Forum Julii, or Friuli, to the eastern extremity of the Hadriatic.

Where the *Alpes Carnicæ* end, the *Mons*

*Albius* begins: the *Alpes Bebianæ*, or the Welebitchian, or Murlakan mountains proceed from it, and extend southerly in a line of about 300 miles over Illyricum to *Mons Orbelus*, whence they branch into the Rhodope and Hæmus.

Such is the chain of the Alps: *the Appennines* are of equal celebrity. They rise in the Col della Tende; after stretching on the east of the supposed line from the Portus Monæci to Mons Vesulus, along the Gulph of Genoa, at no great distance from the coast, they proceed eastwardly to the centre of Italy, and afterwards to the south, always approaching nearer to the eastern than to the western coast. After they arrive at the Mons Gargamus, they take a south-westernly direction, and reach the Calabrian extremities of Italy. This account of the Alps is taken from *Cluverius's Ital. Ant. lib. I. ch. 30, 31, 32*; *Cellarius's Geog. Ant. lib. 2*; *Busching's Geography*; *Chauchard's Map, published by Stockdale*; *Bergior's Histoire des Grands Chemins de l'Empire Romain, 2 vol. 4to. Bruxelles, 1738*; and *Mr. Pinkerton's Geography*, a work of great merit.

## NOTE III.

THE following account of the PRÆTOR'S JUDICIAL POWER, and its variations, is given by Doctor Bever, in his History of the Legal Polity of the Roman State, B. ii. c. 6.

“Originally, no more than one prætor was appointed; but, as the splendour and reputation of this illustrious city daily drew to it a vast conflux of strangers, the judicial business increased beyond the power of a single magistrate to dispatch. This demanded, therefore, the creation of a second, to preside over the causes of foreigners; from whence he was called “Prætor Peregrinus,” to distinguish him from the former, who from the particular objects of his magistracy, was styled “Urbanus.” When the empire received a further augmentation from the conquered provinces, each of these was allowed its provincial judge, with similar title and power.

Another century introduced a new refinement upon this institution. As the objects of judicature, both criminal, and civil, multiplied apace, and a great variety of new causes arose, very distinct, in their nature from each other, for the more easy and expeditious administration of justice, it was found necessary to throw them

into distinct classes, called "Quæstiones," and to assign particular jurisdictions and judges to each who were intituled Prætors and Quæsitors. These were obliged to exercise their respective jurisdictions within the city for the space of one year, after which they were dismissed into their several provinces, under the character of Proprætors. These great officers, of whatever rank or denomination, were first elected by the people, in the "comitia centuriata;" but the right of assigning them to their particular provinces belonged to the senate.

The prætorian edicts, which constitute that branch of the old civil law now under consideration, were certain rules or forms, published by every prætor at the entrance upon his office, on the calends of January, signifying the methods whereby he proposed to administer justice during that year. These were hung up in the public court in a white table, for the inspection of suitors and practitioners; bnt the authority of them lasted no longer than the office itself, unless they received a fresh ratification from the successor, and in that case they were called "Edicta Translatitia."

The prætor had no power to abrogate or alter the laws, but only to temper them with equity, to apply them to the particular cases before him, according to his own ideas of justice, and to

supply whatever was wanting, to give them their full and proper effect. His edicts, therefore, was considered only as the voice of the law, but not law in its most comprehensive meaning, unless they happened to be adopted and continued by succeeding magistrates; under which qualified character only they are considered by Justinian himself. But notwithstanding their inferiority of rank in the scale of legislation, they were yet held in the highest esteem by some of the greatest princes and statesmen in after times, and by none more than himself, as appears from his inserting so large a number of them in the Digest.

In process of time, indeed, as the age grew more corrupt, and as these judges were more intent upon their own private views and emolument than upon a punctual and faithful administration of justice, they were very apt to vary even from their own edicts, when it happened to suit the convenience and interest of their friends or themselves. This opened a door to many shameful acts of injustice, and once more called forth that truly patriotic tribune, Caius Cornelius, under whose influence a law was enacted, to oblige the prætors to adhere to certain established rules, and not to depart from those which they themselves had laid down, at the entrance upon their respective magistracies."

## NOTE IV.

THE following account of THE MODES OF QUOTING THE CIVIL AND CANON LAWS is taken from *Dr. Halifax's Analysis of the Roman Civil Law*, Camb. 1775, Note on page 2.

“ It may not be amiss, for the sake of Beginners, to explain here the method of *quoting* the several parts, which now compose the CORPUS JURIS ROMANO-CIVILIS. The INSTITUTIONS are contained in Four Books: each Book is divided into Titles; and each Title into Paragraphs; of which the first, described by the Letters *pr.* or *princip.* is not numbered. The DIGESTS or PANDECTS are in Fifty Books: each Book is distributed into Titles; each Title into Laws; and, very frequently, Laws into Paragraphs, of which the first is not numbered. The CODE is comprized in Twelve Books; each of which is divided, like the Digests, into Titles and Laws; and, sometimes, Laws into Paragraphs. The NOVELS are distinguished by their Number. Chapter and Paragraph.

The old way of quoting was much more troublesome, by only mentioning the Number, or initial Words of the Paragraph or Law, with-

out expressing the number either of Book or Title.

Thus § *si adversus* 12 *Inst. de Nuptiis*, means the 12th Paragraph of the Title in the Institutions *de Nuptiis*, which Paragraph begins with the Words *si adversus*; and which a modern Civilian would cite thus, I. 1. 10. 12. So *l. 30 D. de R. J.* signifies the 30th Law of the Title in the Digests *de Regulis Juris*: according to the modern way, thus, D. 50. 17. 30. Again, *l. 5. § 3. ff. de Jurejur.* means the 3d Paragraph of the 5th Law of the Title in the Digests *de Jurejurando*: better thus, D. 12. 2. 5. 3. And here note, that the Digests are sometimes referred to, as in the last instance, by a double *f*; and at other times by the Greek Π or π.

The method of quoting the ROMAN CANON LAW is as follows. The DECREE, as said above, consists of Three Parts; of which the first contains 101 Distinctions, each Distinction being sub-divided into Canons: thus 1 *dist. c. 3. Lev* (or 1 *d. Lev*) is the first Distinction, and 3d Canon, beginning with the word *Lev*. The second part of the Decree contains 36 Causes; each Cause comprehending several Questions, and each Question several Canons: thus 3. *qu. 9. c. 2. Caveant* is Cause the 3d, Question the 9th, and Canon the 2d, beginning with *Caveant*. The third part of the Degree contains 5 Distinc-

tions, and is quoted as the first part, with the addition of the words *de Consecratione*, thus *de Consecr. dist. 2. can. Quia corpus* (or *can. Quia corpus 35 dist. 2. d. Consecr.*) means the 2d Distinction, and the 35th Canon, of the Treatise *de Consecratione*, which Canon begins with *Quia corpus*.

The DECRETALS are in Three Parts; of which the first contains Gregory's Decretals in 5 Books; each Book being divided into Titles, and each Title into Chapters: And these are cited by the name of the Title, and the number of the Chapter, with the addition of the word *Extra*, or the capital letter X: thus *c. 3. Extra de Usuris*; is the 3d Chapter of the Title in Gregory's Decretals, which is inscribed *de Usuris*; which Title, by looking into the Index, is found to be the 19th of the 5th Book. Thus also, *c. cum contingat 36. X. de Offic. & Pot. Jud. Del.* is the 36th Chapter, beginning with *Cum contingat*, of the Title, in Gregory's Decretals, which is inscribed *de Officio et Potestate Judicis Delegati*; and which, by consulting the Index, we find is the 29th Title of the 1st Book. The Sixth Decretal, and the Clementine Constitutions, each consisting of 5 Books, are quoted in the same manner as Gregory's Decretals; only, instead of *Extra* or X, there is subjoin'd *in sexto* or in 6. and *in Clementinis* or in *Clem.* according as either part

is referred to: thus *c. Si gratiose 5. de Rescript. in 6.* is the 5th Chapter, beginning with *Si gratiose*, of the Title *de Rescriptis*, in the 6th Decretal; the Title so inscribed being the 3d of the 1st Book: And *Clem. 1. de Sent. et Re Judic.* (or *de Sent. et R. J. ut calumniis. in Clem.*) (or *c. ut calumniis. 1. de Sent. et R. J. in Clem.*) is the 1st Chapter of the Clementine Constitutions, under the title *de Sententiâ et Re Judicatâ*; which Chapter begins with *Ut calumniis*, and belongs to the xith Title of the 2d Book.

The EXTRAVAGANTS of John the 22d are contained in one Book, divided into 14 Titles: thus *Extravag. Ad Conditorem. Joh. 22. de V. S.* means the Chapter, beginning with *Ad Conditorem*, of the Extravagants of John 22d; Title, *de Verborum Significationibus*. Lastly, the Extravagants of later Popes are called *Communes*; being distributed into 5 Books, and these again into Titles and Chapters: thus *Extravag. Commun. c. Salvator. de Præbend.* is the Chapter, beginning with *Salvator*, among the *Extravagantes Communes*; Title, *de Præbendis*.

S K E T C H  
OF THE  
P R O F E S S I O N A L C H A R A C T E R  
OF THE  
E A R L O F M A N S F I E L D .

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The following sketch of an account of Lord MANSFIELD'S professional Life and Character, was written, by the Author of the preceding compilation, at the request of the late Mr. SEWARD, and inserted by him in his interesting, "*Anecdotes of distinguished Persons.*" Vol. ii. p. 425, fourth edition.

HIS Lordship was sent, at the usual age, to the University of Oxford. He applied to the study of the Classics, and afterwards to the study of law, with great diligence. He told the Writer, that he had translated many of Cicero's Orations into English, and then translated them back into Latin. He also mentioned, that,

while he was a student in the Temple; he and some other students had regular meetings to discuss legal questions; that, they prepared their arguments with great care; and that he afterwards found many of them useful to him, not only at the bar but upon the bench.

For some time after he was called to the bar, he was without any practice. There is a letter from Mr. Pope, in answer to one from him, in which he had mentioned this circumstance with good-humour. A speech he made as counsel at the bar of the House of Lords, first brought him into notice.\*

\* To this Mr. Pope alludes in the following lines :

“ Graced as thou art, with all the power of words,  
“ So known, so honor’d at the House of Lords.”

The second of these lines has been considered as a great falling off from the first. They were thus parodied by Colley Cibber :

“ Persuasion tips his tongue when’er he talks,  
“ And he has chambers in the King’s Bench Walks.”

To the chambers in the King’s Bench Walks, Mr. Pope has an allusion in one of the least read, but not

Upon this, business poured in upon him from all sides ; and he himself has been heard to say, that he never knew the difference between a total want of employment and a gain of 3,000*l.* a year.

He learned much of special pleading from Mr. Justice Dennison, and much of the law of title and real property from Mr.

least beautiful, of his compositions, his Imitation of the first Ode of the fourth book of Horace.

“ To Number Five direct your doves,  
 “ There spread round Murray all your blooming  
 “ loves ;  
 “ Noble and young, who strikes the heart  
 “ With every sprightly, every decent part :  
 “ Equal, the injur’d to defend,  
 “ To charm the mistress, or to fix the friend.  
 “ He with an hundred arts refin’d,  
 “ Shall spread thy conquests over half the kind ;  
 “ To him, each rival shall submit,  
 “ Make but his riches equal to his wit.”

The two last verses allude to an unsuccessful address made by his Lordship, in the early part of his life, to a lady of great wealth. Mr. Pope adverts to it in the following lines :

“ Shall one whom nature, learning, birth conspir’d  
 “ To form, not to admire, but be admir’d,  
 “ Sigh, while his Cloe, blind to wit and worth,  
 “ Weds the rich dulness of some son of earth ?”

Booth. He confined his practice to the Court of Chancery. His command of words, and the gracefulness of his action, formed a striking contrast with the manner of speaking of some of his rivals, who were equally distinguished by the extent and depth of their legal knowledge, and their unpleasant enunciation.

After he had filled, with great applause, the offices of Solicitor and Attorney-General, he was created Chief Justice of the King's Bench, in May 1756, on the decease of Sir Dudley Ryder. He held that high situation for two-and-thirty years. Till his time, the practice was, that the bench called on the gentlemen within the bar, to make their motions, beginning every day with the senior counsel, and then calling on the next senior in order, as long as it was convenient to the court to sit; and to proceed again in the same manner upon the next and every subsequent day, although the bar had not been half, or perhaps a quarter gone through, upon any one of the

former days; so that the juniors were very often obliged to attend in vain, without being able to bring on their motions for many successive days. Lord Mansfield, to encourage the juniors, proceeded regularly through the bar to the youngest counsel, before he would begin again with the seniors. This method was not only advantageous to the younger part of the barristers, but, as it prevented a great delay of business, was extremely advantageous to the suitors. On every other occasion, he was equally attentive to the bar and the suitors of the court.

In all he said or did, there was a happy mixture of good-nature, good-humour, elegance, ease, and dignity. His countenance was most pleasing; he had an eye of fire; and a voice perhaps unrivalled in its sweetness and the mellifluous variety of its tones. There was a similitude between his action and Mr. Garrick's; and, in the latter part of his life, his voice discovered something of that guttural, for which Mr.

Garrick's was distinguished. He spoke slowly, sounding distinctly every letter of every word. In some instances he had a great peculiarity of pronunciation—"authority" and "attachment," two words of frequent use in the law, he always pronounced *awtawrity* and *attaichment*. His expressions were sometimes low. He did not always observe the rules of grammar. There was great confusion in his periods, very often beginning without ending them, and involving his sentences in endless parentheses; yet, such was the charm of his voice and action, and such the general beauty, propriety, and force of his expressions, that, as he spoke, all these defects passed unnoticed. No one ever remarked them, who did not obstinately confine his attention and observation to them alone.

Among his contemporaries, he had some superiors in force, and some equals in persuasion; but in insinuation, he was without a rival or a second. This was particularly distinguishable in his speeches from the

bench. He excelled in the statement of a case. One of the first orators of the present age said of it, "that it was, of itself, worth the argument of any other man." He divested it of all unnecessary circumstances; brought together every circumstance of importance; and these he placed in so striking a point of view, and connected them by observations so powerful, but which appeared to arise so naturally from the facts themselves, that frequently the hearer was convinced before the argument was opened. When he came to the argument, he shewed equal ability, but it was a mode of argument almost peculiar to himself. His statement of the case predisposed the hearers to fall into the very train of thought he wished them to take, when they should come to consider the argument. Through this he accompanied them, leading them insensibly to every observation favourable to the conclusion he wished them to draw, and diverting every objection to it; but, all the time, keeping himself concealed; so that the

hearers thought they formed their opinions in consequence of the powers and workings of their own minds, when, in fact, it was the effect of the most subtle argumentation and the most refined dialectic.

Some idea of Lord Mansfield's cast of mind and mode of discussion, may be formed by perusing his arguments in delivering his opinion in the cases of the Mayor of Kingston-upon-Hull, v. Horner; Eldridge, v. Nott; and Hogan, v. Jackson, in Mr. Cowper's Reports, 102, 214, 299. Something of them appears also in the following extract of his speech in reversing Mr. Wilkes's outlawry, 2 Burr. 2561; but it should be taken into consideration, that the last evidently was either a prepared speech, or purposely corrected for the press.

After stating the general merits of the case, his Lordship says,

“ But here, let me pause!—

“ It is fit to take some notice of the various terrors hung out; the numerous

crowds which have attended and now attend in and about the hall, out of all reach of hearing what passes in court; and the tumults which, in other places, have shamefully insulted all order and government. Audacious addresses in print dictate to us, from those they call the people, the judgment to be given now, and afterwards upon the conviction. Reasons of policy are urged, from danger to the kingdom, by commotions and general confusion.

“ Give me leave to take the opportunity of this great and respectable audience, to let the whole world know, all such attempts are vain. Unless we have been able to find an error which will bear us out, to reverse the outlawry; it must be affirmed. The constitution does not allow reasons of state to influence our judgments: God forbid it should! we must not regard political consequences; how formidable soever they might be: if rebellion was the certain consequence, we are bound to say “ *fiat jus-*

*titia, ruat cælum.*" The constitution trusts the king with reasons of state and policy: he may stop prosecutions; he may pardon offences; it is his, to judge whether the law or the criminal should yield. We have no election. None of us encouraged or approved the commission of either of the crimes of which the defendant is convicted: none of us had any hand in his being prosecuted. As to myself, I took no part, (in another place,) in the addresses for that prosecution. We did not advise or assist the defendant to fly from justice: it was his own act; and he must take the consequences. None of us have been consulted or had any thing to do with the present prosecution. It is not in our power, to stop it: it was not in our power, to bring it on. We cannot pardon. We are to say, what we take the law to be: if we do not speak our real opinions, we prevaricate with God and our own consciences.

“ I pass over many anonymous letters I

have received. Those in print are public: and some of them have been brought judicially before the court. Whoever the writers are, they take the wrong way. I will do my duty, unawed. What am I to fear? That *mendax infamia* from the press, which daily coins false facts and false motives? The lies of calumny carry no terror to me. I trust, that my temper of mind, and the colour and conduct of my life, have given me a suit of armour against these arrows. If, during this king's reign, I have ever supported his government, and assisted his measures; I have done it without any other reward, than the consciousness of doing what I thought right. If I have ever opposed, I have done it upon the points themselves; without mixing in party or faction, and without any collateral views. I honour the king; and respect the people: but, many things acquired by the favour of either, are, in my account, objects not worth ambition. I wish popularity: but, it

is that popularity which follows; not that which is run after. It is that popularity which, sooner or later, never fails to do justice to the pursuit of noble ends, by noble means. I will not do that which my conscience tells me is wrong, upon this occasion; to gain the huzzas of thousands, or the daily praise of all the papers which come from the press: I will not avoid doing what I think is right; though it should draw on me the whole artillery of libels; all that falsehood and malice can invent, or the credulity of a deluded populace can swallow. I can say, with a great magistrate, upon an occasion and under circumstances not unlike, ‘*Ego hoc animo semper fui, ut invidiam virtute partam, gloriam, non invidiam, putarem.*’

The threats go further than abuse: personal violence is denounced. I do not believe it: it is not the genius of the worst men of this country, in the worst of times. But I have set my mind at rest. The last

end that can happen to any man, never comes too soon, if he falls in support of the law and liberty of his country: (for, liberty is synonymous to law and government.) Such a shock, too, might be productive of public good: it might awake the better part of the kingdom out of that lethargy which seems to have benumbed them; and bring the mad part back to their senses, as men intoxicated are sometimes stunned into sobriety.

Once for all, let it be understood, ‘ that  
‘ no endeavours of this kind will influence  
‘ any man who at present sits here.’ If they had any effect, it would be contrary to their intent: leaning against their impression, might give a bias the other way. But I hope, and I know, that I have fortitude enough to resist even that weakness. No libels, no threats, nothing that has happened, nothing that can happen, will weigh a feather against allowing the defendant, upon this and every other question, not

only the whole advantage he is intitled to from substantial law and justice; but every benefit from the most critical nicety of form, which any other defendant could claim under the like objection. The only effect I feel, is an anxiety to be able to explain the grounds upon which we proceed; so as to satisfy all mankind ‘ that a flaw of ‘ form given way to in this case, could not ‘ have been got over in any other.’

His Lordship frequently enlivened the tædium of a cause with sallies of good-humoured wit. He was sometimes happy in them. A jew of a very bad character, but covered with gold lace, was brought before him to justify bail for fifty pounds. The counsel asked him the usual question, if he were worth fifty pounds, after all his just debts were paid. “ Why do you ask him “ that question?” said his Lordship: “ don’t “ you see he would burn for twice the “ sum?”

But it was not by oratory alone, that he

was distinguished: in many parts of our law he established a wise and compleat system of jurisprudence. His decisions have had a considerable influence in fixing some of those rules which are called the land-marks of real property. The law of insurance, and the poor laws (particularly so far as respects the law of parochial settlements), are almost entirely founded on his determinations. It has been objected to him, that he introduced too much equity into his court. It is not easy to answer so general an observation; it may, however, be observed, that it is as wrong to suppose a court of law is to judge without equity, as to suppose a court of equity is not bound by law: and, when Mr. Justice Blackstone informs us,<sup>b</sup> that, under the ancient provisions of the second statute of Westminster, the courts of law were furnished with powers, which might have effectually answered all

<sup>b</sup> Com. vol. iii. 435.

the purposes of a court of Equity, except that of obtaining a discovery by the party's oath, there cannot, it should seem, be much ground for such an accusation.

His Lordship was sometimes charged with not entertaining the high notions which Englishmen feel, and it is hoped will ever feel, of the excellence of the Trial by Jury. Upon what, this charge is founded does not appear: between him and his jury there never was the slightest difference of opinion. He treated them with unvaried attention and respect; they always shewed him the utmost deference. It is remembered, that no part of his office was so agreeable to him as attending the trials at Guildhall. It was objected to him, that, in matters of libel, he thought the judges were to decide on its criminality. If his opinions on this subject were erroneous, the error was common to him with some of the most eminent among the antient and modern lawyers. It was also objected to him, that

he preferred the civil law to the law of England. His citations from the Civilians were brought as a proof of his supposed partiality to that law: but they were rather occasional than frequent; and he seldom introduced them where the case was not of a new impression, so that the scantiness of home materials necessarily led him to avail himself of foreign ware. Sometimes, however, he intimated an opinion, that the modification of real property in England, in wills and settlements, was of too intricate and complex a nature, and for that reason inferior to the more simple system of the Roman usufruct. The frequent necessity there is in our law to call in trustees, whenever property is to be transmitted or charged, so as to be taken out of immediate commerce, appeared to him an imperfection; and he wished the nature of our jurisprudence permitted the adoption of the rule of the civil law, that, when a debt is extinguished, the estate or interest of the

creditor, in the lands or other property mortgaged for its security, is extinguished with it. It will be difficult to shew any other instance in which he preferred the civil law to the law of England.

In a conversation he permitted a student at the English bar to have with him, he expressed himself in terms of great esteem for Littleton, but spoke of Lord Coke, particularly of "his attempting to give reasons for every thing" (that was his phrase) with great disrespect. He mentioned Lord Hardwicke in terms of admiration and of the warmest friendship: "When his Lordship pronounced his decrees, wisdom herself," he said, "might be supposed to speak."

He observed with great satisfaction, that during the long period of his chief justiceship, there had been but one case in which he had ultimately differed with his brother judges of the same court. That was the case of Perryn against Blake. He lamented

the difference, but declared his conviction, that the opinion he delivered upon it was right.

He recommended Saunders' Reports. He observed, that the quantity of professional reading absolutely necessary, or even really useful, to a lawyer, was not so great as was usually imagined; but, he observed, "that it was essential he should read much," as he termed it, "in his own defence; lest, "by appearing ignorant on subjects which "did not relate to his particular branch of "the profession, his ignorance of that particular branch might be inferred."

Speaking of the great increase of the number of law books, he remarked, that it did not increase the quantity of necessary reading, as the new publications frequently made the reading of the former publications unnecessary. Thus, he said, since Mr. Justice Blackstone had published his Commentaries, no one thought of reading Wood's Institutes or Finch's Law, which,

till then, were the first books usually put into the hands of students. He said that when he was young, few persons would confess they had not read a considerable part, at least, of the year books; but that, at the time he was then speaking, few persons would pretend to more than an occasional recourse to them in very particular cases. He warmly recommended the part of Giannone's History of Naples, which gives the history of jurisprudence, and of the disputes between the church and the state. He mentioned Chillingworth as a perfect model of argumentation.

In the fundamental principles, either of the constitution or the jurisprudence of this country, no one dreaded innovation more than he did. His speech on the case of Eltham Allen shews his notions on the great subject of toleration. It was published by Dr. Furneaux. He was the first judge who openly discountenanced prosecutions on the Popery laws. His charge to

the jury, in the case of Mr. James Webb, a Roman Catholic priest, tried in 1768 for saying mass, is printed from the notes of the short-hand writer, in a life of Dr. Chalonner, a Roman Catholic bishop, by Mr. James Barnard.

To these may be added, a speech against the suspending and dispensing prerogative, printed in Mr. Almon's collection. It is an invaluable composition, and presents, perhaps, the clearest notions that have yet appeared in print, of this mysterious and delicate part of the law. Much of his manner of arguing, and his turn of expression, is discoverable in it. It cannot, however, be considered as his genuine speech: it is at least three times the size of the speech really delivered by him. He obtained by it a compleat triumph over Lord Camden and Lord Chatham.

Though he was so far a friend to toleration, as not to wish for an extension of the laws enacted against Dissenters, or to wish

the existing laws rigidly enforced against them, yet he was a friend to the corporation and test laws, and considered them as bulwarks of the constitution, which it might be dangerous to remove. On every occasion he reprobated the discussion of abstract principles, and inculcated the maxim, that the exchange of the well for the better was a dangerous experiment, and scarcely ever to be hazarded.

Some time after the commencement of the French Revolution, he was asked, where he thought it would end? He said, he feared it was not begun.—To a person who enquired of him, what he supposed would be the ultimate issue of it; he said, it was an event without precedent, and therefore without prognostic.

It has been argued, that his knowledge of the law was by no means profound, and that his great professional eminence was owing more to his oratory than to his knowledge. This was an early charge

against him. Mr. Pope alludes to it in these lines:

The Temple late two brother Sergeants saw,  
 Who deemed each other oracles of law;  
 Each had a gravity would make you split,  
 And shook his head at Murray as a wit.

*Imitations of Horace, book ii. epist. ii.*

Perhaps the opinion was founded on the notion which many entertain, that the study of the polite arts is incompatible with a profound knowledge of the law; not recollecting, that the human mind necessarily requires some relaxation, and that a change of study is the greatest and most natural of all relaxations, to a mind engaged in professional pursuits. Besides—the *commune vinculum* between all branches of learning, preserves the habits of application, of thinking, and of judging, which are lost in the modes of dissipation usually resorted to for relaxation. The Chancellor D'Aguesseau,\*

\* This great magistrate used to say, “ *Le changement d'étude est toujours un delassement pour moi.*”

and even the stern Du Moulin, were eminently distinguished by their general literature. Lord Bacon's various and profound knowledge is universally known; and many works of Lord Hale are published, which shew, that to the deepest and most extensive knowledge of all the branches of the law, the constitution, and the antiquities of his country, he united a general acquaintance with the history of other nations; that he had given much of his time to the study of theology; that he occasionally sacrificed to the Muses, and spent some time in the curious and instructive amusements of experimental philosophy. It was late in life, that Lord Hardwicke took up the study of polite literature, but he afterwards pursued it with great earnestness. His son, Lord Chancellor Yorke, always called himself a fugitive from the Muses; and, amidst his vast variety of occupation, still found time to converse with them. Each of these great men might have said

with Cicero, "*Quis tandem me reprehendat, aut quis mihi jure succenseat, si quantum cæteri, ad suas res obeundas, quantum ad festos dies ludorum celebrandos, quantum ad alias voluptates, et ad ipsam requiem animi et corporis conceditur temporis; quantum alii tribuunt tempestivis conviviiis, quantum denique aleæ, quantum pilæ, tantum mihi egomet, ad hæc studia recollenda sumpsero.*"

To decide on his Lordship's knowledge of the law, a serious perusal of his arguments, as counsel, in Mr. Atkyns's Reports, and of his speeches, as judge, in Sir James Burrow's, Mr. Douglas', and Mr. Cowper's Reports, is absolutely necessary. If the former be compared with the arguments of his contemporaries, many of whom were men of the profoundest knowledge that ever appeared at the Chancery bar, it will not be discovered, that in learning or research, in application of principles or in recollection of cases, his arguments are anywise inferior to those of the most emi-

ment among them. Neither will he suffer by the comparison, if his speeches in giving his judgments from the bench, are compared with those of the counsel at the bar. It is easy to imagine, that, on some one occasion, a judge, with his Lordship's mental endowments, by a particular application to the learning immediately referrible to the case in question, and by consulting with persons eminently skilled in that particular branch of legal lore, may, with a very small stock of real knowledge of his own, express himself with a great appearance of extensive and recondite erudition. This, however, can be the case but seldom, the calls upon a chief justice of the King's Bench for a full exertion of all his natural and acquired endowments being incessant. There is hardly a day of business in his court, in which a disclosure of his knowledge, or of his want of it, is not forced from him.

Considering his Lordship's decisions separately, it will appear, that on all occa-

sions he was perfectly master of the case before him, and apprised of every principle of law, and every adjudication of the courts, immediately or remotely applicable to it. Considering them collectively, they will be found to form a complete code of jurisprudence on some of the most important branches of our law: a system founded on principles equally liberal and just, admirably suited to the genius and circumstances of the age, and happily blending the venerable doctrines of the old law with the learning and refinement of modern times; the work of a mind nobly gifted by nature, and informed with every kind of learning which could serve for use and ornament.

It was not on great occasions only, that his Lordship's talents were conspicuous: they were equally discoverable in the common business of the courts. *Par negotiis neque supra,*<sup>d</sup> was never more applicable

<sup>d</sup> Tacitus, in *Vitâ Agricolaë*.

than to the discernment, perseverance, abilities, and good-humour with which he conducted himself in that part of his office. The late Earl of Sandwich said of him, "that his talents were more for common use, and more at his finger ends, than those of any other person he had known." But his highest praise is, that his private virtues were allowed by all, and his personal integrity was never called in question.

A memorable event in his Lordship's life, is the destruction of his house and papers, in the riots of 1780. The following account of it is given, by Mr. Douglas, now Lord Glenbervie, in his "Reports of Cases adjudged and determined in the King's Bench, in the 19th, 20th, and 21st years of the reign of George the Third."

In the night between Tuesday the 6th, and Wednesday the 7th, of June, Lord Mansfield's house, in Bloomsbury-square,

was attacked by the rioters, who, on the Friday and Tuesday, to the amount of many thousands, had surrounded the avenues to the Houses of Parliament, under pretence of attending Lord George Gordon, when he presented the petition from the Protestant Association. Lord Mansfield acted at that time as Speaker of the House of Lords, in the absence of the Lord Chancellor, who was ill. On the Tuesday evening, the prison of Newgate had been thrown open, all the combustible part reduced to ashes, and the felons let loose upon the public. It was after this attempt to destroy the means of securing the victims of criminal justice, that the rioters assaulted the residence of the chief magistrate of the first criminal court in the kingdom; nor were they dispersed till they had burnt all the furniture, pictures, books, manuscripts, deeds, and, in short, every thing which fire could consume in his Lordship's house; so that nothing remained but the walls; which

were seen the next morning almost red hot, from the violence of the flames, presenting a melancholy and awful ruin to the eyes of the passengers.

The amount of that part of Lord Mansfield's loss which might have been estimated, and was capable of a compensation in money, is known to have been very great. This he had a right to recover against the Hundred. Many others have taken that course; but his Lordship thought it more consistent with the dignity of his character, not to resort to the indemnification provided by the legislature. His sentiments on the subject of a reparation from the state were communicated to the Board of Works, in a letter written in consequence of an application which they had made to him, (as one of the principal sufferers,) pursuant to directions from the Treasury, founded on a vote of the House of Commons, requesting him to state the nature and amount of his loss. In that letter, after

some introductory expressions of civility to the Surveyor General, to whom it was addressed, his Lordship says,

“ Besides what is irreparable, my pecu-  
“ niary loss is great. I apprehended no  
“ danger, and therefore took no precaution.  
“ But how great soever that loss may be,  
“ I think it does not become me to claim  
“ or expect reparation from the state. I  
“ have made up my mind to my misfortune  
“ as I ought: with this consolation, that it  
“ came from those whose object manifestly  
“ was general confusion and destruction at  
“ home, in addition to a dangerous and  
“ complicated war abroad. If I should lay  
“ before you any account or computation  
“ of the pecuniary damage I have sustained,  
“ it might seem a claim or expectation of  
“ being indemnified. Therefore you will  
“ have no further trouble upon this subject  
“ from, &c.

“ MANSFIELD.”

On Wednesday, the devastation became almost general throughout London. The houses of many of the most respectable individuals had been previously attacked: that evening, the Fleet and King's Bench prisons were set on fire; the Bank of England, the Inns of Court, almost all the public buildings, were threatened with destruction; and an universal conflagration must have taken place, if the king had not issued a proclamation for the speedy and effectual interposition of the military power. Till then, the soldiery had scarcely dared to act offensively; the ordinary magistrates were, for the most part, deterred, or prevented by various causes, from giving their sanction to the employment of the troops; and, in many places, the men under arms, with their officers at their head, though drawn up in military order, did nothing more than preserve a space between the incendiaries and the crowd of spectators, so

as to have the effect of enabling the former to demolish the houses and property of their fellow subjects without interruption.

The courts of justice continued, on the Wednesday, to sit, in order to do the business of course; but almost every where else, except in Westminster Hall, the rioters seemed, that day, to have obtained a complete mastery, and a real anarchy pervaded all parts of the metropolis. The execution done by the troops on the night between the Wednesday and Thursday, though very few lives were sacrificed, produced a happy revolution. The numerous bands of rioters had entirely vanished on the Thursday afternoon; scarce a single badge of the Protestant Association, (which was a blue cockade, and which all the rioters wore,) was to be seen; and the total suppression of this insurrection, in its circumstances without example in the history of Europe, was as sudden as its rise. The encampment of

large bodies of the army and militia in and near London for several months, prevented the renewal of the commotions there ; and, although a scene of the same sort took place a few days afterwards at Bath, and was commenced, or expected, in other parts of England, similar precautions entirely extinguished, not only all danger, but all apprehension; in the space of a few weeks.”

His Lordship resigned his office on the 3d of June, 1788.

Soon after his Lordship's resignation was signified, the following letter was sent to him. It was signed by the counsel of the King's Bench bar, who had practised in the court during his Lordship's administration :

“ TO THE EARL OF MANSFIELD.

“ My Lord,

“ It was our wish to have waited  
“ personally upon your Lordship in a body,  
“ to have taken our public leave of you on  
“ your retiring from the office of Chief  
“ Justice of England ; but, judging of your  
“ Lordship’s feelings upon such an occa-  
“ sion by our own, and considering besides  
“ that our numbers might be inconvenient,  
“ we desire in this manner affectionately to  
“ assure your Lordship, that we regret,  
“ with a just sensibility, the loss of a ma-  
“ gistrate whose conspicuous and exalted  
“ talents conferred dignity upn the pro-  
“ fession, whose enlightened and regular  
“ administration of justice made its duties  
“ less difficult and laborious, and whose  
“ manners rendered them pleasant and re-  
“ spectable.

“ But while we lament our loss, we re-  
“ member with peculiar satisfaction, that

“ your Lordship is not cut off from us by  
“ the sudden stroke of painful distemper,  
“ or the more distressing ebb of those ex-  
“ traordinary faculties which have so long  
“ distinguished you amongst men; but that  
“ it has pleased God to allow to the even-  
“ ing of an useful and illustrious life the  
“ purest enjoyments which nature has ever  
“ allotted to it; the unclouded reflections  
“ of a superior and unfading mind over its  
“ varied events; and the happy conscious-  
“ ness that it has been faithfully and emi-  
“ nently devoted to the highest duties of  
“ human society, in the most distinguished  
“ nation upon earth.

“ May the season of this high satisfaction  
“ bear its proportion to the lengthened days  
“ of your activity and strength.

“ (Signed).”

The letter thus signed, being transmitted to the venerable Earl by Mr. Erskine, at the desire of Mr. Bearcroft, the senior of that

Bar, and the rest of the gentlemen who had thus subscribed it, his Lordship, without detaining the servant five minutes, returned the following answer :

“ TO THE HONORABLE T. ERSKINE,  
“ SERJEANTS-INN.

“ Dear Sir,

“ I cannot but be extremely flattered  
“ by the letter which I this moment have  
“ the honor to receive.

“ If I have given satisfaction, it is owing  
“ to the learning and candour of the Bar; the  
“ liberality and integrity of their practice,  
“ freed the judicial investigation of truth  
“ and justice from difficulties. The memory  
“ of the assistance I have received from  
“ them, and the deep impression which the  
“ extraordinary mark they have now given  
“ me of their approbation and affection has  
“ made upon my mind, will be a source of

“ perpetual consolation in my decline of  
“ life, under the pressure of bodily infir-  
“ mities, which made it my duty to re-  
“ tire.

“ I am, dear Sir, with gratitude to  
“ You and the other Gentlemen,  
“ Your most affectionate  
“ And obliged humble Servant,

“ MANSFIELD.”

“ Caen Wood,  
“ June 18, 1788.”

THE END.

*By the same Author,*

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