

*Leunclavius*, in *Notis ad Parat. Autor. Græcor. Lib. 2. Not. 244.*  
*Vers. multis in locis*, also proves, that this Translation is in  
 many Respects, more ample and correct than the others.

But be that as it will, 'tis no wonder this Translation abounds with Barbarous Expressions and unpolite Terms, for it is made Word for Word; which way of translating will not allow the Language to be either very Elegant or Polite: *Habet omnis lingua sua quedam propria genera locutionum, que cum in aliam linguam transferuntur videntur absurda.*

Every Language, says St. *Augustine*, has its Idioms, which when translated into another seem absurd." *Lib. de vera Relig.* cap. 50.

The second Edition, which came out almost at the same time, was written by the same Paraphrase, made by the same Author, who liv'd under the reign of the succeeding Emperors: This Edition, which consists only of the Decretals, is more valuable, as the Author was in great Reputation for his infinite Knowledge in the Law, and his great Zeal for Justinian's Order, in the *Imperatori Jure enucleando*; which is a Word for Word, and not otherwise excusable, for having omitted only the Emperor's Decretals, after the best manner, with the best Sence. So that when this Paraphrase, which has the Character of being very Faithful and Exact.

The Third Translation is that of *Haloander*, printed first at *Norimberg* in the Year 1531, and since re-printed at several Places.

The Fourth and last, which is very much valu'd, is that made after *Seringer's Greek Copy*, printed at *Basse* by *Hervapius* in the Year 1561.

The First, commonly called the Vulgar, is printed in the *Civil Law Courses*, either with or without Glosses; the Antiquity whereof, and unanimous Consent with which all the Interpreters of the *Law* have generally receiv'd it, renders it very valuable: Besides, as all Nations ac-

knowledge it for *Law*, when any Doubt arises upon the Text, there is no need to have recourse to the *Greek Original*; because, as *Contius* observes, this *Latin Version* was made from a *Greek Copy*, much more correct and perfect than that which we have.

The unhappy Wars and Incursions of the *Goths* into *Italy* and *Greece*, occasion'd the utter Loss of *Justinian's Law*; but it was recover'd at *Maffi*; and *Irenaeus*, by the Authority of *Lotharius* the Second, in the Year 1130, restor'd the *Digest*, *Code*, and *Latin Version* of the *Novels*: Upon which, we are to observe, that it was very defective, and many *Novels* wanting, either because they could not be found, or were quite out of Date; as being calculated for particular Places, and therefore no part of the Common or General *Law*.

This First Version, contain'd only Ninety eight *Novels*; but *Holoander* and *Seringer* made up the Number One Hundred and Sixty five, out of the *Greek Book of Novels*; and *Cujacius* added the Three last, which make in all the present Number of One Hundred Sixty eight. *Mathew* the Monk, in his Preface, *Coll. Constit. Eccl. Graec.* affirms, that *Justinian* made One Hundred and Seventy; if so, there must have been Two lost. *Justinian's Epitomy* contains only One Hundred and Twenty eight; amongst which, there are Four of the Emperor *Justinus*, and Three of *Tiberius*.

This Volume was called *Authentick*, because *Justinian's* last *Constitutions*, therein, are of greater Authority than the rest; according to the Maxim, that when Two *Laws* are contrary one to the other, the last Repeals the first.

'Tis believ'd that about the Year 1140, some Interpreter chang'd the Order they were first plac'd in, and divided them into *Nine Collations*; which Word signifies a Heap or Jumble of several things together: But what Reason he had for making this Division does not appear, since there are *Constitutions* upon very different Matters, that have no Relation one to the other, in the same *Collation*; and which are in no other Order, than as he that divided them pleas'd. It were to be wish'd he had observ'd the order of Time, by which we might have easily distinguish'd those that made others Void; but he has thought fit to put them into *Nine Collations*.

Every *Collation* is divided into several *Titles*: and the Number of the *Titles* of a *Collation*, do not continue in the following *Collation*; so that the last *Title* of the First, is the Sixth *Collation*; and the Second *Collation* begins with the First *Title*, and is not the Seventh. But all these *Titles* are distinguish'd by the Number of *Novels*; for Instance, The First *Title* of the Second *Collation*, is the Seventh *Novel*.

Most part of these *Novels*, consist of a *Preface*, several *Chapters*, and an *Epilogue*.

In the Beginning or *Preface*, the Emperor explains the Reasons and Motives that induc'd him to make that *Constitution*; which is the Method observ'd in most of our *Royal Edicts*.

The *Causes* contain several *Decisions* upon the Matter in question; and these *Causes* are divided into many *Partes*.

Lastly, in some of these *Novels* the Emperor enjoins a strict Obedience to his *Constitutions*, according to its Form and Tenor; and these *Novels* and *Chapters* also conclude their *Orations*.

When the Emperor makes his *Constitutions* and *Laws*, they are first publish'd in Greek, and of very great use, but absolutely useless to us, without a perfect Knowledge of the *Greek Language*. Justinian, in his *Epistle Dedicatory* to the Senate, at the beginning of his Translation, addresses the front of his Translation, a great number of Praises and Commendation of this *Work*, saying, *That he prefers it before all the Riches of Kings and Princes*.

Towards the Year 529, a German, called *Irnerius*, who had study'd at *Constantinople*, re-publish'd the first Translations of the *Novels*; in the close perusal whereof, finding some *Decisions*, which might relate to several *Laws* in the *Code*; which he compos'd *Summaries* or *Extracts* of several of those *Novels*, and inserted them in such Places of the *Code*, as those *Extracts* had any Relation to.

These, this Author plac'd at the End of such *Laws* as they wholly or in part Repeal'd, or to which they made any Addition, or gave any Explanation: These *Summaries* were called *The Authenticks*, by which Name they go at this Day. And to hinder these *Extracts* of the *Novels* being confounded with the *Laws* of the *Code*, they are printed in a different

Character. Nothing can better shew the Variations of the Law; for by their means, we may at once see the Amendments and Abolishments of the Laws of the Code, made by the Novels.

From what has been said, it follows, there is a wide Difference between the *Authentick* and *Authenticks*: The first being applicable only to the Collections of *Justinian's Novels*, the latter, to the *Extracts* of those same Novels: So that when any Difficulty arises about these *Authenticks*, it will be necessary to go back to the Fountain-head from whence they spring, in order to remove it.

The particular Account I have given of the Four Parts which compos'd the *Roman Law*, in the State it now is; and the Care I have taken to set down the exact Time when each of them was publish'd, sufficiently shew, that the *Novels* were not put out till after the other Three Collections: And therefore we ought not to be surpriz'd, there is no mention of them in the Preface to the *Institutes*; which was design'd to give an Account, of how many Parts the Body of the *Roman Law* consisted: But *Justinian* could say nothing of a Work, He had not then so much as projected.

Some of these *Novels* are not observ'd in *France*, even in those Provinces where the *Written Law* is followed; some, because they relate to particular Matters, which being quite out of use, or to which we are utter Strangers, are therefore intirely useless; others, because they are not agreeable to the Rules of Equity, and are thought to be dictated by *Tribonian*, as well as several *Laws* which bear *Justinian's* Name; inserted in the *Code* thro' a Spirit of Avarice, which the Antients lay to his Charge.

I have not here given the *Analysis* of this Work, as of the other Parts of the *Law*, because it is impossible to make a Methodical Succession of the Titles which compose it: Besides, that the same *Novel* contains several Matters which have no Coherence, there is no manner of Order observ'd in the Collection. And *Gottsfredus* was oblig'd to make an Abridgment thereof, in order to put the Subject Matters of which it treats, into the same Order with the *Code*; which Abridgment is to be seen at the Head of his Edition of the *Novels*.

The Order I have propos'd, requiring I should shew what Authority the Body of the *Civil Law* was of in the *East* and *Western* Empires after *Justinian's* Death; the same shall be the Subject of the following Chapters.

## C H A P. XXIV.

### *Of the Law observ'd in the East, after Justinian's Death.*

THE Body of the *Law* made by *Justinian*, kept its ground in the *East* for many Years after his Death, without being altered or corrected, than being translated into other Languages.

The *Greek* and *Latin* were put into *Greek* in *Justinian's* Time; and after *Justinian's* Death, one *Theophilus* (not he that compiled the *Code*) made a *Greek Paraphrase* upon the same *Code*; and *Novels* also, written originally in *Latin*, were translated into *Latin*, as is observ'd in the *History* of *Constantine*.

Two Hundred and thirty Years after *Justinian's* Death, the *Emperor* *Leo* made a new *Code*, with so much Pains and Success, that it supplanted the former, and was no longer supplanted by any other.

The *Basilians*, the *Emperors*, and their Jealousie of *Justinian's* Fame, made them study for a Pretence to destroy it; at first they gave out, that *Justinian's* Books were not alone sufficient, to answer all Difficulties that daily arose; and that the Method observ'd in compiling them wanted Exactness: After that, they made several *New Ordinances*, contrary to the *Roman Law*, and introduc'd particular Customs, with a View of abolishing it totally.

These *New Ordinances* and Customs, furnish'd the *Emperor Basilus* with a Handle to make a new Body of *Law*, which he set about towards the Year of Grace 880, but did not live to finish it. *Leo*, Sirnam'd the *Philosopher*, brought it to Perfection, and divided it into Sixty Books, which he publish'd in 886, under the Title of *Βασίλικο*; in Honour,

as some think, of his Father, who was the first Projector; but others believe, they were so called, because they contain an *Imperial Law*, taken partly from the latter Emperors of *Constantinople*; the Word *Basiliæ*, signifying *Royal or Imperial*. [See the First and Seventieth of *Leo's Novels*, and *Cujacius's Sixth Book of his Observat.* Chap. 9.]

*Constantinus Porphyrogeneta*, *Leo's Son*, corrected, augmented, and put the *Basilicks* into better Order: About the Year 920 he publish'd them; and then they began to be in full Authority among the *Greeks*; the Truth whereof is so undeniable, that *Cujacius* says in the Seventeenth Book of his *Observations*, Chap. 31. The Constitutions of the Emperor *Leo* were of no force, but as they agreed with the *Basilicks*.

From that time, the *Basilicks* alone, with some *Epitomes* and *Abridgments* of the *Law*, and a few *Constitutions* of the Emperors who succeeded *Basilus*, made up the whole *Law* of the *East*; and continu'd so till the Reign of *Constantine XIII.* the last Emperor of the *Greeks*, in whose Time, *Constantinople* was taken by *Mahomet*, Emperor of the *Turks*, in the Year 1453; which put an End both to the *Eastern Empire* and its *Laws*.

But *Justinian's Law* was quite laid aside, long before; upon the Introduction of the *Basilicks* and *Epitomes* before-mention'd; and so desirous were the Emperors of *Constantinople*, to give a Currency to their own *Constitutions*, and encourage the *Vulgar Tongue* of the Countrey, in which the *Basilicks* were written, that *Justinian's Books* were utterly neglected, and scarce any Copies of them to be found in the *East*, for a long time before *Constantinople* was taken by the *Turks*.

Yet, some impute the Loss of *Justinian's Books*, to the Burning of *Constantinople*, under the Emperor *Zeno*, when above Six Thousand Volumes were destroy'd.

There are Two Things be remark'd of the *Basilicks*; The First, that they were partly compos'd of *Roman Laws*, translated into *Greek*, the use whereof had been preserv'd in the *East*: The Second, that after the taking of *Constantinople* by the *Turks*, they lay hid a long time.

*Heroerus* first publish'd Seven Books of them, then *Cujacius* Three more, and 'tis said he had them all; lastly, *M. Tabrot* put out a *Greek and Latin Edition* of Seven Volumes in *Folio*, which is held to be compleat enough.

The

*Of the Law observ'd in the West, &c.* 105

The *Grecian Lawyers* made many *Remarks* and *Commentaries* upon the *Basilicks*, which I have made use of, as well as of those by *Accursius*.

As to the *Novels* set forth by *Leo the Philosopher*, there are One Hundred and Thirteen of them, which are to be found translated into *Latin* at the End of the Body of the *Civil Law*, and we make use of them in *Cases* omitted by *Justinian*.

Besides, the *Basilicks* and *Novels* of *Leo the Philosopher*, the *Grecians* had many *Abridgements* of their *Laws*, which were more in Credit than the *Basilicks*: The First is the Manual of *Basilius*; the Second, *Michael Ataliatus's* Abridgment, call'd *The Abridgment abridg'd*; it came out in 1270. The Third is another *Abridgment*, publish'd about the same Time; The Fourth is *The Epitome of the Universal Law*, by *Hermanus*, which was about 1150. The Fifth, is the *Summa of Gratianus*, which appear'd in 1570.

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CHAP. XXV.

*Of the Law observ'd in the West, after Justinian's Death.*

*The Roman Law*, which *Justinian*, was at first the only Law of the Western Empire; for, when the *Goths*, *Visigoths*, *Franks*, and some other Provinces, the *Roman Empire* had been swallow'd up by different Nations, to the most of which the *Roman Laws* were unknown; yet, in some Places, they were adopted by the *Goths*, *Burgundians*, and *Franks*; who having divided *France* among them, continu'd the use of the *Roman Law*, with a Mixture of *Laws* of their own making, suitable to their Manners and Genius; which Mixture remain'd after the Establishment of that Kingdom.

*Alarick* the Second, King of the *Goths*, perceiving the *Gauls* unwilling to submit to the *Gothick Laws*, order'd a Collection of the *Roman Laws* to be made for their use, which he publish'd in 506. under the Title of the *Theodosian Code*.

And

And this is the *Code* mention'd by *Agathias*, when he says, The *Franks* and *Germans*, regulated *Contracts* and *Marriages* by the *Roman Law*; and that they were wont to make use of it in all Cases not decided by the particular *Laws* of *France*.

The *Body of Law* compos'd by *Justinian*, was in a manner wholly unknown to the greatest Part of the *Western Empire*, till the Time of *Lotharius II.* who found the *Pandects* at *Malsi*, about the Year 1130.

But since that, it has been receiv'd with great Applause by all *Europe*, quoted at the Bar, and taught publicly in the Schools; which ought not to be wonder'd at, being so agreeable to Right Reason and Equity, that 'tis look'd upon as the Rule of all good *Laws*, and Fountain of the true Principles of that Science: Therefore, several Nations are wholly govern'd by it, and others have recourse to it, when their own *Laws* or *Customs* fail. But all the Nations of *Europe* agree, in admitting no other *Law* to be taught in their Universities; and in several of them, the Degrees of *Doctor* or *Licentiate* in the *Law*, are indispensable Qualifications to intitle Men to be *Advocates* or *Judges*; as being the only Road to all Preferment in the Profession of the Long Robe; which shews the Value all Nations set upon this *Body of Law*, as soon as ever it came to their Knowledge.

This was the Fate of the *Roman Law*, after the Destruction of the Empire: It seems as if Providence had been particularly careful, in the Downfal of so vast and flourishing an Empire, to preserve this perfect Model of Justice and Human Prudence, for the good of Mankind. Herein one cannot sufficiently admire the Goodness of God, who in subverting the Throne of Emperors, still supported the Empire of the *Laws*; the very People who had shaken off the *Roman Yoke*, yielding to be govern'd by their *Laws*; and even those whom the *Roman Arms* had never reach'd, acknowledging the Power and Authority thereof.

Natural Equity, therefore, being the Foundation of this *Law*, inclin'd People to receive and have recourse to it; not thro' a Necessity of obeying, but Reason, which engag'd them voluntarily to follow it: *Non quidem ratione Imperii, sed imperio rationis.* In effect, this written Reason, drawn from the *Law of Nature* and *Nations*, ought not to be regard-

Of the Use of the Roman Law in France. 107

ed as the particular *Law* of the *Romans*, but as the *Common Law* of all Nations.

But tho' *Justinian's Law* was unknown in the Western Empire, till the Time of *Lotharius the Second*, it must unquestionably have been known before in other Places; of which here are some uncontestable Proofs.

In the *Capitulars* of *Charlemagne*, we find the very Terms of *Justinian's Seventh Novel*, *De rebus Ecclesie alienandis vel non*. *Charles the Bald*, in his Answer to *Pope Adrian the Second's Letter*, makes use of the very Expressions in *Justinian's Hundred and Thirteenth Novel*. To conclude, *Ivo* of *Chartres*, in his *Decree*, quotes the *Pandects*, and gives the Definition of *Marriage*, in the very Words of the Fifth Paragraph of the *First Book* that Subject in the *Institutes*. ✓

BOOK XXVI.

Of the Use of the Roman Law in France.

THE *Roman Law* is admitted in France, and it is shew'd how it was first received.

THE *Romans* had govern'd those People who were govern'd by the *German Law*, till they suffer'd them still to continue the use of it: And it is observ'd of the Kings of *France*, that they were ambitious of having the Title of *Glorious Protectors of Liberty*, as of deserving it: Therefore, when the *Gauls* were intirely reduc'd to their Obedience, they permitted such as were govern'd before by the *Roman Laws*, to make use of them still.

Nay, it is held, that every one who commenc'd a *Suitor*, was oblig'd by the *Ordinances* of our first Kings, to declare at the Beginning of the Process, by what *Law* he design'd to pursue it. And it is also pretended, that certain Forms were prescrib'd by order of those Kings, to govern all Actions either according to the *Salick* or the *Roman Law*; and that *Judges Learned* in both, were appointed to determine Dis.

## 108 *Of the Use of the Roman Law in France.*

Disputes, by the Rule of that *Law* to which the contending Parties were subject.

The *Roman Laws*, which at first were known only in a few Places in this Kingdom, in time spread themselves over other Provinces, which, till then, were wholly govern'd by their own particular *Laws* and *Customs*, by reason of the few *French Laws*, and their insufficiency to decide all Cases that arose: And as the *Roman Law* at all times had that great Authority which it deserves, and was even follow'd by many of the Nations the *French* had conquer'd, it was easily communicated to the rest, so that it was universally receiv'd in this Kingdom, but the use of it, in the several Provinces, has varied very much.

The Kingdom of *France* is divided into Provinces, some of which are called the Country of the *Written Law*, and thers that of the *Customary Law*.

Those of the *Written Law*, are such as being in the Neighbourhood of *Italy*, were first conquer'd by the *Romans*, and last by the *French*, and had no other *Law* but the *Roman* at the Time they were subdu'd.

The Neighbourhood of *Italy*, not only gave them the Convenience of studying, but also an Inclination of conforming themselves to them. We reckon in the Number of these Provinces *Guyenne*, *Provence*, *Dauphiné*, and others; in a Word, all those which are Dependant upon the Parliaments of *Tbolouse*, *Bordeaux*, *Grenoble*, *Aix*, and *Pau*, and several Provinces which depend upon the Parliament of *Paris*, viz. the *Lyonnais*, *Forrest*, the *Bauiolois*, and a great part of *Auvergne*.

As the People of these Provinces, were unwilling to submit to other *Laws*, than those to which they had been accustomed; they obtain'd, thro' special Favour of our Kings, the Liberty of following the *Roman Law*, in Matters not determin'd by the *Ordinances*; and tho' many *Customs* that were different from the *Roman Law* have been introduc'd among them, they are not very Opposite, nor of very great Extent: Besides, these *Customs* are only observ'd in those Places where they were introduc'd, and none of these Provinces have any other *Common Law* but the *Roman*.

*Of the Use of the Roman Law in France.* 109

But this is thro' the Prince's special Grant ; for every one knows, conquer'd Nations can have no other *Law* but that of the Conqueror ; nor any Power to make, adopt, or even retain their own *Laws*, without his leave : From whence it must be concluded, that the *Roman Law* does not derive its Authority in these Provinces from the Authors thereof ; but from the Grant of our Princes, who have thought fit to indulge their Subjects the Use of it. It is the same with *Customs*, which have not the Force of *Law* in the other Provinces, but by virtue of the Royal Authority, from whence they receive their Virtue.

In the Provinces of the *Written Law*, *Contracts*, *Wills*, and all kind of Affairs, are intirely regulated according to the *Roman Law* ; some of them have been drawn from the *Customs* of *Bordeaux*, and brought under the *Roman Law* ; *Paris*, they have still had the *Customs* of *Paris* ; but all disputes relating to them, at last are decided according to the *Roman Law*.

In the Provinces where the *Roman Law* is not in use, being govern'd by their *Customs*, which in process of Time, were confirm'd by the Authority of our Kings. *Customs* are their *Laws* ; because their *Customs* are their *Laws* ; and the *Roman Law* is consider'd by them, on-  
ly as a *Source* of *Customs*.

The *Roman Law* having been brought into France, at a very early time, was not adopted by all the Provinces ; some were oblig'd to follow, but others refused, to which they had recourse, when their own *Customs*, and the Royal *Ordinances* were silent.

The *Roman Law*, notwithstanding, is of very great use in the *Customary* Provinces ; and the Study of it there, no less requisite for a *Judge* or *Advocate*, than in the Countrey of the *Written Law* : For in Cases omitted by their *Customs* or *Ordinances*, they are oblig'd to consult and take their Measures from the *Roman Law*, in order to make their Determinations Just and Equitable : So that 'tis a Mistake to imagine, when the *Ordinances* and *Customs* have made no Provision, the Judge may give what Sentence he pleases ; and besides, it is contrary to the Nature of *Judgments*, which are to be govern'd by Certain and Uniform Rules ; and to the

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the Practice of many Ages, as well as the Opinion of our best Authors.

Such an Arbitrary way of proceeding, would introduce a dangerous Ignorance into our Courts, and disconcert the the whole *Judicature*: And indeed, to what can we more properly have recourse, than the *Roman Law*, which is the *Civil Law* of all well-govern'd Nations; and the Light that informs our Understanding; without which, our natural Faculties in most sorts of Business, would be nothing but Darkness and Confusion: Therefore, a Judge should be well stock'd with *Right Reason*, I mean, the *Roman Law*, which is the true Source thereof.

The Judicious *Coquille*, one of the most Learned Interpreters of our *Customary Law*, says in his Preface to the *Customs of Nivernon*, "That the *Roman Law* ought only to be regarded as *Reason*; He adds, That the *Romans* excell'd both in *Arms*, and making *Good Laws*, for Governing their People in time of Peace: And therefore, we ought to make use of them, in default of our *Ordinances* and *Customs*." Which is also the Opinion of *Mornac*, one of our most celebrated *Lawyers*; who says, "That where *Custom* has determin'd nothing, *Tunc ad jus commune & Romanum confugimus*."

*Leyscau*, a very famous Author, in his Treatise upon Forfeitures of Copy-hold Estates, says, That the *Roman Law* is the *Common Law* of *France*; and it was a Maxim in his time, That Cases omitted by the *Customs*, ought to be decided by the *Roman Law*. So that before the *Custom* of *Paris* be extended to others, we ought first to examine, if the Question be not decided by the *Roman Law*.

*M. le Pretre* says, "That as the Emperor *Antoninus* said, the Earth was govern'd by his *Laws*, and the Sea by those of the *Rhodians*, as far as they were not repugnant to his; so the *Roman Law* governs in *France*, when the *Customs* and *Ordinances* are not contrary thereto.

*Charondas*, in his *Answers*, the famous *Argentre*, and *M. Ricard*, all say, "We do not consider the *Roman Law* as an absolute *Law*, which of Necessity we are to obey; but we admit the Reason therein contain'd; and because of its great Equity, make use of it in default of our *Customs* and *Ordinances*, to govern our Determinations as far as our *Usage* will allow."

But

Of the Use of the Roman Law in France. III

But besides the Solidity of the Principles, and Equity which is observ'd to be in all the *Roman Laws*, and from which it would be dangerous to deviate, there is another Reason, that makes the Study of it absolutely necessary even in the *Customary Countries*; which is, that the *Roman Law* is universal, and comprehends the Decision of almost every Case that can possibly arise; whereas, the *Regulations* of the *Ordinances* and *Customs*, are confin'd to so narrow a Compass, that they are scarce sufficient to determine one Fourth of the Cases that arise: So that the Decision of the rest, which are without Comparison far the greatest part, depend absolutely upon the *Civil Law*; by which the *Judges* make their Decisions, when it is conformable to the *Principles* of it. If it would be useless, to study the *Roman Law*, if it did not answer upon *Law Questions*, and to qualify themselves therein, there would be of no use to them, in their Employments, nor observations.

The *Parliaments* are contented to lay down the *Principles* of the Government of their Kingdom, the *Duty* of their Officers, and cut short the *Law*, by prescribing certain *Regulations*, so that the greatest part of the manner of carrying on thereof.

is limited, to particular Matters, which take no cognizance; as *First*, the *Succession* of Goods, between married Persons, *Emancipation*, *Noble and City Ward*, and some others.

On the other Hand, the *Roman Law* directs all Matters relating to *Contracts*, *Tutorships*, *Restitution* to the first State, *Obligations*, *Actions*, and a vast Number of other Matters, which are either not at all mention'd, or very lightly touch'd upon in the *Ordinances* and *Customs*.

Besides, it cannot be deny'd, but that in the Matters treated of both in the one and the other, there are many Articles borrow'd, or in Imitation of the *Roman Law*: From whence it follows, that neither the *Customs* nor *Ordinances* can be rightly understood, without the Help of the *Roman Law*; in respect of the Relation most of them have thereto.

thereto. Therefore, all our *French Lawyers* have fill'd their *Commentaries* with *Roman Laws*, to support their own *Opinions*; and it was not possible for them to do otherwise, because both *Ordinances* and *Customs*, are for the most part taken from those *Laws*.

It is also certain, the *Roman Law* is the Model by which the best *Ordinances* of our Kings have been made; and to which, consequently, recourse must be had for their Explanation. And, as they always employ'd the ablest Men in that *Law*, to draw up their *Ordinances*, 'tis no wonder they have such a Resemblance of that which their Authors were so full of.

It must also be agreed, that our *Customs* have been partly taken from the Principles of the *Roman Law*; for in the Method they are at present, one may easily observe, they are nothing else but a Mixture of different *Laws*, which our Kings of the *First Race* suffer'd their Subjects to use, as they saw best. Now amongst these, the *Roman Law* was follow'd in many Particulars, and all the rest had a great deal borrow'd from it; from whence it is called, the *Mother of the Laws*: And our *Interpreters* have always made use of it in their *Commentaries* upon our *Customs*, as the only Means to discover their true Sense; whether it be upon Account of the Footsteps of the *Roman Law*, which are to be observ'd in most of them, or Exactness of the Principles which is peculiar to it.

It must then be agreed, that our *Customs* have been taken partly from it; and that it is always made use of to interpret them: Wherefore, those who are most skill'd in the *French Law*, confess, that the greatest Part of our *Customs*, are nothing else but *Confirmations*, *Extensions*, *Derogations*, and *Restrictions* of the *Roman Law*; to understand which, a perfect Knowledge thereof is absolutely necessary, in regard our *Customs* touch but very lightly upon Matters determin'd by the *Roman Law*.

For Instance, the *Custom of Paris* says, in *Article 183*. That *Compensation takes place in a clear and liquid Debt, of another equally clear and liquid*; which agrees with the *Roman Law*: But it does not treat of the *Questions* that may arise upon that Subject. All the Sixth Title of that very *Custom* treats of *Prescriptions*; but there are a vast Number of *Questions* whereof it makes no mention, and which must

be

Of the Use of the Roman Law in France. 113

be decided by the *Roman Law*. And if we observe, those who were employ'd in reducing or reforming our *Customs*, have treated at large of those Matters only, which are unknown to the *Roman Law*; taking very little notice of what is Decided therein: By that means, pointing out to us, that we are to look for the *Decision* thereof in the *Roman Law*.

The same Observation holds good in the *Ordinances*, when they speak of Matters decided by the *Roman Law*, 'tis only *En passant*: For Example, the *Ordinance* of Lewis the Twelfth, of the Month of July, 1510. mentions the Causes of *Restitution* introduc'd by the *Civil Law*; but gives no Explanation thereof, which we are to look for there: And indeed, if *Restitution* in the *First State*, are the mere Institution of the *Roman Law*. Why should we not have recourse to the *Laws* in Matters of this kind; since it would be very improper to neglect them as we ought, if we varied from them.

Therefore, when I have taken notice in another Place, our Kings had this Care, either to seek our Remedy by *Royal Letters*; and then do not require the Judge to obey them, without Cognizance of the Cause, unless the *Damage* suggested, and which the *Letters* were granted, appears very manifest and great, what *Damage*? Why the very same that is decid'd and determin'd by the *Roman Laws*.

There was likewise a famous Dispute between Mr. Poyet and Mr. Chausseignier de Thou, concerning the Authority of the *Roman Law*, in the *Customary Countries* of France. The first maintained, it ought to be receiv'd as *Common Law*, where the *Customs* were silent; and that the defect of a *Local Custom*, ought not to be otherwise supply'd. On the contrary, the other was of Opinion, that the *Roman Law* ought to have no other Force than as *Written Reason*, which might be follow'd, or not, as was convenient; and that for want of a *Decision* of any Case, recourse was to be had, rather to the Neighbouring *Customs* than to the *Roman Law*.

But to speak impartially, this was a Question rather about the Name than the Thing it self; since *Reason* is the Soul of the *Law*, and the Rule of all *Determinations*: So that altho' the *Roman Law* were not to be regarded in the *Customary Countries*, as a *Law* to which we were absolute y oblig'd

oblig'd to submit; if it be receiv'd as a Rule to guide our *Judgments*, does it not follow that a Judge ought to have recourse thereto, so far as it is agreeable to *Equiry*, and may serve to determine the *Dispute in Hand*?

As to the *Question*, whether upon failure of the *Custom* of a Place, we should have recourse to Neighbouring *Customs*, or to the *Roman Law*, I think there is a Medium to be observ'd therein: In Matters that are merely *Customary*, the Neighbouring *Customs* or that of *Paris* may be consult'd; but in such as are directly deriv'd from the *Roman Law*, there can be no difficulty in the *Customary* Countries to have recourse to the *Civil Law*; not as the *Common Law*, since it is not so in those Parts of *France*, but as *Written Reason*, and as the *Opinions* of the most Learned and Wise Men that ever liv'd; to whose *Judgments* that Deference is due.

Thus, as the *Roman Law* treats of abundance of Matters, not at all or but very lightly mention'd in our *Customs*, we may well say, that in such Matters the *Roman Law* is the *Common Law* of the *Customary* parts of *France*; but improperly, because the Judges are not oblig'd absolutely to follow it; and if they do, 'tis thro' *Reason* and not *Necessity*: Which has made *Brodeau* say, in his *Preface* to the *Customs of Paris*, "That the *Custom of Paris* is not easily extended to others, in Matters that have their Original and Foundation in the *French Law*, or partake of the *Common or Universal Law*: Such as the *Formality* in making of *Wills*, the *Legitime*, and others of the same Nature, not thoroughly discuss'd by our *Customs*; in which Case, this Author says, recourse must be had to the *Roman Law*."

We may also say, that our *Customs*, out of their own *Distinctions*, are not properly the *Common Law* of the *Customary* Parts of *France*, in *Customary* Matters; especially in the Neighbouring Provinces: Nor are the Judges absolutely oblig'd to make it the Rule of their Determinations, in Cases that are omind by the *Customs* of the Place, for any other Reason, than that the *Proximity of Places*, and near *Scituations* and *Climates*, naturally produce a *Similitude of Inclinations and Manners*.

Let us therefore conclude, that as to Matters of the *Roman Law*, tho' from what we have said before, the Judges are not absolutely oblig'd to make it their Guide; neither ought they to deviate from it, when it agrees with Reason and Equity: For not to make use of it as a *Common Law*, to supply the Defects of the *Municipal Laws*, would be to leave most Causes undecided; and by that means, introduce a kind of ambulatory and fluctuating Justice.

A more proper Occasion, doubtless, could not offer, to set forth the Excellence of the *Roman Laws*, and the Necessity all Judges and Advocates are under to make themselves Masters thereof, even in the *Customary Countries*; but this Subject deserves a separate Treatise, wherefore I shall make a particular Chapter, after having explain'd the *Decretal Super-specula*, *et alia Decretalium Privilegiis*; and the Sixty ninth of the *Statutes of Blon.*

## CHAP. XXVII.

### *The Decretal Super-specula explain'd.*

THE *Super-specula* is a most useful and necessary Work, which has been so long and so much in use, that it is not possible to shew they are misapprehended; the Exercise of the Study of the *Super-specula* has never discontinu'd in this Chief University of *Paris*, either after the *Decretal Super-specula*, or even after the *Donnance of Bleis*: This was a Point that seems to challenge a Place in this Work; wherein I propose to insert every thing that any ways regarded the History of the *Roman Law*, and fully satisfy the Curiosity of the Reader in that particular.

No sooner were the *Pandects* discover'd, than they were admir'd by all Nations; and from that time the *Super-specula* propos'd by *Justinian* has been publickly professed in the University of *Paris*.

## 116 *The Decretal Super-specula explain'd.*

*Irnerius* was the First, who read Publick Lectures upon it at *Bologna* in *Italy*; from which Place, abundance of *Lawyers* dispers'd themselves all over *Europe*.

In *France*, it was first taught at *Paris*; where, about the same Time, there appear'd Three Great Men, who reduc'd the Study of Three of the most useful Sciences into a certain Method; viz. *Peter Lombart*, *Theology*; *Gratian*, the *Canon-Law*; and *Peter Comestor*, or the *Eater*, the *Sacred History*: All these Sciences were greatly encourag'd in that Capital City, from their first Appearance; and probably, were the Occasion of founding the University of *Paris*.

So that notwithstanding there can be no *Art* produc'd before the Year 1199, from whence the Incorporation of *Doffors* into a Community in this City may be prov'd; it cannot be doubted, but these Sciences were long before cultivated, and even from the Time of *Lewis le Gros*, who began his Reign in 1108.

*Rigord*, Chaplain to *Philip the August*, remarks, that in his Time, the Number of Learned Men was greater than ever it had been, either in *Rome*, *Athens*, *Alexandria* or *Egypt*, which were the most famous Theatres of Learning; as he mentions the *Civil Law*, we may conclude, not only that, but the *Canon Law*, was allow'd by the Prince to be taught in the University of *Paris*, from the Time of its Foundation.

Nay, the *Civil Law* had more Students than any other Science; for not only the *Laiety*, but abundance of *Churchmen* follow'd it with great Application: The Truth is, most of the Ecclesiasticks and Religious Persons, left the Study of *Divinity* and the *Canon Law*, to follow either the *Civil Law* or *Physick*; under pretence of qualifying themselves to manage the Affairs of their respective Societies, or the better to help and administer to the Sick; but they were often reproach'd with Insincerity, and told that it was a Worldly View or Self-Interest, or a vain Affectation of Reputation, that made them so diligent in the Study of prophane Sciences.

To put a Stop to this Irregularity, which daily increas'd, the Council of *Tours*, where *Alexander III.* presided, in the Year 1163, made an Order, That no profess'd Religious Person, should leave the Convent he belong'd to, with a Design of Studying either *Law* or *Physick*; which Decision of the Eighth Canon



being separately taken, passes upon the World for a general Prohibition, including all Ranks of Men.

For how is it possible, if it be consider'd as belonging to the First Part of the *Decretal*, not to perceive it no otherwise regards the *Civil Law*, than by extending the Prohibitions of the Council of *Tours*, which reach only the *Religion*, to all *Ecclesiasticks* in general, from applying themselves to this Study, to the neglect of those Sciences which seem to be their proper Business: And the Reason why those of *Paris* are mention'd, is only because the Sciences flourish'd most there at that Time.

Besides, the Reason of this *Decretal's* mentioning the University of *Paris*, was, because it was then the only one in *France*; for that at *Tholouse*, which comes next to it in Antiquity, was not founded till 1230; Eleven Years after the Promulgation of this *Constitution*; and all the rest since the Year 1300.

We have, besides, substantial Proofs to shew, that this *Decretal*, in the Article *Super-specula*, was only intended against Ecclesiastical Persons.

For, the Pope, having no *Temporal Jurisdiction* within another Prince's Dominions, how could his Prohibitions to read or study the *Civil Law*, extend to any other than *Ecclesiasticks*. The Distinction which the *Law of God* makes between the *Temporal* and *Spiritual* Power, shews evidently, that such a Prohibition would have been an open Invasion of the *Royal Authority*.

Besides, how could such a *Decree* be register'd in the Reign of a Prince so powerful and tender in those Matters as *Philip the August*: Every Body knows, that all *Bulls* and *Constitutions* from the *Holy See*, even those that relate to *Ecclesiastical Matters*, as well as the *Regulations* of *General Councils*, are of no force in this Kingdom till they have been duly confirm'd in *Parliament*, in pursuance of his Majesty's *Letters Patents*.

But to remove this Difficulty, 'tis pretended, that Pope *Honorius* had not made this Prohibition, but at the Request of *Philip the August*, so far as the *Sovereignty* of the Kings of *France* seem'd to be diminish'd, by Reading the *Civil Law* in the University of *Paris*.



This Direction is to those only, who had Jurisdiction over the *Priests* and *Monks*; and were themselves under an Obligation of observing the Prohibition, as well as making others do it; for the Word *Prelate* here, signifies not only *Bishops*, but regular *Abbats*, *Deans*, *Provosts*, and all others who had *Spiritual Jurisdiction*.

Nor is it less manifest, from the Body of this *Epistle*, that this *Decree* relates only to *Religious Persons* and *Priests*, if it be laid altogether, and the latter compar'd with the former Parts; which is a Rule the *Lawyers* prescribe for interpreting all *Laws*: In short, to understand the true Meaning of it, it must not be taken by Scraps and Pieces, but consider'd intire, and in the Literal Coherence one Part has with the other; by which means, it will soon be discover'd, that the *Decree* relates only to Ecclesiastical Persons, and that the latter Part thereof cannot be extended to the Laity.

The Motive also of the other *Constitution*, is another Argument to shew, that the Design of it was to regulate the Study of the *Ecclesiasticks*; the Pope alledging no other Reason for his making it, than to encourage the Study of the *Holy Scriptures*.

Now, methinks, it cannot be pretended that his Intention was to make the *Scriptures* the only Object of the Study of the Laity of *Paris*.

'Tis objected, that the Terms of this *Constitution* are General, and enjoin *Ne quisquam*, That no Person whatsoever should presume to Teach or hear the *Civil Law* read at *Paris*. To this it is answer'd, that *Verba intelligenda, sunt pro sub-jecta materia*: Thus the Terms, *Nullus, Quisquam, Omnis*, &c. tho' they seem General, and to comprehend all kind of Persons and Places, are nevertheless to be understood conditionally, and with such Restrictions as Reason and Circumstances require: This is a Rule which the *Laws* themselves teach. Now amongst these Conditions, the most necessary, is, that those who are comprehended in any *Law* or *Ordinance*, should be subject to the Jurisdiction of him that makes it; and in that Point which the *Constitution* goes upon: For no Man is oblig'd to obey another, who commands a thing out of his own *Distric*t, or for which he has no competent Power. From whence it follows, that when the Pope said *Ne quisquam presumat*, His Intention by those General Terms, was only to bind all Ecclesiastical Persons.

Persons mention'd in the former Part of his *Epistle*, and over whom only he could exercise his Authority in that Particular.

Let us now see if this *Decree* was ever observ'd in respect of the Laity, and whether the Prohibition it contains of teaching the *Civil Law* publicly at *Paris*, was put in Execution; for every one knows that the Pope's *Decrees* have not the Force of *Laws* amongst us, till they are authoriz'd by *Usage*, having first been duly accepted and register'd.

*Rigord*, who was a Contemporany Author, and out-liv'd *Philip the August*, proves, that in his Time the *Civil Law* was not only allow'd by the King to be taught at *Paris*, as well as other Sciences, but with extraordinary Privileges.

We find in *Histories*, that the Doctors and Scholars of the University of *Paris*, having had some Disgust given them by the *Twelfth*, for infringing their Privileges, in the Beginning of the Reign of *St. Louis*, dispers'd themselves into several Places, such as *France* and the neighbouring Countries. *Pope Gregory the Ninth*, who thought it necessary to restore the University of *Paris*, contriv'd, in Conjunction with *St. Lewis*, to attract the greatest part of those Doctors to return to *Paris*, in the Year 1231; and amongst the rest, the Professors of the *Civil Law*. [*Videndus Navigium Bern. Gulielm. de Chro. Rom. Pontificis Gregorij IX. in Epist. ad Romanos, in Annal. Silesi. ad ann. 1228, & 1231.*]

Several Authors make mention of an Oath of Fidelity taken to *Queen Blanche*, afterwards *St. Lewis*, as Regent, by the University of *Paris*, and particularly, by the Doctors of *Law* and *Theology*, in which Oath they read the *Decretals* of the *Civil Law*. This was in the Year 1231, and consequently, about five Years after the Publication of *Pope Gregory's Decretals*, and so after his Death.

The *Statutes* of the Faculties of *Law* at *Paris*, prove also, that the *Decretal Super-specula* did not all interrupt the Study of the *Civil Law* in that Faculty; they were made in the Year 1296, which was the Eleventh of *Philip the Handsome*, and renew'd upon reforming that University, a long time after.

It appears by these new *Statutes*, there were at that time Bachelors in the *Civil* as well as the *Canon Law*, and they prescribe the same Rules for both.

The ancient Registers of the *Deanaries* of the same Faculty, take

take notice of the Names of those who were *Graduates in Jure Canonico tantum, vel in Legibus tantum, seu in Jure Civili, aut in utroque Jure.* Several old Acquittances of the Monks of *St. John de Lateran* shew, that they receiv'd from the Faculty the *Annual Stipend* allow'd them for saying Mass in their Church.

All our Registers testify, that since the *Decretal Super-specula*, there have been continually Publick Lectures of *Civil and Canon Law* in our Faculty; and the Names of such as underwent those Laborious Functions being register'd, we may easily observe, the greatest part of them have been Persons remarkable for their Birth, Personal Merit, as well as great Offices to which they were advanc'd. The great Number of them will not allow me to give an Account of all; but some I shall take notice of.

In our first Register, amongst others, we find the Name of *Miles de Irlions*, who was Counsellor to the Parliament, Arch-Deacon, and at length, in 1459, made Bishop of *Chartres*; of *John de Selve*, Counsellor to the Parliament, Canon and Arch-Deacon of *Paris*, in the Church of *Paris*; of *Martin de Fresnes* also, Chancellor in the Parliament of *Paris*.

In the second Register, amongst others, we have the Names of *Guillaume de Cambray*, Master of Requests, Son of *Guillaume de Cambray*, First President, who was employ'd by *Francis the First* in several Embassies; of *Nicholas de Caumont*, Governor of *Amiens*; of *James de Vintimille*, *John du Plaisir*, *Guillaume de la Roche*, and *Robert Luller*, all Four Counsellors in the Parliament of *Paris*; and of *John Seguyer*, who in the Year 1480, was made Counsellor of the Parliament of *Toulouse*. The same Register has also the Names of *Robert Gaguin*, afterwards First President; of *Reguier de la Vauguierie*, also First President; of *Claudius de Hangeot*, Counsellor in the Parliament of *Paris*; and of *Nicholas d'Origny*, Canon of *Troyes*, and President of the Parliament.

In the third Register, among other Regent-Doctors, are *Martial Galiciere*, Arch-Deacon of *Meaux*, Canon of *Paris*, and President of the Parliament in 1525; *Peter Pappas*, Counsellor, afterwards President of the Great Council; *Philip le Boindre*, Counsellor; *Peter le Clerc*, Ambassador of *Francis I.* at the Council of *Trent*: These last were Collegues with *John Rebasse*, *John Quintin*, *John Vadel*, and for some time of *André le Conte*, all famous Men in the Profession of the Law.

Besides

Besides these, there were several other *Regent-Doctors*, who were *Counsellors* in the Parliament, and whose Names are set down in the Register; as *Francis de Marillac*, *William de Boucierat*, *Charles le Fevre*, *Ansbury le Civier*, and many others.

We learn from the same Registers, that *M. Henry de Mesmes*, Deputy to one of the *Regent-Doctors*, read Lectures in the Schools upon *Justinian's Institutes*, in the Year 1551; and that in the Year 1556, *M. John Chevalier*, who was afterwards First-President of the Court of *Aids*, read Lectures there publicly, upon the Title *De Actionibus*; having first disputed, in order to be made Deputy to *M. Peter le Clerc*, *Regent-Doctor*.

*And* *Paris* and *Montpellier* have *Lawyers*, whose Profession is distinguished by the most Eminent Offices of the *University*, such as *Chancellor*, *Master of the Hospital*, *Procurator-General*, &c. The Faculty of Law at *Paris* consists of a great Number of *Doctors*, who are distinguished by the Science, but the most eminent is the *Doctor of the Robe*, to which they have been admitted by their own Right, and fill'd the same Office for many Ages. But, if on one hand the *Law* has been the most useful of those *Master-Doctrines*, which are necessary to the *State*, and they added to the *Faculty*, it has not been without Reason, being an indispensible Part of Education, *Mercy*, and *Capacity*.

It is true, that the *Faculty* of *Law* has been always publickly taught in the *University* of *Paris*.

*Bouchet*, in his *History of the French Law-Library*, mentions the Word *University*, in an Order or Letter, written by the Rector of the *University* of *Paris*, Novemb. 22. 1547. Directed and Signify'd to the *Regents* and *Deputies* of the *University*; in which the Names of all the *Licentiatees*, either in the *Canon* or *Civil Law* are expressly set down.

In the third Register of the *Faculty*, there are Two Orders of the Court, one dated the First of July, 1542; the other the First of September, 1547. to forbid the Printing of any Books in *Paris* without Licence; in which, the Right of Licencing and Approving *Civil* and *Canon Law-Books*, is granted to the *Dean* of the *Faculty* of *Law*, as that of *Divinity* and *Physick*, was given to the Professors of those Sciences;

ences; and that of *Grammar*, to the *Rector*; which has been since put in Execution, and renew'd on several Occasions. Now if the *Civil Law* had not been publickly taught in the Schools at *Paris*, could such a Knowledge of the *Civil Law*, as was necessary to pass a true Judgment upon the Books that treat of that Subject, have been reasonably requir'd?

All that has been before said, makes it fully appear, that till the Publishing the *Ordinance of Blois*, the *Civil Law* was ever taught in the *Faculty of Paris*; and therefore, it will be needless to add any other Proofs: It may not be amiss, however, to consult the Note made by *M. Charles Du Moulin*, upon the *Article 273*, of the *Ancient Custom of Orleans*; *Rebuffe*, in *tractatu Nominat. Quest. 5. Num. 15. & seq.* *Paquier*, in his *Recherches*, Book 9. Chap. 35. and 37. and *M. Caseneuve*, in his *Treatise of Frankaloid*, Book 1. Chap. 5.

As to what remains, it will be no difficult Matter to prove, notwithstanding the *Ordinance of Blois*, the *Civil Law* has been continually read at *Paris*; which shall be the Subject of the following Chapter.

## C H A P. XXVIII.

### *The Sixty ninth Article of the Ordonnance of Blois explain'd.*

THE *Ordonnance of Blois*, publish'd in May, 1579, was drawn up by the *Journal of the States*, two Years before: In the Minutes by which that *Ordonnance* was form'd, there was no mention of prohibiting the Study of the *Civil Law* in the *Faculty of Paris*; yet, the Enemies of the *Faculty*, have had the Dexterity to get the Sixty ninth Article inserted, which forbids the *Regent-Doctors of the Faculty of Law at Paris*, to read, or confer Degrees in the *Civil Law*.

Let us briefly examine the Manner and Reasons upon which that Prohibition was grounded, and then see if the *Ordonnance of Blois* has been put in Execution in that particular.

I have just now said, there was no such thing mention'd in the *Minutes* from which that *Ordonnance* was taken; but there is something more in it; for that Prohibition was made without any Examination or Cognizance of the Cause, and even without hearing the Parties concern'd.

This Article which was not touch'd upon in the *Assembly* of the *States*, was afterwards added to the *Ordonnance* by the Chancellor *Chiverny*, to favour the City of *Orleans*, where he was Governor and had a great Estate; this is a Fact related by several Authors, and not at all unlikely.

The Pretence for making this *Ordonnance*, was the *Decretal* of *Honorius* before spoken of, to which it was hinted, Obedience ought to be paid.

And to give this Article the Colour of a *Reason of State*, it was laid out upon a Principle, that it was the King's Interest to defend the reading of the *Roman Laws*, in his Capital City; from whence it tacitly infer'd the Empire's Superiority over the Kingdom of *France*; which is absolutely independent of any such Pretence. Their Argument run thus, The *Civil Law* is the Word of the *Roman Emperors*, therefore, in giving it Authority, we acknowledge in them the same Power as the Crown of *France*, which the King of *France* is bound to obey, and is a Dependant of the *Roman Emperors* Power.

But when this Objection has been call'd upon, this Objection is easily remov'd, by a very plain and obvious Answer, to wit, That the allowing the *Civil Law* to be read in any one Place, does not more from the King's Sovereignty, than the Permission of reading it in any other Place of the Kingdom.

And now, when appearance is there, that the Sovereignty of a Prince should be in the least diminish'd, by adopting the *Laws* of another Sovereign Prince, or giving his Subjects leave to follow and make use of those *Laws*?

Our Kings, by approving the *Roman Laws*, have made them their own, as the *Romans* did the *Laws* of *Rhodes*, in *Maritime Affairs*; and can it be said, that the *Roman Emperors* submitted to that Island, because they adopted some of their *Laws*?

The Book of *Fiefs*, which is generally thought to be the Composition of some *Lombard Doctors*, pass nevertheless for *Law* all over *Europe*, when *Custom* is not contrary to it, yet no one ever concluded from thence, that all *Christendom* was subject to the Princes of *Lombardy*.

'Tis well known, the Kings of *Poland* and *Denmark*, suffer their Subjects to make use of the *Roman Laws*, and that they are oblig'd to follow them, when their own *Municipal Laws* are defective; the same are also taught in their Universities of *Cracow* and *Copenhagen*, yet they were never under any Apprehension, that this Permission would blemish their Sovereignty in the least Degree.

Has the *Turkish* Emperor diminish'd his, by submitting to the Decision of the *Roman Laws*, when the *Alcoran* is silent! And do so many other Princes, who were never subject to the *Romans*, or withdrew themselves from their Obedience, all become Dependants of *Rome*, by observing the *Laws* made there? No certainly; the voluntary Deference which they shew them, is not an Effect of their Dependance, but of their Reason, which leads them to make choice of such *Laws*, as they could not reject, without straying at the same time from *Equity* and *Right Reason*: And the Truth is, the *Roman Law* is now, not the *Law* of any particular People, but a *General* and *Common Law*, which, from the Destruction of the *Roman Empire*, has ever been regarded by all well-govern'd Nations, as a *Natural Law*, and a *Law of Nations*, which consequently ought to be universal.

These are the Reasons, why after the Destruction of the *Roman Empire*, their *Laws*, instead of losing their Authority, spread themselves all over *Europe*, and most Nations were proud of following them.

The King of *France* therefore, who is a Monarch in his own Kingdom, and invested with all Imperial Privileges, does in no measure submit to the Empire, by suffering the *Civil Law* to be taught, and his Subjects to make use of it: There is only one Observation to be made on this particular, which is, that in *France* the Nullities of the *Civil Law* are not allow'd; that is, when the *Roman Law* annuls a *Contract*, by any Remedy or Benefit introduc'd by the *Equity* thereof, the Judges cannot pronounce Sentence upon that Nullity, unless the Party has first obtain'd Letters from

from the Prince for that Purpose, in token of not acknowledging the *Roman Emperor's* Authority; whereas they may pronounce definitively without such *Letters*, when the Nullity proceeds from the *Ordonnances* or *Customs*: So that when we say, the ways of Nullity are not admitted in *France*, it is for the Reason aforesaid, to be understood only of such as have their Foundation in the *Civil Law*.

But it may be said, the *Civil Law* is not receiv'd as *Law* all over *France*; 'tis true, yet this is no Reason why it should not be taught there: Do those Nations of *Europe*, which follow it only when their own *Laws* are defective, suffer any other *Law* to be taught in their Universities? And is it not a Rule among many of them, not to admit any one to be a *Judge* or *Advocate*, before he is a *Doctor* or *Licentiate* in the *Civil Law*? So true it is, that this *Law* is every where look'd upon as the perfect Model of all good *Laws*, and Source of all good Principles.

But, the *Capitulars* are not admitted as *Laws* amongst us, till *Customs* has given them that Authority; and when they are not thought to be the Liberties of the *Gallican Church*, nor to our particular *Customs*; yet, there is no University in the Kingdom, wherein there are not Publick Lectures of the same.

Thus, as the prohibition of reading the *Civil Law* published at *Paris*, contained in the *Ordonnance of Blois*, is against the *Liberties* of the University, if it never was obey'd; nor has it hinder'd the *Professors* of the Faculty, to continue their Lectures of the *Institutes*, and other parts of that *Law*, till the *Reformation* of the Faculty of *Paris*, to be made, and *Admitted*, as they were before the *Ordonnance* of *Blois*.

The result of this is thus, clearly made out, not only by the *Historians* of that time, but by the *Statutes* of the Faculty, which were reform'd by *Commissaries* appointed by *Henry IV.* in 1598, and ratify'd in *Parliament* the Year following.

These *Statutes* begin with an *Encomium* of the Faculty, which is called, The Seminary of Persons design'd to fill the most eminent Employments both in Church and State; the Words are these. *Juris Canonici schola adhuc usque tempora seminarium honestissimorum hominum, ad Ecclesiasticos gradus & Republica munia, tam Ecclesiastica quam secularia promovendum existit*, &c.

The Fifth Article of these *Statutes* provides, That all new Scholars in the *Faculty*, shall begin their Studies of the *Civil* and *Canon Law*, by reading the *Institutes*; and learn by heart the *Rubricks* of both *Laws*. *Prolyta, à lectione & auditione Institutionum & Canonici & Civilis Juris studium exordietur ac sedulam operam in eo collocet, ut utriusque Juris titulos memoriter teneat.*

Another Argument, and a very good one, might be added to all these Proofs, which is, that the *Faculty's* Power of teaching the *Civil Law* at *Paris*, has never been call'd in question; from whence it follows, that it ought never to have been depriv'd of that Power: For whoever has the least Tincture of the *Canon Law*, will easily judge of the Impossibility of understanding it rightly, without the Assistance of the *Civil Law*. Indeed, as they are the two Eyes of Politick and Judiciary Prudence, the Strength of both ought to be united, to see things in their true Light; and in a Word, ought both to operate at the same Time.

In what manner soever we consider the Prohibition in the *Ordonnance* of *Blois*, against teaching the *Civil Law* in *Paris*, 'tis plain, the Execution of it is Impracticable: Every one knows, the University of *Paris* is the First in the Kingdom; our Princes have honour'd it with the Title of their *Eldest Daughter*, as having had its Birth in the Royal Palace: Besides, it claims a Place in the *States*, has sent Deputies to *General Councils*, been frequently consulted by our *Kings*, and often by the *Popes*; and Foreign Nations have chang'd the Advice they have had from thence into *Laws*; so that one may say, it is not confin'd to the Circle of *Paris*, but according to its Motto, is, *HIC ET UBIQUE TERRARUM*: From whence it follows, that it is so far from being inferior to other Universities, it ought to have some Prerogatives, and serve as a Pattern for their Imitation.

This being laid down for a Certainty, as it really is, would it have been fit that this University should be defective, and want one of its most Noble Parts, the *Civil Law*? How could it without that, have maintain'd either the Dignity or even the Name of an University, which is nothing else but a Collection of all the Sciences?

In short, the City of *Paris* being the Common Countrey of all *Frenchmen*, the largest and most beautiful Theatre of *Europe*, it was necessary that all kinds of useful Learning should be taught there, for the Advantage of our own Countrey-men, as well as Strangers, who continually flock thither.

Now it cannot be deny'd, that there is no Study comparable to that of the *Civil Law*, and that the Science thereof is far above all others, as shall be shewn in the following Chapter; but here we must first remark, that *Lewis XIV.* being inform'd of the Inconveniencies, which might arise from the *Ordonnance of Blois*, made an *Edict* in *April, 1679.* by which he orders, that for the future, the Publick Lectures of the *Civil Law*, jointly with those of the *Canon Law*, should be

This *Edict* was made in the Year 1679, and all Students are to employ themselves in the Study of the *Law*, and to be made *Graduates*; with many other things, which tend to the Discipline of the Scholastic, and to the Improvement of the *Law*, which was slightly neglected, by all the

The *Faculty of Theology* and the *Faculty of Medicine* applying some Remedy to the Disorders of the *Universities*, oblige every one that they were qualify'd or not, to put a Stop to the Disorders, which were introduc'd.

The *Faculty of Civil Law* in the *Faculty of Theology* and the *Faculty of Medicine* complain'd continually, of the Breach of the Prohibition, which was made in the *Ordonnance of Blois*; so that the *Royal Authority* was oblig'd to interfere, to support the *Faculty* in a Right that had ever belong'd to them.

## C H A P. XXIX.

*Of the Excellency of the Roman Law.*

**I**F there have been some that have disputed the Excellency of the *Roman Law*, the absurdity of so extravagant an Opinion, may very well save me the Trouble of refuting it: For tho' particular Mistakes often become general, there is no likelihood it will happen so in this Case; and the Merits of the *Roman Law* are establish'd upon too good a Bottom to give way to a Prejudice, which in all likelihood proceeds from the Ignorance of those who suffer themselves to be led away by such an Error.

Nevertheless, it cannot be deny'd, but the Number of Persons who favour this Opinion, may very much increase, because it offers at first sight an agreeable Prospect, in sparing such as embrace it a laborious Study. This, doubtless, is the only Advantage that can result from it: But it will be no hard Matter to expose the Fallacy of this pretended Advantage, and undeceive those, who having compleated the Time prescrib'd for their ordinary Exercises, content themselves with taking their Degrees, and look no farther than to get the *Testimonials* usually given on that Occasion.

The Time allotted for studying the *Law*, by the King's Declaration, to intitle Students to take their Degrees, is not sufficient to acquire a compleat Knowledge of so profound a Science.

It would therefore become those who have taken their Degrees, to make a better use than some do of the Principles they are taught; for the Publick are sensibly interested, that all who are *Magistrates*, or take upon them the Profession of *Advocates*, should be fully instructed in the Maxims of the *Roman Law*, without the Help of which, it will be impossible for them to become eminent in *ours*.

What is before said in the Twenty sixth Chapter, concerning the Use of the *Roman Law* in *France*, has a very near Relation to the Subject of this Chapter; therefore I shall refer



## 132 *Of the Excellency of the Roman Law.*

their *Lawyers* to give a new Splendor to the *Roman Laws*, by their Labour and Application.

So that *Rome* was the Countrey of *Laws*; and the Body of the *Roman Law*, as we have it at this Day, is a Collection of the best *Laws* that were made in *Rome*: This valuable Treasure of Antiquity, contains the refin'd Doctrine of the Precepts of the *Law of Nature* and *Nations*, as well as all the principal Points of Morality; wherein alone the Principles of Equity, and Rules of Universal *Law* are to be found; and no doubt, if all this Nation were so happy as to live under the same *Law*, there would be no need of any other for the Regulation of the Condition and Manners of all its Subjects; and indeed, where else shall we find certain Maxims for the Regulations of *Agreements* and *Contracts*, for establishing *Penalties* upon those that are guilty of *Crimes* and *Offences*? In short, where shall we find Principles to govern the most Ordinary, as well as the most Important Affairs, but in the Body of the *Civil Law*, whose *Decisions* are so Equitable and Judicious, that they may be apply'd to Matters quite different from those for which they were originally made?

The Science of the *Roman Law*, has not only the Advantage of informing the Understanding, but setting the Heart upright; it communicates at the same time Light to the Mind, and Righteousness to the Soul, and teaches us how to conduct our selves as well in a Private as Publick Capacity; and furnishes the *Magistrate* with Rules to give every Man his due: In a Word, the *Roman Law* is a Master-piece of Wisdom, Honesty, Politicks, Prudence, Justice and Equity.

It was called *The Law*, by way of Excellence, as if there was none other Considerable in the World; and altho' the *Roman Power* has been quite lost for many Ages, the *Roman Law* is still preserv'd over all *Europe*. But it is no wonder if its Excellency has been perceiv'd by all People, and at all Times; and tho' it was made for the Subjects of the Empire only, there are few Nations that have not adopted it; and even those whose Inclinations and Manners were the most opposite to the *Romans*, were the first that embrac'd the *Laws* made by them.

Of the Excellency of the Roman Law. 133

Let it not therefore be said, this was an Effect of the Universal Monarchy acquir'd by the *Romans*: The great Equity which all Nations observ'd in the *Roman Laws*, was the only Cause of the Deference paid to them, and of their readiness to follow them; *Servatur ubique jus Romanum non ratione imperii sed rationis imperio*. In short, most of the Nations conquer'd by the *Romans*, admir'd and cultivated the Equity of their *Laws*; altho' their Tyranny seem'd insupportable: And when, upon the Declension of the *Roman Empire*, they recover'd their Liberty, that Revolution did not at all diminish the Respect they bore to the *Roman Laws*.

I can in this Place, pass over an Observation which might seem to reflect self; Whatever Glory *Rome* might have deriv'd from the Number and Extent of its Conquests, that vantage-ground of Lustre, was, without doubt, its being the Mother of the World to be the Part of the Universe, that must be the Seat of their great Strength or Weakness; of all good Fortune; of all ill: But the Credit of the *Roman Laws* was equally receiv'd by all Nations; and the *Romans* only can boast of, that the Nations who had freed themselves from the yoke of bondage, continu'd voluntarily to prefer them to those of their own Country: Their concurrence be the Effect of Flattery, as the Object of it subsisting no longer.

The *Romans* subdu'd the Universe, by their Arms and Laws; but the Empire which was gotten by Force, is gone to ruin; whereas, they still continue to govern by their *Laws*: This Dominion is so much the more glorious, as it is not owing to Force, and is over the Minds and Hearts of Mankind; and as 'tis founded upon Reason and Equity, nothing can destroy it. The Wars of the *Romans* were often unjust; but their *Laws* seem to have been dictated by Justice herself: Therefore, they ought never to cease being observ'd by Mankind, unless they will utterly banish from Society, that Vertue which is the strongest Support of it.

### 134 *Of the Excellency of the Roman Law.*

To this, let us add, that the invincible Stubbornness of the *Jews*, has yielded to the Excellency of the *Roman Laws*; who have recourse to no other, in default of their own: And as great as the Antipathy of the *Turks* is, to every thing that is of Christian growth, yet it has not hinder'd them from translating the *Roman Law* into their own Language, nor from following its Decisions, in Matters to which the *Alcoran* cannot be apply'd.

Nothing could be easier, than to add a Thousand other Observations of this kind, to shew the Excellency of the *Roman Laws*; but Truth has the Prerogative of Self-Perswasion. Besides, all that I could say, would not be Equivalent to the Encomiums which the Great Men of all Ages have ever given the *Roman Law*. Let us therefore hear what they say, and run over the most Famous of them who have mention'd it; upon whose Credit, every Man of Sense will without Scruple ground his Judgment.

St. *Austin*, \* in his Book *De Civitat. Dei*, says, that Providence made use of the *Roman People*, to subdue the Universe, and to govern it the better by their *Laws*, after it had utterly destroy'd that Empire.

St. *Jerom*, † speaking of the Declension of the *Roman Empire*, says, "The Ruins and Shadow thereof, were yet to be seen in *Germany*; but tho' nothing at all of it had remain'd, we have still their *Laws*, which all Nations have admitted with great Applause.

*Zonaras*, upon the *Constitutions of the Apostles* ‡, says, "God made Choice of the *Romans*, to give the World a sample of his Justice.

*Peter Pech* || says, "The *Roman* is the Sovereign *Law*, universally receiv'd for so many Ages.

D. *Gothofredus*, \*\* says almost the same, and adds, "That the *Laws and Regulations* of other Nations do not come near it; and that all their *Customs and Ordinances* are comprehended in it.

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\* Chapter 22. Book 16.

† Epist. 10. of *Monogamy*, Tom. 1.

‡ Book 7. Chap. 27.

|| *De Regula Juris*, Chap. 28.

\*\* *In praxi rerum civil.* Lib. 2. Tit. 11.

Of the Excellency of the Roman Law. 135

Baldus, upon the Law, *Nemo C de sentent. & interlocut. omnium Judicium*, says, "The Roman Law has the same command in all Nations as Reason.

Contius, *Lectio num Juris*, cap. 9. says, "There is no Law more just or conformable to Reason, than that which is contain'd in the Books of the Roman Law.

Baro, *lib. 3. de jur. Benef. tit. 2. & ad legem si reus C. de pactis*, says, "That Justinian's Books are valu'd like fine Pictures sav'd from a great Shipwreck.

Baldwinus, in his *Prolegomena* upon the *Institutes*, says, "The Study of the Law was ever in great repute among the Romans, and spread it self afterwards over all Nations, with universal Approbation.

Charles Du Moulin, whose great Reputation was wholly owing to his perfect Knowledge of the Roman Law to that of his Country, in his *Preface* to the *Customs of Paris* says, "The Roman Law is so just, and so agreeable with Reason, that it has receiv'd and approv'd of it, his Words are these;

Mussonum, & negotiorum, & nequaquam sub-  
diti ejus, sed quia  
tam equum est, tam  
gentium usu & appro-

He tells him, "No Nation can be without the Help of the Roman Law; Knowledge of that Divine Law, is the Wisdom, the Honour, the Wealth, the Wife, and Fortunate Man. It is the perfect Idea of the Rules of

Equity. Mornac, in his *Commentary* on the Code, *De veteri Jure enucleand.* says, "In Matters not determin'd by the Customs, recourse must be had to the Roman Law, as to a Sheer Anchor, and the most secure Means to come to Equity; because the Precepts and Duties of Civil Life, are no where else so well establish'd.

Leuwinus, in his *History of the Law*, says, "The Books of the Roman Law, contain the most Religious and Just Determinations that ever were made, as well as the most perfect Idea of Right and Justice: Therefore, says he, all Nations acknowledge the Roman Law for their Com-

# 136 Of the Excellency of the Roman Law.

“ *mon Law* ; not because it is *Roman*, but that it is the  
“ *Law of Nations*.

*Albericus Gentilis*, Book 1. *De Jure belli*, Chap. 5. carries it so far as to say, “ All Sovereign Princes are oblig’d to  
“ be govern’d by it, in the Disputes that happen between  
“ them.

*Cogitile*, in his *Questions*, Chap. 306. says, “ The *Roman*  
“ *Laws*, by the wise and politick Reasons, upon which they  
“ are grounded, were receiv’d by us in aid of our Royal  
“ *Constitutions*, and of our *Customs*, when they either are  
“ deficient or want Explanation. He adds, That the great  
“ Events of the Politick Government of *Rome*, shew, that  
“ God endow’d that People with a singular clearness of  
“ Judgment, and openness of Heart.

*Charondas* in his *Answers*, Book 5. upon the *Edict of Second-*  
*Marriages*, and in his *Pandects*, Book 3. Chap. 9. says, “ ’Tis  
“ a general Custom amongst us, to observe the *Roman* as  
“ the *Common Law* ; to which we have recourse in default  
“ of the *Ordonnances and Customs* : Not that the *French* any  
“ ways acknowledge the Emperor of *Rome*, but because the  
“ *Laws* of no Nation or Government are more just, better  
“ contriv’d, or more agreeable with Reason, than those in  
“ the Body of the *Roman Law*.

*Loyseau*, in his *Treatise of Surrendry of Copy-hold Lands*,  
Book 2. Chap. 1. N. 17. *Rebuffe*, upon the Title *De Consue-*  
*tud*. *Tiraqueau*, in the Preface to his *Treatise* called, *Le*  
*mort saisit le vif*. *Chassenet*, upon the Custom of *Burgundy* ;  
*Pontanus*, upon that of *Blois* ; *Chopin*, upon that of *Paris*, in  
his Preface upon that of *Anjou*, and his *Treatise* of the *Do-*  
*maine* ; *Ricard*, upon the Hundred and Sixty first Article of  
the Custom of *Senlis* ; all say almost the same thing.

*M. Colomber*, in his *Abridgment of the Roman Law*, Tit. 3.  
says, that “ the Body of the *Roman Law*, is not the Work  
“ of one Man, nor of a few Years, but of several Nations  
“ and Ages ; brought to Perfection by long and labori-  
“ ous Observation of Human Affairs, which Men of the  
“ best Understanding in that flourishing Nation, fully in-  
“ structed by the Exercise of inferior Offices, and from  
“ thence rais’d to the highest Employments in the Empire,  
“ have made ; and reduc’d to practise, by certain Principles and  
“ General Maxims. He adds, that this Work was found to  
“ be so excellent, that even after the Fall of the *Roman Em-*  
“ pire,

"pire, it was embrac'd by the best govern'd Nations of  
"the World; which still continue to make use of it in  
"deciding their Disputes, and cause it to be publicly  
"taught for that purpose.

M. Servin, in one of his *Pleas*, says, that "The Civil  
"Law of the Romans, surpasses in Natural Equity all other  
"Laws; and that all of them have recourse thereto.

M. le Maître, so famous for his Eloquence and extraordi-  
nary Parts, in his *Twelfth Pleading*, calls the *Roman Law*,  
"The wonderful Collection of the Wisdom of so many  
"Wise Men, who did not confine themselves to particular  
"Usages, but to Justice in general; and have establish'd  
"such *Laws*, as they thought most useful to Mankind; and  
"who have written the Rules of Government for all Nati-  
"ons, as *Solon* did those of Divine Wisdom.

It cannot be denied, that these Proofs are liable to any  
Exception, but the most part taken from *French Lawyers*,  
who have shewn that they could not forbear taking  
notice, how much the *Laws* are to those of their  
own Country, and how much in both their good  
Sense and

The most *Kings* in the  
World is not a slender Indi-  
cation given it the Force of  
Law, if it be publicly  
taught, and belong to the *Laws*  
themselves, there has been no  
in *Solon's Laws*, how much  
any others, publicly in the

*France*; Our *Kings* have not  
only taught in those Provinces where  
it is in use, but in those govern'd by *Customs*, as  
appears by the *Ordonnance* of *Meulins*, made in *August 1546*  
and 1566, Article 108. and that of *Blais*, in 1576, Article  
108.

Our *Kings* have upon all Occasions commended it, and  
made many *Ordonnances*, to enforce its Observation in their  
Dominions.

*Clotarius*, in his *Ordonnance* of 560, commands, that all  
Matters relating to the *Romans*, that is, the *Gauls*, should be  
regulated according to the *Roman Law*.

## 138 *Of the Excellency of the Roman Law.*

As for the Second Race of our Kings, we have the *Constitution of Charles the Bald*, dated the 25th of June, 864. in which he declares, that neither he nor his Predecessors ever intended to order any thing in opposition to the *Roman Law*.

But as the Difficulty does not fall upon the Times of the Two first Races, let us pass to the Third.

I shall begin with *St. Lewis*, who, for his great Care to promote Religion and maintain Justice in all his Dominions, may be a Pattern for all our Kings. He order'd in his *Edicts*, that all Matters should be decided by the *Roman Laws*, which, by way of Excellence, he calls *The Law*.

*Philip the Handsome*, as well as *Francis I.* speaks of it in the same manner.

*Henry IV.* in his Declaration of 1607, made to empower *Mortgagees* to enter into the Succession of old *Creditors*, without *Cession* or *Subrogation*; says in express Terms, *Ie always approv'd of the Roman Law, as it agreed with Reason and Equity.*

All our Kings have express'd themselves upon it almost in the same Terms; and 'tis from thence they have taken their best *Ordonnances*.

*Lewis XIV.* in his *Edict* of 1679, for re-establishing the Publick Profession of the *Civil Law* in the *Faculty of Paris*, begins by saying, "that altho' the Wars had not hinder'd him from publishing several *Ordonnances* for the Reformation of Justice, yet, enjoining at that time a glorious Peace, he was more disengag'd, and in a better Condition to provide for the due Execution of Justice, thro' all his Dominions." He goes on, and says, "that he believ'd he could do nothing that would more contribute to the Happiness of his Subjects, than the affording such as were design'd for the Administration of it, the Means of qualifying themselves as they ought: Therefore, having understood that the Uncertainty of Judgments, so prejudicial to his Subjects, was chiefly owing to the utter Neglect of the Study of the *Civil Law*, for above an Age, all over France; and that the Publick Profession thereof had been discontinued in the University of *Paris*; He orders, That from thenceforward, the Publick Lectures of the *Roman Law* should be reviv'd; any thing in the Sixty ninth

Article

Of the Excellency of the Roman Law. 139

"Article of the Ordinance of Blois to the contrary notwithstanding.

To see to the Execution and Continuance of this *Edict*, his Majesty commission'd Four Counsellors of State, viz. Mr. le Pelletier, Bazin de Bezons, Boucherat and Bignon; whose Characters being capable of no Addition by any thing I can say, I have only mention'd their Names, to shew the Importance of the Affair, as well as to encrease, if possible, the Respect which Posterity ought to have for the Memory of such illustrious Restorers of the Study of the *Roman Law*; for one may say, all Discipline was at that time utterly lost, and there never was more Occasion for reviving it.

But these Commissioners, by their great Application, restor'd the Study of the *Civil Law*; and the Success which attended their Endeavour

is another Proof of the Excellency every one is under, intends to be an *Advantage*.

That notwithstanding the in the *Customary Courts*, its Decisions are of are called *Customary in Reason*; to which, in Cases omitted by aid upon this Subject in ch I refer the Reader, rging further upon it in

our *Law* was confin'd to would be very little Diffic-  
culties, and *Practitioners*; he more able than ei-  
ther the *Doctors*, nor where the Learning of an *Advocate* goes no farther than *Tritura fori*, or *Practice*, 'tis impossible he should defend a Cause with Success; which made *John Favre* say, *Ad. 23. Instit. tit. de Legat. Quod appellamus praxim, non est in patrono nuda & circumforanea praxis, cujusmodi est procuratorum forensium, sed juris scientiam applicare negotiis.*

In short, Experience shews, that whatever good Dispositions young Men may have, it will be no easie Matter for them to learn the Sciences, unless they are directed by a Method, and general Principles; the future Application of which, depends upon their own good Understanding. Now it is in the *Roman Law* only, these Principles are to be found; which are so much the more valuable, as they are the Opinions of the wisest Men among the Ancients: Whereas the Decisions of our *Customs*, have no other Foundation than certain *Usages*, introduc'd frequently without any Reason or Principle at all, or of which the Reason is unknown, even to those, who by good Observation are the best Judges of what is the Common *Usage*.

This made *Cujacius* say, Tit. 14. of his Book of *Fiefs*, That we must judge of most Things ordain'd by the *Customs*, as *Neratius* did of the *Law* introduc'd by *Usage*; who advises, not to look too diligently after the Reason of it, lest we subvert the Authority of the whole. The Words of *Cujacius* are these; *Multa sunt in moribus Gallie, dissentanea multa sine ratione, ut quod de jure recepto Neratius scripsit, non esse ejus rationem anxie inquirendam ne multa ex his quæ certa sunt, subvertantur id Gallie moribus aptari verissimè, possit quod plerumque omni ratione destituantur petiri, partim ex jure Gallico, partim ex imperitorum sententiis malè coheren:ibus.*

'Tis true, the Reformers and Reducers of our *Customs*, have corrected abundance of unjust Things, which Use had introduc'd; but it was impossible for them to make a perfect *Law* from the bad Principles they had to work upon; and therefore, the Oracle of the *Customary Law*, when he undertakes to explain some of the Articles of our *Customs*, exclaims in many Places, *O the unjust Custom! O the extravagant Custom!* He shews how it came to pass, that so many unjust and odious Dispositions remain among our *Customs*, and imputes it partly to the *Attornies* or *Practitioners*, who made the *Registers* of which the *Customs* were form'd; and partly to the *Commissioners*, who did not allow themselves Time, nor take the Pains a Work of that kind requir'd.

*Chopin, de Comm. Gall. consuet.* Part I. N. 4. ascribes it wholly to the Officers of the several Places, whose Business it was to draw up the Substance of the *Customs* in Writing: He says, they inserted Articles for their own, or the Interest and Conveniency of their Friends.

Of the Excellency of the Roman Law. 141

Mornac, *Ad Leg. 2. §. 5. ff. de Origin Juris*, says, "There are many obscure Things in our *Customs*, which are owing to the Negligence of those who reduc'd them; and that they were often put in by Design.

The *Commissioners*, whose Names are at the Head of the Proceeding, were too precipitate in the Execution of their Commission, and often did nothing more than hear the *Custom* read in their Presence, and refer contested Matters to the Court, which never decided them: Besides, 'tis impossible that Order or Method should be thought of, in such tumultuous Assemblies: So that in the manner our *Customs* have been reduc'd, 'tis hard to believe, the *Magistrates* who were employ'd with it, were Men of great Understanding.

All the *Decisions*, are but too strong Arguments of the want of the Assistance we ought to make between the *Customs*; nor is there any one but who respects the *Roman Laws* are superior.

The *Decisions* of all the Precaution imaginable, the greatest and most learned Men, contrary, the *Customs* were reduc'd to the hands of Practitioners, who were unable to observe the *Usages* they observ'd were then.

The *Roman Laws*, are in an easie elegant style suitable to the Nature of the Law; but the *Customs* are generally immethodical, and the Style of them is obscure, and consequently, hard to be understood and remember'd.

All kind of Matters, as well of an Ordinary as Extraordinary Nature, are explain'd in the *Laws*; but our *Customs* are confin'd to a few particular ones, as has been before observ'd.

In short, the *Decisions* of the *Roman Law* are so Judicious, that they infinitely surpass every thing that has been done by the *Legislators* of other Nations; but the greatest part of our *Customs*, are the Production of mere Chance, or of the Fancy of those who have suffer'd themselves to be led, rather by certain *Usages* than Reason.

There.

Therefore, the *Customs* are reckon'd as so many Facts, of which the *Judges* are presum'd to be ignorant; altho' they are at this Day reduc'd to Writing, as *Fountain* has observ'd, in his Additions to *M. Bourdin's Paraphrase*, Art. 42. And perhaps, this is the Reason, that when an *Advocate* reads an Article of the *Customs* to the Audience, he is uncover'd as if he were reading a Play; because the *Customs* are particular *Usages*, which no one is oblig'd to know: But if he is to quote any Text of the *Laws*, he is not uncover'd; nor is he allow'd to read it out of the *Digest* or *Code*, but having it written on a Paper, is to recite it as it were by Heart; because the *Judges* and *Advocates*, are suppos'd to know the Dispositions of the *Common Law*.

Let no one, therefore, any longer pretend, that the Study of the *Roman Law* is useless: So bold a Paradox, ought at least to be supported by some Colour of Reason; But what do all the Reasons that are brought to maintain this Assertion, amount to? Why, they say, the Science of the *Roman Law*, is a Matter of mere Curiosity, which recompences those who are at the Pains to obtain it, with nothing but a Confusion of Maxims; without the Help of which, they might make as good a Progress in the Study of our *Law*; to prove which, they say, that this *Law* treats of several Matters not in use amongst us.

This Objection is easily answer'd; for, granting that the *Roman Law* does contain some Matters which are not in use with us, must it from thence be concluded, that the Science of that *Law* is useless? It treats of other Matters that are in use with us, and which relate both to the Preservation of the *State*, and the Order of *Civil Society*: Must we then reject a Work which in general is so useful, because some Things in it are not applicable to the present Use? Besides, in the *Customary Part* of *France*, the *Roman Law* is observ'd no farther than as Reason: Now it happens every Day, that the Reasons, upon which the Principles of Matters not in use amongst us are grounded, may be very fitly apply'd to those which are frequently in use.

In short, having these strong Reasons and Authorities on our Side, may we not say, that if any one attacks the *Roman Law*, 'tis for want of knowing its Beauty and Solidity? How often does it happen, that the best and most useful Sciences are rejected thro' Ignorance? Nothing is more common,

mon, than to see Men, thro' Weakness or Indolence, declare against a thing that requires Pains and Application; either they have little hopes of Success, or rather, strange Apprehensions of the Difficulties which inseparably attend all Beginnings; and finally, they can excuse their Caprice in despising what they are ignorant of, or justify their Idleness, in crying down what ought to have taken them from it.

But if there are some at the *Bar*, who are prejudic'd against the *Roman Law*, there are, without Comparison, a far greater Number, who looking upon it as the Source of indubitable Maxims, adhere to it with the utmost Attention; which is what all our able *Magistrates* and *Advocates* have ever done; nor have they fail'd of a Reward, for making it the principal Object of their Application.

To conclude, is there any likelihood, that Men of Sense, who have not, as one may say, a Moment's time they can call their own, would take so much Pains as they do, in a Study that could be of no advantage to them?

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C H A P. XXX.

*Of the most celebrated Interpreters of the Roman Law.*

Methinks, this *History of the Roman Law*, would be in some measure imperfect, if I should say nothing of those, who by their Works have contributed to the better understanding thereof; wherefore, I thought my self oblig'd to give some Account of the principal *Interpreters* of this *Law*. The Reader must not expect here an Historical Library of every Author that has wrote upon that Subject; my Design being only to shew Beginners, those who have most signaliz'd themselves in that way, and whom they will find mention'd at every turn.

AZO, was one of the first who took any Pains in the Study of the *Roman Law*; his *Summaries* upon the Titles thereof, are an excellent Work. He was born at *Bologna* in *Italy*; 'tis held, that he profess'd the *Law* about the Eleventh Century: The Enemies which his Merit rais'd him, oblig'd him to leave his Countrey, and go to *Montpellier*, where he profess'd the *Law*; afterwards, he came back to *Bologna*, where having taught the *Law* some time, he died in 1200, or as others say in 1225. There goes a Story of his being Hang'd, for killing *Bulgarus* in the Heat of a Dispute; but 'tis not warrant'd by any Writer of those Times.

ACCURSIUS, a Native of *Florence*, began to study the *Law* when he was Forty Years old, under the famous *Azo*; in which Progress, that he soon outstripp'd his Master, is manifest by his publickly at *Bologna*, and afterwards at *Montpellier*, giving Explanation and Answer to the Questions which cost him much Labour, and answer'd the Questions of the Glosses by *Azo*, and the *Laws* that at that time were in use, by many wrong means, and for which he was censur'd as too hastily. Besides, his *Explanations* are reprov'd for following to his making use of the Names in his Quotations, the Negligence of Copyists, having many Errors. However that be, he was formerly or is now call'd, that he was call'd *The Advocate's Idol*. Certainly, as a Man of great Parts, and the Barbarisms we meet with in his Writings, ought to be imputed to the Unpoliteness of the Times.

*Cujacius*, who finds fault with him in several Passages, even to ridicule him, could not forbear praising him in his *Observations*, Book 3. Chap. 11. and Book 12. Chap. 16. And those who have Judgment enough to compare *Accursius's* Glosses with *Cujacius's* Explanations, will find them to be the very same, excepting the Order and Style. He died in the

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Year of Christ 1229, Aged 78. His Tomb is to be seen in the Church of the *Franciscan Friars*, at *Bologna*, with this Inscription, *Sepulchrum Accursii Glossatoris Legum & Francisci ejus filii.*

**BARTOLUS** was born in 1300, in a Village of the Province of *Umbria* in *Italy*; He was Professor of *Law* at *Pisa*, at the Age of Twenty five; after that, he taught it at *Peruze*, in 1350. He was a Man of a very bright Wit and Penetration, and so studious, that nothing could divert him from his Books. His surpassing Merit, made him reckon'd the best Interpreter of the *Laws*, next to *Accursius*. He was of the Council to Pope Emperor *Charles IV.* who permitted him to bear the Arms of *Bohemia*; but having no Children, that Honour died with him. He was so severe and strict a Follower of the Letter of the *Law*, that being a *Magistrate*, he executed his Office with so much rigour, that he drew upon himself the Hatred of the People, which oblig'd him to withdraw into the Country, where he compos'd some part of his Works, that are now extant: His Writings are full of Learning, but very Unpolite. He wrote upon the *Digestes*, some Books of the *Code*, and a good part of the *Decretals*, and made 2 Books of the Councils. He died in 1357, Aged 57.

**BALDUS** was the Son of a Learned Physician of *Peruze*. He dedicated his Law under *Bartolus*, and with so good Success, that he was thought to have improv'd that Science, more than any that went before him; which made *Jason* from Avignon say, that *Bartolus* knew every thing.

Some have reported, that he did not begin to apply himself to the *Law*, till he was Forty; which seems to have little Truth in it, because *Pancirole* proves, that when he was but Fifteen, he rais'd a very puzzling Objection against his Master *Bartolus*; and at Seventeen, read Publick *Law Lectures*. He was *Præceptor* to Pope *Gregory XII.* His great Skill in the *Law*, got him so much Reputation, that *John Galeas Viceconti*, Duke of *Milan*, brought him to the University of *Pavia*, where he continu'd Professor of the *Law* for Fifty six Years. He was much talk'd of for a quick Repartee, when he first enter'd the Schools at *Pavia*: For, being a very Diminutive Person,

Some of the Auditors upon his Entrance said, *Minuit præsentia famam* ; to which he instantly reply'd, *Augebit cætera virtus*.

He often pleaded against his Master *Bartolus*, and the Emulation between them, turn'd at last to perfect Hatred. He got a great Estate, and wrote several Books. His Writings, which favour very much of the Barbarity of the Times, are not altogether free from other Faults: He advances a Thousand Singularities, without the least Authority, and some that are quite contrary to the common Opinion. He has little or no Order in any thing he treats of; He often quotes *Laws* that are foreign to the Purpose; is very large upon useless Matters, and passes slightly over those which are most necessary. He says nothing upon Cases that arise every Day, and is very Learned upon those that seldom or never happen, and often confounds himself with his own Subtilties.

He died *April* 28. 1400; there is something melancholy in the Nature of his Death, He was bit in the Lip by a little favourite Dog, which turn'd to an incurable Distemper.

PAUL, called DE CASTRO, because he was born at *Castro*, a Town in the Kingdom of *Naples*, flourish'd in the Fifteenth Century: He profess'd the *Law*, in several Universities of *Italy*, for Fifty Years, his Explanations upon the *Laws* of the *Digest* and *Code*, are in so great Esteem, that *Cujacius* says, *Qui non habet Paulum de Castro, tunicam vendat & emat*. He died in a very advanc'd Age, in 1437.

BUDEUS, was of a Noble Family, and born at *Paris*, 1467. He spent Three Years at *Orleans*, and after that, some at *Peru*, in the Study of the *Law*, but made no great progress therein: At last, his Inclination to Learning got the better of his Pleasures; and tho' his Friends represented to him the Danger of destroying his Health, by his close Application to Study, no Periwations could draw him from it; and that he might follow it without Interruption, he retired to the Village of *Hieret*, in the neighbourhood of *Paris*; where, in a very short time, he acquir'd as much Learning, as if he had had the best Master, and the most worthy Competitors to animate and inspire him with Emulation.

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He soon gave Publick Marks of his Improvements, and after having translated some Greek Authors, put out his *Observations* upon the Books of the *Roman Law*. Francis I. made him his *Library-Keeper*, and *Master of Requests*. The excessive Heats in the Year 1540, having oblig'd the King to retire for Air towards the Coasts of *Normandy*, Budens went with him; but being seiz'd on the Road with a violent Fever, he return'd home, and died the Twenty third of *August*, 1540; leaving behind him a numerous Family, of Four Sons and Eight Daughters.

JOHN PAUL ALCIAT, a *Milanese* Gentleman, was the first, as Mr. de Thou says, who united the Study of the Law with polite Learning, and the Knowledge of Antiquities. His Works upon the Law, and his *Emblems*, are Proofs of his great Capacity and Judgment. Francis I. brought him into France, where he taught the Law at *Avignon* and *Bourges*; after that, passing the Alps, he profess'd it at *Bologna*, *Ferrara*, and lastly, at *Pavia*, where he Died, in the Year 1550. His *Epitaph*, which I have here set down, is to be seen in the Church of St. *Epiphania*: *Andreas Alciato Mediolanensi Jurisconsulto, Comiti, Protosynario Apostolice Camereque Senatori, qui omnium doctrinarum orbem absolvit primus Legum studia antiquo restituit decori, vixit annos 58. menses octo, dies quatuor obiit pridie Idus Januariæ, anno 1550.*

FRANCISCUS CONNANUS, *Sieur de Coulon* and *de Rabestan*, was a *Parisian*, and Son of one of the Judges of the *Exchequer*, or *Masters of Accounts*. He studied the Law at *Orleans*, under *Peter Stella*, and at *Bourges*, under the famous *Alciat*, who was so taken with his Wit and great Parts, that he shew'd him all possible Marks of his Esteem. At his return to *Paris*, he follow'd the Bar, and was afterwards a *Master of Accounts*; and at length, preferr'd by Francis I. to be *Master of Requests*, in 1544. He was so zealous to improve this Study that he undertook to reduce it to a Method; but the Tenderness of his Health, prevented his finishing it: He was but Forty three, when he died, which happen'd in *September* 1551.

**BARONIUS**, a Native of *Leon* in *Britany*, profess'd the *Law* with *Duarenus*, at *Bruges*; the Emulation between these Two Learned Men, set them at Variance. We have a *Commentary* upon *Justinian's Institutes*, some *Interpretations* upon the other Books of the *Law*, and a *Treatise* of *Benefices*, and some other Matters, written by the first. He died *August* 22. 1550. Aged 55.

**DUARENUS**, was born at *Brien* in *Britany*, where his Father was a *Judge*, and whom, tho' very young, he succeeded in his Office. He came to *Paris*, in the Year 1536; where he read *Lectures* upon the *Pandects*, I suppose, as Deputy to some Professor: He was intimately acquainted with the Learned *Budeus*, who imparted to him much of his Knowledge of the *Greek Language*, and *Roman Antiquities*: He took great Pains whilst he was at *Paris*, to improve *Budeus's* Three Sons in the *Law*; being willing thereby to repay the Obligations he ow'd their Father.

He was sent for to *Bruges*, in 1538, Three Years after *Alciat* left that Place; that he might join the Practice with the Theory of the *Law*, he quitted his Professorship, and came to the Bar at *Paris*, where he staid only Three Years or thereabouts. *Baudwinus*, who succeeded him in the Faculty at *Bruges*, prevail'd upon his Collegues to recal him; and to remove all Obstacles, yielded to him the Point of Precedency.

The *Duchess* of *Berry*, Sister to *Henry II.* increas'd his Pension, as Chief Professor of the *Law*, and made him her *Master of Requests*: So that no Body, except *Alciatus*, acquir'd so much Reputation in that University. His Writings, which are perfectly free of the Barbarism of the *Glossaries*, contain nothing but the pure Sources of the *Roman Laws*. The desire he had, not to share this Honour with any Man living, made him jealous of his Colleague *Barenus*; but that ended with *Baronius's* Death, and turn'd into so passionate an Esteem, that he endeavour'd all he could, to perpetuate his Memory, by erecting a Monument in honour of him, which he adorn'd with an Epitaph. This kind of Behaviour, which is very common between Men of the same Profession, seems to be elegantly describ'd by *Horace* in this Verse;

*Vix enim praesens, extinctus amabitur idem.*

*Duo-*

*Duarenus* had other Collegues, who reviv'd his Disquiet; He could not with any Patience see *Bodwinus* out-strip him; and his Death, instead of easing him of his Pain, did but encrease it, when he found *Cujacius*, who had more Merit, succeeded him: The Quarre's that arose between them, would have ruin'd the University of *Bourges*, had not *Cujacius* given way, by retiring to *Valence* to teach the Law there. *Duarenus's* Works were always in great Esteem among the Learned, and *Cujacius* himself valu'd them exceedingly; for notwithstanding their frequent falling out, he us'd to say, he was much oblig'd to his Collegue, for making him double his Pains, which had greatly contributed to his Advancement. However, it is to be observ'd, that the Works of *Duarenus* upon the *Canon*, mutually surpasses all that he has wrote upon the *Civil Law*. He died in 1558, Aged Fifty Years.

**DU MOULIN**, descended from a Noble Family, was born at *Paris*, towards the latter End of the Year 1500: He came to the Bar at Twenty five; and follow'd the Study of the *Roman*, *Canon*, and *French Law*, with such Application, that his Name soon became famous all over *Europe*. He us'd to say of himself, *That he would neither yield to, nor be taught by any one*; which Saying would have become any other better than him. He had a vast and transcendent Genius, more than is to be expect'd; his Learning was not to be equall'd, and he had the Theory join'd with the Practice of the Law, in the highest Perfection. But how great soever his Knowledge of the *Roman Law* might be, he was infinitely more Learned in the *Canon*, in our *Usages* upon *Beneficial Matters*, and in the *French Law*.

He was ever at Work, and had read so many Books, that 'tis incredible: He lov'd studying so much, that he refus'd to be made a *Counsellor* in the Parliament of *Paris*, lest it should take him from his Reading. Yet, there is one Fault in this great Man's Works, that is, his Style; which he form'd after the Model of the *German Authors*, having read a prodigious Number of them: He seems to have borrow'd from them that harshness of Expression, and confused manner which appears in all his Questions; but his Penetration and Exactness, in starting all the Questions that can possibly arise upon the Subject he handles, is so

wonderful, that not one escapes him. He examines them with such a Depth, and states the Reasons of doubting with so much Skill, that the Reader is puzzled which Side to take: Then he determines with so much Judgment, and such convincing Proofs, that one cannot help condemning the very Uncertainty, which those Reasons of Doubting had occasion'd: So that one may liken him to the Sun, which still casts Light, notwithstanding the Opposition of the Clouds. In short, there never was in *Europe*, nor ever will be, a Man of so deep and penetrating a Genius, and so laborious, as Monsieur *Charles Du Moulin*.

His Life was chequer'd with good and bad Fortune: He died at *Paris*, in 1566.

**BALDWINUS** was born at *Arras*, the First of *January*, 1620. His Father was a Counsellor, and the King's chief Advocate. He studied *Latin* and *Greek* at *Louvain*, and afterwards turn'd to the *Law*, of which he render'd himself Master the more easily by living with *du Moulin*. Afterwards he profess'd the *Law* at *Burges*, for Seven Years; and then at *Strasburg*, *Heidleberg*, *Daunay*, and *Besancon*; from whence *Henry III.* then King of *Poland* only, sent for him, and made him one of his Counsellors of State: As he was preparing to follow that Prince into *Poland*, a violent Fever carried him off, on the Twenty fourth of *October*, 1523. his Body was buried in the Cloyster of the *Mathurins*, in the College of *Arras* at *Paris*. We have several of his Works that are in pretty good Esteem; amongst the rest, a *Commentary* upon the *Institutes*, and another upon the *Laws* of *Romulus*, and the *Law* of the *Twelve Tables*.

*Mr. de Thou*, calls him a Lawyer of a *sure Judgment* and *exact Diligence*; and *Cujacius* us'd to say of him, *That he had a better Head for the Law than himself, if he would but have taken a little more Pains*: However that was, *Baldwinus* was not insensible of the Emulation that reign'd then among the chief Lawyers of his Time; so that by endeavouring to make himself able to contend with them, he acquir'd a great Knowledge of the *Law*, of which the Books he left behind him, as well as the great Esteem *Margaret Duchess of Savoy* and *Berry* had for his Worth, are uncontestable Proofs. He died at *Bourges*, in 1586, and was buried in the Church dedicated to *St. Hypolitus*, near the fa-

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*MOUS DURENUS*, who was his Adversary. Thus Providence was pleas'd, that those Two who could never agree together in their Lives, should rest together after their Deaths.

*HOTOMANNUS*, originally descended from a German Family, was born at *Paris*, August the Twenty third, 1524. He begun about Fifteen to study the Law at *Orléans*, and after Three Years spent therein, obtain'd a Doctor's Degree. His Father, who was a Counsellor in the Parliament of *Paris*, put him to the Bar, with a Design of bringing him into his own Employment; but the young Man, had more Mind to follow the Study of the Roman Law, and other polite Learning: 'Tis said, he read Publick Lectures in the Law Schools in *Paris*, at the Age of Twenty five. He was afterwards Professor of Law at *Strasbourg*, and then at *Valence*; the Credit of which Univerſity was very much increas'd by his Merit. He was call'd to *Bourges* Three Years after, by *Margaret of France*, King *Henry the Second's* Sister; from whence he went to *Geneva*, and after teaching the Law there for some time, he went to *Basle*, where he died in 1590, Aged Sixty five Years. He left Two Sons, and Four Daughters: The Eldest *John Hotman*, Author of the Burlesque Piece call'd *Antichopinus*; and of *Antichafon*, which is an Apology for his Treatise of the Ambassador.

The Father, who is here spoken of, was so famous a Lawyer, that *St. Maſthe* makes him almost equal to *Cujacius*; yet, 'tis certain, he minded the Antiquities, more than the Decisions of the Roman Laws.

*CUJACIUS*, the most celebrated of all the Interpreters of the Roman Law, was born at *Tbolouſe*; his Parents were of the Scum of the People; but Nature made him amends for the Baseness of his Extraction, by endowing him with a Genius, next to a Prodigy: He learnt the Greek and Latin Languages, without the Assistance of any Master. He was better qualify'd than ever any Man was, to be an excellent Professor of the Law; I mean, by the Uprightness of his Heart, the Clearness of his Understanding, his sound Judgement, accompany'd with polite Learning, and an exquisite Discernment; to all which, he added an indefatigable Application.

*Du Moulin*, by consent of the best Judges, has been allow'd to be the Prince of the *French Lawyers*; and certainly, he would surpass all the Writers upon the *Law*, if there could be any one superior to *Cujacius*.

If I may be permitted to give my Thoughts in so nice a Matter, I think, both of these great Men have excell'd each other: *Du Moulin* is more inventive, and has a deeper and more transcendent Genius: *Cujacius* is clearer, more uniform, and perfect. *Du Moulin* handles Matters with more Vivacity and Extent; *Cujacius* with greater Order, Exactness, and Elegancy; is more easily understood, and never goes from his Point.

Those who have most envied the latter, pretend that he is Dull; but at the same time allow, his Works upon the *Law*, are so exact and correct, that there is nothing wanting.

*Anthony Favre* says; *Nihil ferè intactum in Jure reliquit & assiduo labore vicit tarditatem ingenii.* But *Du Moulin's* greatest Admirers, admit that he has neither Order nor Method; and that it were to be wish'd, he had wrote with *Cujacius's* Politeness, Plainness and Brevity.

But let us end the Parallel of these two great Men, by saying, that *Cujacius* made the *Roman Law* his particular Study; of which he acquir'd so compleat a Knowledge, that he has surpass'd all that went before, and ought to be a Guide to those that come after him.

*Du Moulin*, who did not apply himself particularly to the Study of the *Roman*, excell'd in the *Canon* and *Customary Law*; but in so transcendent a measure, that no one could ever come near him: Therefore, as one is beyond Contradiction the Prince of the *French Lawyers*, the other is unquestionably the Prince of the *Interpreters* of the *Roman Laws*; and both incomparable in their different Ways and Manner.

BRISSONIUS, President in the Parliament of *Paris*, was born at *Fontenay le Comte* in *Poitou*: He was first *Advocate-General*. *Henry III.* us'd to say, that no Prince in the World could brag of so Learned a Subject as *Hu BRISSON*, as he call'd him by way of Excellence: Therefore he employ'd him in several Negotiations of Peace, and to collect his *Ordonnances*, and those of his Predecessors. He was  
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the Author of Two Pieces upon the *Roman Law*: one, *De verborum quæ ad jure pertinent significatione*; and the other, *De formulis & solennibus populi Romani verbis*, which are full of exquisite Learning: He had given hopes of other Works, when he was kill'd at *Paris* in a shameful manner: Some of the *Leaguers* being angry that he was not of their Party, broke in upon him, and hurried him to Prison, where they strangled him on the Fifteenth of November, 1501; but they paid for it with their Lives a few Days after, by order of the very Heads of the *League*. His Body is interr'd at *St. Croix de la Bretonnerie*.

DION. GOTHOFREDUS was born at *Pern*, in 1449; where, in process of Time, he acquir'd great Reputation. The Civil Wars having oblig'd him to leave *France*, he profess'd the *Law* in some of the Universities of *Germany*: After the Death of *Cajacius*, no means were left unattempted, to persuade him to accept of his Chair, but he was otherwise engag'd in *Germany*. He died in 1522, Aged Seventy three, leaving behind him most excellent *Notes*, and some other Works upon the *Law*, *History*, and other parts of polite Learning.

There was another *Dion. Gothofredus*, known more particularly by his *Histories*, who was Son to *Theodorus*, the Eldest Son of *Dionysius* of whom we are now speaking: This *Theodorus* was also remarkable for his great Learning; but he wrote nothing upon the *Law*.

JAC. GOTHOFREDUS, second Son of *Dion*, settled at *Geneva*, where he was preferr'd to the Chief Offices of the Government; he was a Man of universal Learning, understood *Greek*, *Chronology*, the *Fathers*, *Councils*, and *Ecclesiastical History*: The best of his Works is his Learned *Commentary* upon the *Theodesian Code*. He did not live to publish any of his own Works; but *Anthony Marville*, Professor of *Law* at *Valence*, having purchas'd his Library of the Executors, gather'd from it that vast Work, which he printed at *Lions*, in Four Volumes in Folio, in the Year 1665; the rest of his Writings have since appear'd.

ANTONIUS FABER, a Native of *Bourg* in *Bresse*, was a long time the Chief *Magistrate* there : After the Exchange of the Province, the Duke of *Savoy* being unwilling to lose so useful a Man, made him President of the Council at *Geneve*, and afterwards of *Chambery*.

This able *Magistrate*, in the midst of all his great Employments, dedicated some of his private Hours to the Publick ; He made several *Commentaries* upon the *Law*, which are printed in Eight Volumes in *Folio*. He has carry'd his Notions a greater length than any of the Moderns. He had a vast Understanding, which was never discourag'd by the greatest Difficulties ; but he is justly accus'd of deciding too *Magisterially*, contrary to the receiv'd Opinions ; and of taking too great a Liberty, in adding to or clipping the *Laws* : He carries his Niceties too far, and a Man must be aware, lest he be misled by them ; for in going from the common Opinions, he also frequently leaves the Principles. In a Word, 'tis impossible to express the Subtilty of this Author, but he is very far from being sure.

*Backovius*, a German Author, has wrote against the Second Part of his Book, *De Erroribus Pragmaticorum* ; and *Jer. Borghias*, of *Naples*, has censur'd his Treatise *De Compensuris* ; but it must be allow'd, their Criticisms are not all of them just. His Code is reckon'd the best, and least faulty of his Works, in that he does not ramble, but generally keeps to adjudg'd Cases : But notwithstanding all the Faults in his other Works, it were to be wish'd he had lived to finish Two ; that is, his *Rationalia*, which goes no farther than the Twenty sixth Book of the *Digest*, and his *Jurisprudencia Papiniana*, wherein his Design was to have comprehended all the *Law*, according to the Order of the *Institutes* ; but he made only the First Book. He died in 1622, Aged Sixty seven Years.

ANTHONY MORNAC, *Advocate* in the Parliament of *Paris*, was one of the most famous *Lawyers* of his Time, remarkable for his great Probity and Learning : To his Skill in the *Roman Laws*, he added that of the Practice of the Bar ; and had undertaken a Comparison between the *Roman* and the *French Law*, a Work that deserves the highest Commendation, but he did not live to finish it, what we have of it, is enough to make us regret the Loss of it.

of the rest, it were to be wish'd some able Hand would continue, and might have the Happiness of finishing it.

I could here mention several other *Lawyers*, whose Writings have contributed to facilitate the Study of the *Roman Laws*; but it would be an endless Work: And I gave the Reader to understand in the Beginning of this Chapter, that my Design was only to mention the most renown'd of them; those who are desirous of knowing the rest, need only consult the Book intitled, *Le Bibliothèque des Interpretes du droit*; written by M. Simon, *Counselor* in the *Prejudial Court*, and *Affessor* in the *Marshalsea* at *Beauvois*.

## C H A P. XXXI.

### Of the Dispositions requir'd for the Study of the Roman Law.

**I**F it be true, that nothing can be more serviceable to such as embrace the Profession of the *Law*, than the Study of the *Roman Laws*; it is also necessary they should bring those Dispositions with them, which are requisite to make them full success therein.

It is with the *Roman Law* as with most other Sciences; I mean, that such as desire to be Proficients in it, must besides Natural Talents bring with them a sincere Desire of Learning.

Among these Natural Talents, we must reckon first, a *sound Judgment*, *good Memory*, and *clearness of Expression*.

And if it be certain, that all Men ought to labour as much as possible to form their Judgments; it is yet more incumbent upon those who follow the *Law*, to have their Judgments form'd before they begin: And indeed, as the *Laws* are nothing else, but the Result of the Meditations of a vast Number of wise and understanding Men, is it possible their Beauty should be perceiv'd, by such as have not Discernment enough to follow that which is most Reasonable? The Principles of the *Civil Law*, being only an Emanation from  
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the *Law of Nature* and *Nations*, we must first learn their Principles, before we enter upon the *Civil Law*.

A right Conception is no less necessary in *Studying the Law*; for by that means, we are enabled to discover the Circumstances, which make the Difference in two Cases, that at first sight appear to be intirely the same.

To soundness of Judgment, and a right Conception, we must add a good Memory; *We know nothing*, says the *Roman Orator*, *but what we remember*: Therefore, it would be in vain to take Pains to learn the Definitions and Principles of the *Law*, unless the Student can retain them; besides, as the Number of the *Roman Laws* is vastly great, and have either a great Conformity, or a very apparent Opposition, 'tis not sufficient to have a lively Memory, but it must be strong and unconfus'd.

Memory is generally reckon'd a mere Gift of Nature, altho' Experience sufficiently justifies, how much it may be improv'd, by Care and Vigilance; this must be done by daily Exercise. Nature is generally more liberal to us, than we are grateful to her, and seems to require nothing more in return for the Talents she bestows upon us, than the necessary Exercise for their Cultivation and Increase; yet, how many are there that never think of this Matter? And whilst some neglect to improve the Gifts they have receiv'd, we see others by Care and Pains repair the Injury Nature has done them, by her Parsimonious Hand.

Let not those who complain of a bad Memory, ever despair of mending and making it more happy; Let them know, that as it may be quite lost for want of Exercise, 'tis strengthen'd by employing it; 'tis true, if it be over-burden'd, 'twill be difficult for it to answer our Expectations; but when manag'd prudently, will acquire more strength. A continual Exercise, with Moderation, accustoms it insensibly to what we expect from it; but Experience has put this Matter beyond Doubt, and therefore, I shall not enlarge thereupon.

Clearness of Expression is another Qualification, requisite in such as would succeed in the Study of the *Law*; because without it, it would be impossible to unravel the nice Distinctions, in which the Point of Decision often lies.

I agree, that all Men are not born with these Dispositions, and that 'tis very seldom they are all found, in any eminent Degree, in the same Person; but to begin the Study of the Sciences, 'tis sufficient that Nature promises these Accomplishments, and shews an early Disposition, which by Care and Application, will with Time, infallibly ripen and come to Perfection.

After these Natural Talents, we have already observ'd, all Students in the *Law*, ought to be animated by a strong Inclination for Study; for the Mind and Memory are averse to Burthens that are disagreeable to them.

Lastly, The Study of the *Law*, ought to be preceded by a perfect Knowledge of all kind of polite Learning, especially the *Roman History*.

As to polite Learning, if it be requisite for making a Progress in all other Arts and Sciences, 'tis much more absolutely so in the Study of the *Roman Law*; the Proof whereof is easie: The *Roman Laws* were compos'd, as I have already often said, by the most Learned and Wise Men that flourish'd in different times at *Rome*; and therefore, were conceiv'd in such proper and apt Terms, that it would be very difficult to put others in their Places of equal Energy, and consequently are to be understood only by such as by their Studies, have contracted a Familiarity with the Expressions made use of in the purest *Latinity*.

In regard to History, I have taken notice in the Beginning of this Work, concerning the Relation of the *Roman Laws*, to the *History of that People*, by whom they were made, that I need say no more here on that Subject.

It may therefore be safely concluded, that such as have reap'd no other Benefit from their Studies, than the Dust of the Schools, are in no Capacity to undertake the Study of the *Roman Law*; which sublime Science will not discover it self, but to those, who by improving the Endowments Nature has given them, have laid in a great Stock of Learning: Besides, they must employ in Study a sufficient time every Day, for many Years; for how diligent soever a Student in the *Law* may be, it will be a great while before he is sensible of the Progress he has made therein.

And tho' these Difficulties that arise from the vast Extent of the *Roman Law*, may intimidate young Beginners, they will find in themselves Motives to spur them on, if they have improv'd as they ought, by their Lessons in the Classes.

The Glory of Success, is proportion'd to the Pains and Labour that attends it; and the Difficulties, how great soever they may be, when we are able to surmount them, discourage none but those, who either have no Ambition for Glory, or want Perseverance to deserve it.

Whatever Pains the Application which the Study of the *Law* requires, may cost, the Advantages that accrue by it, are more than a sufficient Recompence; which Consideration, ought to encourage Youth to employ their whole time in a Study, the End whereof is not so much to obtain Degrees, as to improve their Understanding, and refine their Reason.

By what is here said, 'tis evident I have not been over-studious to conceal the Difficulties of the Study of the *Law*, and the Time it requires. In the next Chapter, I shall shew the shortest and most easie way to succeed therein; which I think my self the more oblig'd to do, the End of this Work being to point out to Youth, the Courtes they are to observe in the pursuit thereof.

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## C H A P. XXXII.

*Of the Method to be observ'd in studying the Roman Law.*

EVERY one knows, that to be in a Condition to make any Progress in the Study of the *Law*, *Justinian's Institutes* must be the first Book we read, they are the first Elements of the *Law*, made by Order of that Emperor, for the Benefit of the Youth who have a mind to apply themselves that way: They cannot be too often read, nor too perfectly learn'd, since they contain an Abridgment of the whole Oeconomy of the *Roman Law*.

To succeed herein, the *Definitions* and *Titles* are first to be learn'd by heart; then the *Text* is to be read over carefully, with the *Notes* made by *Vinnius* thereupon; after which, it will be very easie to reap the Advantage of the *Commentaries* made in the Schools; the *Paraphrase* of *Theophilus* will be of great help towards a right Understanding of the *Text*, by means of the several Cases therein reported upon most of the *Paragraphs*.

As to the *Text* of the *Institutes*, we must not be satisfy'd with once reading it; we must turn it over and over, and as far as possible retain it: For it is the *Text* that is the chief Object of their Application, who desire to make any Progress in the Study of the *Law*; the right Sense of which cannot be taken, unless the very Terms are known. The Style, in the Body of the *Roman Law*, especially in the *Institutes* and *Digest*, is so fine and pure, the Terms are so proper and well-chosen, that there is no making use of any other, without running the Hazard of forsaking their true meaning, or at least rendring them obscure.

One thing, which Beginners ought especially to take Care to avoid, is the reading of abundance of Books: We ought to make choice of the Best, read them often, and endeavour to understand and retain their Substance; above all, we ought not to meddle with large Commentaries, which are rather apt to confound than help Beginners: A plain and

easy way is what Youth is pleas'd with; by which Means, being encourag'd with the Progress they make, they are insensibly accusom'd to a noble Emulation and Exactness, that leads them by Degrees to all sublime Learning.

The reading the *Institutes*, ought to be follow'd by that of the the Two last Titles of the *Digest*, which it is fit also to get by heart; one of them contains the Explanation of those *Laws*, in which there is any *Ambiguity*, the other the Rules of the Ancient *Law*; that is, certain General *Decisions*, taken from the *Lawyers Writings*. The next to be studied, are the *Paratitles* of the *Digest* and the *Code*; after which, the Student will be in a Condition to come at the true Sence of the *Laws* themselves; having first propos'd the Case, and deduc'd the Reasons for doubting and deciding according to our common practice, in the Exercises which our Profession obliges us to make every Day.

I cannot help observing in this Place, that if their Private Studies are of great use to forward them in the *Law*, the Instructions which they receive in the Schools, when they are follow'd as they ought to be, are incomparably of more Service: Those who are oblig'd to make Publick Lectures, are under a Necessity of doing their utmost, to make the most abstruse and obscure Things clear and perceptible to the dullest Understanding: Besides, as *St. Jerom* says, *Habet nescio quid latentis energie vive vocis actus & in aures discipuli de auctoris ore transfusa fortius sonat.*

Another thing which must not be forgotten, is to look out and make good the Quotations we find in the Books of the *Law*, and carefully to examine their Application: The reading over the *Laws* that are quoted, gives us a better Conception of the Sence: And therefore, those who have any skill in this profound and sublime Science, agree, that it is the only means to fix the Principles of the *Law* in the Memory; and even the greatest Difficulties, which, without such Assistance, would but too easily escape us: Therefore, we must be particularly careful in reading over and understanding the Texts that are made use of by those Authors, which we make use of to direct us in our Study.

'Tis not sufficient to read over the Texts of the *Institutes*, and the *Laws*, which are brought to explain some Principles; we must be able to understand what we read, and to retain it, in order to make a just Application thereof to such Questions as may offer. *Scire Leges non est verba earum tenere, sed vim ac potestatem*, L. 17. ff. de Legib. For which Reason, I thought my self oblig'd to set down here in a few Words, the Method to be observed therein.

The true Sence of a *Law*, is generally taken first from the *Law* it self; that is to say, the Terms in which it is conceiv'd: Secondly, from the Circumstances which may be suggested by the true Sence; to come at the Knowledge of which, we must first know, by whom the *Law* in question was made, upon what Occasion, and what was the Motive, and to whom it was directed. An Abstruseness in these Points is very disagreeable; and it is losing almost all ones Time, not to examine with Care, those Circumstances, which often serve to unravel the Difficulties that at first seem unfurmountable.

When we meet with *Laws* that are not to be understood by bare reading, we must have recourse to *Cujacius*, who is indisputably the best Interpreter of the *Roman Laws*, and most to be rely'd on; and as we may happen to meet with some *Laws* not explain'd by him, the *Gloss*, and other Interpreters are then to be consulted.

I shall here lay down a few Rules, by which those that have already made some Progress in this Study, may know how to reconcile those *Laws* that seem contradictory.

The first is, when one *Law* is oppos'd to another, to be certain of the true Reading of both; for the Texts of many *Laws*, have been corrupted by the Ignorance of Scribes; employ'd to write over the Body of the *Law*, before the Art of Printing was discover'd; they often transpos'd Words, Stops, and Comma's, and even whole Periods: Which Omissions or Transpositions, have frequently given the *Law* a quite different, and sometimes a contrary Sence.

It was the same formerly with the Abbreviations made use of by the Writers, which had introduc'd into the *Laws* a prodigious Obscurity: Therefore, the Emperor *Justinian*, to take away that Inconveniency, commanded *Tribonian* and the rest of the Compilers, not to make use of them in the Composition of the *Digest*.

*Antonius Augustinus* has made a Book, *Emendationum*, in which he has corrected the *Laws* that have been corrupted by Omission, Addition, or Transposition of Notes, Stops, Comma's or otherwise. *Cujacius* and *Faber*, have also corrected several defective Passages in the Body of the *Law*; but the Corrections of the latter, are sometimes too bold, and therefore not to be blindly followed.

The second Rule is, to take notice whether the Terms of the Two *Laws* that seem opposite to one another, are not capable of receiving different Significations; for if a Word in a *Law*, be taken in a different Sense from the Author's meaning, we shall find abundance of Contrarieties, where in reality there are none.

The third is, to see if One of the Two *Laws* which seem contradictory, does not contain an express *Decision*, in the most rigorous Sense, and the other an Equitable Tempera-  
ture.

The fourth is, to observe the Authors of those *Laws* which seem contradictory, and examine if they were not of different Factions: For the *Lawyers*, who were of different Schools and Sects, were also frequently of contrary Opinions, upon the same Question. I shall here instance some *Laws*, which are the Remains of their Dissentions, and can be reconcil'd by no other means, than saying their Authors were of different Factions; *Vide L. 22. ff. de Jurejurando juncta. L. 5. ff. de Peculio, L. 9. §. 2. ff. de Acquir. rer. Dominio juncta. L. 25. §. 3. ff. de rei Vendicatione. L. 7. §. 7. ff. de Acquir. rer. Dominio juncta, L. 61. ff. de rei Vendicatione, L. 35. ff. de Peculio, cum L. 1. §. 10. ff. de dote Prelegata juncta, L. 1. §. 7. ff. Quando de peculio Attio Annalis est, cum L. 18. ff. de peculio Legato.*

The fifth is, to take notice of the Inscriptions of the *Laws*, and the Titles under which they are placed; for there are many *Laws*, which are not to be understood, but by the Relation they bear to the Titles whence they are taken, and which cannot be apply'd to Matters of another kind: *Multa generaliter accepta incautos fallerent & restringi debent ad Argumentum libri unde desumpta sunt. Vide L. 2. §. 1. ff. de sum & Legitime heredibus juncta, L. 5. ff. de ritu Nuptiarum, L. 13. ff. de Verborum significatione, juncta epigrapha ejusdem Legi, L. 197. ff. eodem titulo juncta, L. 3. §. 14 ff. de Senatus-Consulto Silianiano.*

The

The sixth is, to observe the Time when the Two opposite Laws were made; *Sæpe enim distinguenda sunt tempora ut consilietur jura*; for that which was the last made, repeals the former; And herein we must take great Care to distinguish betwixt the Ancient and the New Law; for many Laws in the *Digest*, have been mutilated by *Tribonian*, in order to accommodate them to the Law observed in his Time, which makes it impossible to reconcile them any other ways than by saying, *Passa sunt manum Triboniani*.

The seventh, is to examine carefully the State of the Question proposed; that is, whether it be *De genere an de aliqua specie*; for as the Orator says, *Lib. 2. De inventione Si ex contrariis Legibus controversia nascatur cum inter se due videntur, aut plures Leges discrepare, considerandum est utra Lex de genere omni utra de parte quadam, utra communiter in omnes, utra in aliquam certam rem scripta videatur*: The Questions, *De genere atque universo infinita sunt*; but those, *De specie sunt finita*: Wherefore, *Semper generalibus specialia insunt, sed specialibus non insunt generalia*: For Example, a Legacy of *Alimony*, does include *Meat, Drink, Cloathing and Lodging*; because the Body cannot be supported and maintained without them, *L. 6. ff. de Aliment. legat.* But not on the contrary; for a Legacy of *Cloathing*, does not comprehend either *Alimony or Habitation*.

The eighth is, to examine whether the Law that is opposite to another, does not give a different Decision for some particular Reason or Circumstance, which induc'd the Maker to go out of the common Road; *Quod jure singulari contra communes juris regulas introductum est non debet trahi ad consequentiam*.

The ninth is, to endeavour to find out the true Causes of opposite Laws, which is often the Way of resolving the greatest Difficulties, that we meet with in the Explanation of the Laws; *Ex facto enim jus oritur*: To this End, the Terms of the Law are to be well examin'd; the right Understanding whereof, does not only lead us to the Fact and the Case upon which the *Lawyers Answer* or *Emperor's Rescript* was made, but also to discover the Rules and Principles of Law, by which the Question was determin'd.

## 166 Of the Quotations and Abbreviations.

If, notwithstanding all these Precautions, there still remains some Contrariety in the *Laws*, we must agree, that they are *Antinomies*, overlook'd by *Tribonian*, thro' Inadvertency; *Etenim contra Justiniani mandatum nonnulla contraria, & pugnantes Jurisconsultorum sententias in Pandectarum libris reliquit. Vide L. 1. ff. de usufructu accrescendo, juncta L. 20. ff. de Legatis 2º. L. 15. ff. de rebus creditis, juncta L. 34. ff. mandari, L. 18. ff. de rebus creditis, juncta L. 36. ff. de Acquir. rer. Dominio, L. 82. ff. de Legat. 2º. juncta L. 5. ff. ad Legem falcidiani, L. 22. ff. de Furejurando, juncta L. 5. ff. de Peculio, L. 6. & 7. de servis exportandis. Vide etiam Cujacium, L. 8. Observat. cap. 9.*

In short, *Tribonian* has reported in the *Digest*, *Laws* that were utterly abrogated, or contrary to *Usage*, *Vide L. 41. ff. De pignoratitia Actione juncta, L. 22. de Pignoribus & Hypothecis, L. 122. §. 2. ff. de Verborum obligationibus, juncta L. penult. ff. Qui sine manumissione, &c. L. 9. ff. ad municipalem, juncta L. 5. ff. de statu Hominum.*

## C H A P. XXXIII.

### Of the Quotations and Abbreviations.

**A**S it is necessary in the first Place, to know how to make use of the *Quotations* which we meet with in the *Books of the Civil Law*; and to find out the several *Laws* quoted by *Authors*: I thought it my Business to lay down some Rules for that purpose.

The *Body of the Civil Law*, as we said before, is compos'd of Four Parts, the *Digest*, *Code*, *Institutes*, and *Novels*.

The *Laws of the Digest*, are generally quoted by the first Word, and Number of the *Law*; for Instance, *Lege siquis tertius Digestis de jure Codicillorum*; sometimes the Number only, or the first Word of the *Law* from whence the *Quotation* is taken, is set down.

When a *Law* is divided into several *Paragraphs*, after the Number of the *Law*, that of the *Paragraph*, or the first Word of it, is set down; for Example, *Lege 32. §. 11. Digestis de Donationibus inter virum & uxorem.*

Some-

Sometimes a *Law* of a *Title* in the *Digest*, is quoted by the first Word only, with the *Title*, without mentioning whether it be out of the *Digest* or *Code*; and in that Case, it is an Indication that the *Law* quoted is in the Collection before spoken of; that is, in the *Digest* or *Code*, according as they were before mention'd.

The *Laws* of the *Code*, are quoted after the same manner as those of the *Digest*.

The *Paragraphs* of the *Institutes*, are quoted after the same manner as the *Laws* of the *Digest* or *Code*; thus a *Paragraph* of the *Institutes* is quoted, by shewing the Number, and mentioning the first Word of the *Paragraph*, or by either; but the *Title* under which the *Paragraph* is, must always be mention'd, as thus, *Paragrapho testis 15. Institutionibus*, or else *apud Justinianum de Testamentis ordinandis*.

The *Novels* are quoted by their Number, with that of the *Chapter* and the *Paragraph*: For Example, *Novella Justiniani 185. Capite 2. Paragrapho 4.* or else a *Novel* is quoted by the *Collation*, and by the *Title*, *Chapter*, and *Paragraph*, after this manner, *In Authentico, Collatione 1. Titulo 1. Cap. 281.*

As to the *Authenticks*, they are quoted by the first Words of them, after which is set down the *Title* of the *Code* under which they are placed; for Example, *Authentica cum testator Codice ad Legem falcidiam.*

This being laid down, let us now see how we shall go about to find out a Quotation in the Body of the *Law*.

If the Passage quoted is taken from the *Digest* or the *Code*, it will be best for Beginners to turn to the Alphabetical Table, of the *Titles* at the Beginning of the Body of the *Law*; where having found the *Title* mention'd in the Quotation, they must then look in it for the *Law*; by the Number or first Word.

If the Quotation is taken the *Institutes*, they must likewise have recourse to the Table of *Titles*; and after having found the Book in which it is, look after it there, and then the *Paragraph* which is quoted.

If we would find out a *Novel*, there is nothing more to be done, than to look after it by the Number it is under.

If it be an *Authentick*, we must look in the Table of the *Code*, for the *Title* under which it is plac'd: It is so much the more easily found, because all the *Authenticks* are inserted in the *Code* in a different Letter.

To conclude, as those who have a Mind to look after any *Law*, waste a great deal of time in turning over the the Table or Index, they may save themselves that Trouble, by rendring the Titles of the Body of the *Law* familiar, and getting them by heart, by which means, they will acquire a general Notion of the Places where every particular Matter is treated of, and without the least Difficulty, be able to find out any *Law* they have occasion to consult.

To compleat these Instructions for young Students how to find out the Quotations in our Books, it remains only that I explain the Abbreviations.

### A B B R E V I A T I O N S.

AP. JUSTIN. *Apud Justinianum*, in *Justinian's Institutes*.  
ARG. or AR. *Argumento*, by an Argument drawn from such a *Law*.

AUTH. *Authentica*, in the *Authentick*; that is to say, the Summary of some of the Emperors *Novel Constitutions* inserted in the Code under such a Title.

CAP. *Capite* or *Capitulo*, in the Chapter of such a *Novel*.

C. or COD. *Codice*, in *Justinian's Code*.

C. THEOD. *Codice Theodosiano*, in the *Theodosian Code*.

COL. *Columna*, in the first or second Column of the Book quoted.

COLL. *Collatione*, in the Collation of such or such a *Novel*.

C. or CONT. *Contra*, this is generally us'd to denote a contrary Argument.

D. *Dicto* or *Dicta*, that is, the aforesaid, or *Law* or Chapter before quoted.

D. *Digestis*, or in the *Digest*.

E. or EOD. Under the same Title.

F. *Finalis*, the last or latter Part.

ff. in the *Pandects* or *Digest*. The Grecians having made use of the Letter  $\Pi$ , to signify *Pandects*, the Romans chang'd them into Two f's join'd together. *Digestorum liber ideo duplici ff. signatur, quod Græci Pandectas per  $\Pi$  cum accentu circumflexo notabant, sub quibus, & Digestorum libri comprehensi sunt, unde facili litura  $\Pi$  in ff. latine inolevit*, says Calvin in his *Lexicon Juris*.

GL. *Glossa*, the *Gloss*.

H. *Hic*, here, in the same Title, *Law*, or *Paragraph*.

H. TIT.

H. TIT. *Hoc titulo*, in this Title.

I. or INF. *Infra*, beneath or below.

J. GLO. *Glossa*, the Gloss joined to the Text quoted.

IN AUTH. COLL. 1. *In Authentico, Collatione* 1. in Justinian's Novels, Part or Section 1, &c.

IN F. *In fine*, at the End of the Title, Law or Paragraph quoted.

IN PR. *In principio*, in the Beginning, and before the first Paragraph of a Law.

IN F. PR. *In fine Principii*, toward the End of a Beginning of a Law.

IN SUM. *In summa*, in the Summary.

L. *Lege* in such a Law.

LI. or LIB. *Libro*, in the First or Second Book, &c.

NOV. *Novella*, in such a Novel.

PAR. *Paragrapho*, in such a Paragraph or Article of the Law, or of a Title in the Institutes.

PR. or PRIN. *Principium*, the Beginning of a Title or a Law.

II. *Pandectis*, in the Pandects.

Q. QU. or QUÆS. *Questione*, in such a Question.

RU. or RUB. In such a Rubrick or Title. For Titles were called Rubricks, from their being formerly written in Red Letters.

SC. or SCIL. *Scilicet*, that is to say.

SOL. *Solutio*, the Answer to an Objection.

SUM. *Summa*, the Summary of a Law.

§. *Paragrapho*, in such a Paragraph.

T. or TIT. *Titulus, Titulo*, Title.

V. or V. *Versiculo*, in such a Verse, which is a Part of a Paragraph.

ULT. *Ultimo, ultima*, the last Title, Paragraph or Law.

OF THE  
USE and AUTHORITY  
OF THE  
CIVIL LAW  
IN THE  
Kingdom of *England*.

V



*BRITAIN*, as it is separated by the Ocean ; so in the Use of the *Civil Law* it differs from all other Nations in *Europe*, the Kings thereof not allowing the *Roman Laws* so great Authority within their Dominions, as the rest of the *European Princes*. Hence it is commonly reported amongst them, that we make but very little use of the *Civil Law*. And some of the best *French Authors* who are nearest to us, have affirm'd, that the *English* make no use at all of the *Civil Law* ; into which Mistake they have been led, by observing, that none of our Countrymen have taken the Pains to Explain and Illustrate it, as the Learned of other Nations have done : For it was impossible, by the Books written in *English*, they should understand what Use and Authority the *Civil Law* was of among us.

\*But, in order to Treat more distinctly of the Authority of the *Roman Laws* in *Britain*, it must be first consider'd, what Princes and Governments this Nation has been under.

der from the earliest Times ; first, under the *Romans*, then the *Saxons* ; after that, the *Danes* ; and lastly, the *Normans*. From which several Transmutations we shall clearly distinguish what Laws the *Britains* have from time to time been govern'd by ; how far the *Civil Law* has been received, and of what Authority it ought to be at this time among us.

*Britain* being bounded by the Ocean, was never attempted by any Foreign Power, till the time of *Julius Caesar* : For neither *Hercules*, nor *Bacchus*, nor any other of those Antient Princes (says *Diodorus Siculus*, who wrote the History of the Reigns of *Julius Caesar* and *Augustus*) carried their Conquests so far. *Polybus* reckons what is related by the *Roman* Historians of the *Britains*, to be Fabulous ; and *Dio Cassius* likewise says, neither the *Greeks* nor *Romans* were at any Certainty concerning *Britain* ; but that all they reported of it was Guess-work. The first *Roman* who came over into *Britain* with an Army, was *Julius Caesar* ; who having conquer'd all *Gaul*, made an Expedition into *Britain*, under pretence of revenging the Affront the *Britains* had offer'd him, by sending Supplies to the *Gauls* during the Course of his Wars ; or rather excited by Ambition, and Desire of Enlarging the Limits of the *Roman* Empire : And after some Advantages obtained, and Hostages receiv'd for the Payment of an Annual Tribute, return'd into *Gaul* : Wherefore *Tacitus* observes, He rather Discover'd than Conquer'd *Britain* for the *Romans*.

After the Death of *Julius*, the Imperial Power shifting from the People to the *Cesars*, the succeeding Emperors strenuously labour'd to make a Conquest of *Britain*. *Augustus* was upon the Point of coming hither with an Army, but was prevented, first, by the Revolt of the *Pannonii*, then of the *Cantabii*. *Tiberius* contented himself with the *Britains* Annual Tribute ; which, when they refus'd to pay under *Claudius*, he Invaded *Britain* ; and with the Assistance of *Aulus Plautius Vespasianus* and *Ostorius Scapula*, gave them a signal Overthrow, leading their General *Carracacus* in Triumph to *Rome*, and assuming the Title of *Britannicus*. But *Nero*, who was his Successor, was like to have lost this new Acquisition, had not *Suetonius Paulinus* made a brave Resistance : Nor could the *R-*

mans render themselves absolute Masters of Britain, till *Vespasian's* and his Son *Domitian's* time. During which Interval of One hundred and thirty Years the Romans and Britains contended for the Sovereignty with equal Fortune: But then being embroil'd in Factions and Civil Wars among themselves, were easily overcome by the Roman Generals; and, to their great Misfortune, never having been under the Administration of One Person, became an easie Prey to the Roman Eagle.

For both the South and North Britains and Caledonians were subdu'd under *Vespasian* and *Domitian*; and the British Islands, under the Conduct and Bravery of *Petitus Cerealis* and *Julius Agricola*, added to the Roman Empire and all Britain, then first reduc'd into the Form of a Roman Province: From which happy Loss of Liberty they learnt the Roman Manners, Laws, Language, Eloquence, Architecture, Art of making High Ways, and all other Sciences in which the Romans excell'd; and, as good Luck would have it, the Memory of these Transactions has been preserved to us by *Tacitus*, Son-in law to *Agricola*, and other Roman Historians, which otherwise would have been forgotten, and buried among the Ruins of the Druids superstitious Laws and Ceremonies.

BRITAIN being thus made a Roman Province, the following Emperors seem'd more careful of it than of the rest of the Provinces depending upon the Empire; and to quiet the Disorders and Insurrections that happen'd, visited Britain oftener than any other part of their Dominions; assisting, above all the rest of their Titles, to be called *Britannici*. Under the Emperor *Adrian*, when the North Britains were in Arms against his Lieutenant *Cn. Trebellius*, the Emperor coming into Britain, put them to flight; and to prevent the Incurfions of the Picts and Scots, built a Wall of Stakes and Turf of Eighty thousand Paces long: But the Scots breaking thro' the same, again invaded the South Britains: To whose Assistance *Helvius Pertinax* was sent by the Emperor *Antoninus Pius* and *Commodus*, who kept them in Awe for some time, till under *Septimius Severus*, *Virius Lupus*, then Governour of Britain, being oppress'd by the Revolt of the Britains, implor'd the Emperor's Assistance, who came hither, accompany'd by *Basianus* and

*Geta*,

*Geta* his Sons, and *Papinian* the Chief Justice, and continued here for Three Years, built *Adrian's* Stone Wall, subdued the North *Britains* and *Caledonians*, but not without great slaughter on his part, and at length dyed at *Turk*: This Emperor is by *Herodian* extoll'd, as more skilful than any of the rest in Warlike Affairs. He had the Title of *Britannicus Maximus*.

After *Severus* and his Son *Caracalla*, the succeeding Emperors could scarce keep *Britain* in obedience; not being a Match for them, by reason of the frequent Insurrections in other Provinces, which drew their Forces another way, and many of the *Roman* Commanders, usurping the Imperial Power, Lorded it tyrannically over the *Britains*; among whom was *Caracallus* and *Alectus* in *Dioclesian's* Time; against whom *Constantinus Chlorus* being made Governor, and sent into *Britain*, restor'd the Island again to the Imperial Dominions: And being declared *Cæsar* by *Dioclesian*, begot *Constantine* upon *Helena*, Daughter to *Coel*, one of the *British* Kings; which *Constantine*, after his Father's Death, was saluted Emperor by the *British* Legions, and by their Power and Bravery, subduing his Rival *Maxentius*, made himself sole Master of the *Roman* Empire.

This, the most Illustrious of all *Britains*, not only honour'd *Britain* with his Birth, but by introducing a new kind of Provincial Government, under the *Prætorian* Lieutenant of *Gaul*, together with the Duke and Count of *Britain*, the Count of the *Saxon* Shore, and the Lieutenant or Vicar of *Britain*, who had the Administration of Affairs both in Peace and War committed to them: And was the first *Roman* Emperor that encourag'd the Christian Religion, and favour'd the Light of the Gospel.

Now that *Constantine* the Great was born of his Mother *Helena* in *Britain*, not only the Writers of our own History, but Strangers do affirm; and the same is strenuously asserted against *Julius Firmicus* and *Justus Lipsius*, by the Most Reverend *James Usher*, Archbishop of *Armagh*, who for his great Learning, is deservedly reckon'd an Ornament of the *British* Nation.

In this Particular only our Emperor *Constantine*, in all other Respects without Controversie the greatest of all the Emperors, was unhappy; that thro' an Over-Ambition of extending the *Roman* Empire, he translated the Seat there-  
of

of to *Byzantium*, a pleasant and strong place, situated almost in the midst of the World: For the *Barbarians*, tempted by the Absence of the Emperors, quickly invaded the Empire; *Italy* was seiz'd by the *Goths* and *Lombards*, *Spain* by the *Goths* and *Vandals*, *France* by the *Franks*, and *Britain* by the *Scots* and *Picts*; after which, the total Extinction of the Eastern Roman Empire immediately ensu'd.

*Constantine* the Great being dead, his Sons *Constantinus* and *Constantius*, and after them, the Emperor *Gratian* kept Possession of *Britain*, till *Valentinian's* Time; whose Lieutenant *Theodosius*, once more delivered *Britain* from the Oppressions of the *Scots* and *Picts*, and put the Countrey into so peaceable a Condition, that the Emperor order'd, the Part which was subdued by *Theodosius*, should be called *Valentia*: The same *Theodosius* being afterwards rais'd to the Empire, was succeeded by his Son, the Second of that Name; and after him, by *Honorius* a Minor. The Government, during his Minority, being by his Father committed to *Stilicho*, who also reliev'd the *Britons* from the Invasions of the *Picts* and *Scots*.

But afterwards, under the same *Honorius* and *Arcadius*, the *Picts*, *Scots*, and *Attacors* invading *Britain*, now quite exhausted, and the Roman Forces employ'd in defending other Provinces against the *Barbarians*, the poor *Britons*, whose Sighs are described by *Gildas*, the most Ancient of our Historians, and after him by *Beda*, in vain implor'd the Emperor's Assistance; driven, say they, by the *Barbarians* to the Sea, and then back to the *Barbarians*, they met with Death every where. Nor was *Honorius* or *Valentinianus* III. ever in a Capacity to defend them from the Insults of their Neighbours: So that *Britain*, about Five Hundred Years after *Julius Caesar's* first Entrance, became a Derelict.

Thus the miserable *Britons*, unable to resist the Fury of the *Scots* and *Picts*, first by them, and then by the *Saxons*, were forced to fly for Safety, some into *Bretany* in *France*, and others into *Wales* and *Cornwall*; and the few *Anglo-Saxons* that remain'd, apply'd to their Neighbour the *Germani*, to help to expel the *Scots* and *Picts*.

At length, assisted by the *Romans*, about the Year of 449, *Julius Caesar* first enter'd it, Sixty Years before his own Nativity.

The Saxons, who were called in to help and protect the Britons against the Scots and Picts, after having subdued them, turn'd Traitors to their British Masters: Charm'd with the Fertility and Sweetness of the Countrey, they complain of not being paid their Wages, and sufficiently rewarded by the Britons: Wherefore, Hengist and Horsa undertake to satisfy their own Demands, by pillaging the People; to whom other Saxon Forces afterwards joining, they subdued the Britons in several Parts of the Island, created new Kingdoms and Principalities; and at length form'd the Heptarchy.

The first of the Seven Kingdoms was that of Kent, over which Hengist the Saxon made himself King, in the Year 443; the second was of the South Saxons, whose first King was Ella, who began his Reign in 488; the third was of the East Angles, first erected by Offa, in 575; the fourth of the East Saxons, began by Erchwin, in 527; the fifth of the Mercians, was first ruled by Creda, a Saxon, who began to Reign in 582; the sixth Kingdom was that of the Northumbrians, first possess'd by Ida, in the Year of Christ 588; the seventh and last, of the West-Saxon, was first govern'd by Cerdic, in the Year 521; whose Successors, either by their own Bravery or the Strength of their Subjects, which were reckon'd the most Warlike of all the Britains, conquer'd the rest of the Saxon Kings, extinguish'd the Heptarchy, and brought all their Dominions under the sole Power of Egbert King of the West Saxons, in the Year 800; and he first impos'd the Name of England upon Britain, and by his Edict, order'd the Britons to be call'd Englishmen; from which time, all Nations have distinguish'd us by that Name.

After Egbert, who out of the Spoils of the Saxon Kingdoms had erected the Monarchy of England, succeeded Ethelwolf and his Descendants, for a Hundred and Seventy five Years; during which time, they suffer'd great Slaughter and Damages by the Incursions of the Danes, who possess'd the Kingdom for some time, till the Anglo-Saxons recover'd it, and were themselves in a short time, oblig'd to quit it to the Dukes of Normandy, whose Posterity enjoy it to this Day.

But in the Time of *Ethelwulf*, the *Danes* invaded and plunder'd the Countrey of *Kent*; and under *Etheldred*, that of *Northumberland*; and afterwards, under *E'red*, *London* and *Exeter*, exacting Tribute from the *English*: At length *Swain* King of *Denmark* got Possession of the whole Kingdom, in the Year 1014; and with his Son *Canute* after him, enjoy'd it for Twenty eight Years. Upon the Death of *Canute*, the *English*, out of hatred to the *Danes*, recall'd *Edward Etheldred*, at that time an Exile in *Normandy*; who, by the Assistance of *William the Bastard*, Duke of that Countrey, being made King of *England*, reign'd Twenty four Years, with great Piety and Justice; and enacted several *Laws*, so just and agreeable to the Temper of the Nation, that his Memory is still venerable on that Account, and at length was canoniz'd.

*Edward* dying without Children, *Edgar Etheling* Grandson to *Edmund*, commonly called *Ironside*, and a Favourite of the People, endeavour'd to possess himself of the Kingdom; but being under Age, and unfit to govern, *Harold*, Son of *Earl Godwin* by King *Canute's* Daughter, seized the Throne, and got himself inaugurated by the Archbishop of *Tork*, in the Year 1046.

*William* Duke of *Normandy*, by his Embassadors, requir'd the Restitution of the Kingdom; first, because he was the nearest of Kin to *St. Edward*, as being the Son of *Robert*, by *Emma* Daughter of *Richard* Duke of *Normandy*, who was *St. Edward's* Mother; and because *St. Edward* had by Promise made him Heir to the Kingdom, in case he died without Children; and also *Harold* had by Oath engag'd himself, to assist *William* in getting the Kingdom after *St. Edward's* Death.

*William* came with an Army, to vindicate his own Right and punish *Harold's* Perfidy; who being slain, he was proclaim'd King in 1067: After a Reign of Twenty one Years, he was succeeded in *England*, in 1088, by *William Rufus*, his second Son; who dying without Children, the Kingdom fell to his Brother *Henry I.* youngest Son to the Conqueror, in whom, after a Reign of Thirty five Years, leaving no Children, the Male Line of *William the First* was extinct. He was succeeded in 1136, by *Stephen* Son of *Adela*, *Henry* the First's Sister. To *Stephen* succeeded *Henry II.* and to him his Son *Richard I.* with whom

whom ended the *Norman* and Foreign Government. *Richard* and his Successors were born in *England*, and custom'd to the *English Laws*: And it is much for the honour of the *English Nation*, that tho' the *Normans* hated the *English*, endeavour'd all they could to change their *Laws*, and introduce the *Norman Customs*; yet they still preserv'd, and have transmit the *English Name* to Posterity.

From what is premis'd, the several Changes of Princes and Governments which *England* has suffered, sufficiently appear: Let us now return to the different *Laws* made under those several Changes and Revolutions, and see how far the *Civil Law* obtain'd among them, and what Authority it is of at this Day in *England*.

There is no Historical Account either of the *Laws* or Government of the *Britons*, before the Entry of *Julius Caesar*, except what we find in the *Roman Authors*: *Caesar* relates, that in *Britain* and *Gaul*, the *Druids* were both Priests and Judges, and decided all kind of Publick and Private Controversies; if Murther or any other Crime was committed, or Dispute happen'd about Inheritance or the like, they determin'd it; and such as refus'd to stand to their award, were forbid to appear at their Sacrifices: But of their *Laws* and their *Holy Ceremonies*, there is no Account extant; nor being permitted to commit any thing to Writing. But *Caesar* made no Alterations in the *Laws* of *Britain*; He suffer'd them to be govern'd by their own *Kings* and *Laws*; only requir'd Hostages and a Tribute: And *Seneca* says, *Britain* before *Claudius's* Reign was *SUI JURIS*.

But *Claudius* subduing a part of the Island, introduc'd the *Roman Laws*; and by his *Edict*, silenc'd the *Druids*: Which made *Seneca* sportingly say,

*Ille Britannos*  
*Ultra noti*  
*Littora penti*  
*Et caeruleos*  
*Scuta Brigantes*  
*Dare Romulen,*

*Colla Catenis*  
*Jussit & ipsum*  
*Nova Romana*  
*Fura securis*  
*Tremere oceanum.*

Two Kings, whose All-commanding Yoke  
The Fastest *Britains* gladly took ;  
Whom *Brutus* in blue Arms ador'd :  
Whom the Waves confess'd his Power ;  
And with *Laws* they scorn'd before ;  
And the young *Neptune* serv'd a *Roman* Lord.

And *Tacitus* writes, that *Claudius* planted a Colony at *Doncaster*, to keep the Rebels in awe, and teach his Allies the Study of the *Roman Laws* ; and *J. f. Scaliger* understands the ancient Poet, of the Times of *Claudius*, when he says,

*Cernitis ignotos Latia sub lege Britannos  
Sed citra nostrum flectitur Imperium.*

*Tacitus* also relates the Complaints of *Britain* under *Nero* in these Words ; That whereas in former times they had only one King, now they were govern'd by Two ; the Lieutenant to suck their Blood, the Procurator their Substance.

But *Britain* being intirely subdued by the Prudence and good Conduct of *Agricola*, was reduc'd into the Form of a Province by *Vespasian* and *Domitian* ; who, as well as their Successors govern'd it by the *Roman Laws*, and administred Justice to the *Britons* by *Roman Magistrates* ; such as *Proconsuls*, *Presidents*, *Legates*, *Praetors*, and latterly by Earls of *Britain*, or their Deputies ; the *British Laws* being intirely abrogated.

Under *Domitian*, the *Roman Laws* had taken so deep root in *Britain*, that *Agricola* exhorts them to build Temples, Market-Places, and Houses after the *Roman Manner* ; and they accommodated themselves so well to the *Roman Arts*, that they learnt the *Roman Eloquence*, and Art of Pleading from the *Gauls*. And *Aristides* the *Grecian Orator*, in the time of *Mark Anthony*, places it among the *Encomiums of Rome*, that she had rendred her *Laws* common, even to *Britain* ; and extended the Use of them as far as her Empire : And *Rome* is by *Claudian* called the Mother of *Arms and Laws* ; and by *Sidonius Apollinaris*, the Abode or Place of Residence of the *Laws*.

The Use and Exercise of the *Roman Laws* in *Britain* appears also from this ; that under *Septimius Severus*, *Emilius Papinianus* sat at *York*, as *Præfectus Prætoris* or Chief-Justice, which was the most eminent Degree in the Empire, and pronounc'd Judgment there ; concerning which, *Dio Cassius*, who wrote the Life of *Severus* is to be credited, altho' there is no mention of it in any of the other *Roman Writers*.

*Severus*, to wean his Sons *Antoninus*, *Caracalla* and *Geta*, from the Debaucheries of *Rome*, and keep his Legions from Idleness, came over into *Britain* ; and leaving his Son *Geta*, with some of his Counsellors and intimate Friends to govern the Inland Parts, subject to the *Romans*, went himself with *Antoninus*, at the Head of an Army against the *Caledonians* : In which Expedition, as they were riding together, *Antoninus* stopping his Horse, of a sudden drew his Sword, with intent to kill his Father ; but was prevented by the Interposition and Clamour of the Soldiers. *Severus* pass'd this over, and stifled his Resentment till he came to his Quarters, where he order'd his Son, together with *Papinian* and *Castor*, his intimate Friends, to come to him ; and having commanded a Sword to be laid before him, reprimanded his Son for making so villainous an Attempt, in the Sight of the Allies and Enemies ; and said, *If thou art desirous to put me out of the way, now kill me with thy own Hand ; or there is Papinian, who if thou commandest will obey thee.* This *Papinian* was made First Minister to the Emperor *Severus*, as well for his superlative Skill in the *Laws*, as that he was nearly related to the Emperor by a Second Marriage.

The *Caledonians* being subdu'd by *Severus*, he return'd to *York*, where he made the Edict, whereby it is provided, That if a Man had a Slave, which he bought, or came otherwise honestly by, and believed himself to have a good Title to him, tho' he proved to belong to another ; yet all Acquisitions made by that Slave, either with the present Master's Money, or by his own Work and Industry, should stand good in Law. And, on the contrary, if the Master knew the Servant to belong to another. This Edict was made in the Year when *Faustinus* and *Rufus* were Consuls, in which *Severus* died at *York* ; and was wrote

by

For our Commentators are of opinion, that the Laws of *Severus* and *Antoninus* were written by great Care and Deliberation: And the Learned were not only *Papinian*, but *Paul* and *Ulpian*, who were then as Assessors to *Papinian*, and Coadjutors in the Administration of Affairs. All which is much for the Honour of our Nation: For there never was, nor ever will be, as *Cujacius* says, a Lawyer that excell'd, or can equal *Papinian* in that Science.

*Ulpian* and *Javolenus* also, bear witness in the *Pandects*, that the Government of *Britain* was under Roman Laws: The British Children were subject to Paternal Authority *ex Jure Romano*, by the Roman Law. And Fathers made Pupillary Substitutions; but not unless they had first constituted their Heir by Will. And *Ulpianus* reports of *Severus*, that he gave the same Answer to *Vinius Lupus*, Governour of *Britain*. And *Javolenus*, in the Case of *Sejus Saturninus's* Will, gives his Opinion, that the Estate ought to be restor'd by the Fiduciary Heir, if the Person to whom he was by the Disposition of the Will to surrender it, happen'd to die before the time for the Restitution expir'd.

But the *Britons* not only conformed themselves to the Roman Laws, but affected their Manners, Language, Dress, Eloquence and other Arts, which by Divine Providence spread over the whole Countrey, that otherwise had continu'd under its Native Barbarity: For they were no whit improv'd by the *Saxons*, *Danes* and *Normans*. So that whatever our Ancestors boast of, either of Beauty or Splendor, was all owing to the Manners, Vertues and Government of the *Romans*: And the *Britons*, at length, so adapted themselves to the Roman Discipline, that *Gildas* reports, the Countrey was called *Romania*.

Nor did the *Britons* forsake the Roman Laws, till they themselves were deserted by the *Romans*, which happen'd in the Time of *Honorius*; when a barbarous People inhabiting the other side of the *Rhine*, invading this Countrey and mastering it as they pleas'd, reduc'd the *Britons* to so many Slaveights, that obeying no longer the Roman Laws, they erected a Government of their own, as *Zexinus* says; though however, they did not maintain long, being conquer'd

quer'd by the *Saxons*, and by them oblig'd to follow their *Laws*.

But forasmuch as some of our most celebrated *Lawyers* have advanc'd, that the *Romans* never impos'd their *Laws* upon the *Britons*, but suffer'd them to use their own; upon what Foundation I cannot imagine, since it is repugnant both to the *Roman* and *British* History; and both *C Camden* and *Selden*, two famous Men, maintain and prove the contrary by most evident Testimonies; of whom one has render'd our Nation illustrious, by his *Chorography* and *Annals* of *Q. Elizabeth*; and the other by his exquisite Skill in our *Common Law*, to which he added that of the *Mosaick* and other Nations, with a singular Knowledge of the *Oriental Languages*: To whom may be added, *Spelman* the famous Antiquary; all proving by substantial Reasons, that the *Romans*, having abrogated the *British* *Laws*, introduc'd their own, and administer'd Justice by them, as long as the *Roman* Emperors continu'd Masters of *Britain*. And we ought to be convinc'd by the Arguments of those who excell'd, both in all kinds of Learning, and in the Knowledge of the Antiquities of our Nation.

This Opinion, however, seems to be oppos'd, by the Epistle sent to Pope *Eleutherius*, from *Lucius* one of our *British* Kings; whereby he desires the Pope to transmit to him the *Roman Laws*; which would have been an Absurdity, if *Britain* had then been govern'd by them. This Epistle was first printed in the Reign of *Henry VIII.* and has been recited by some of our Modern Historians, byas'd by the Desire of doing Honour to our Countrey, in order to give it the greater Credit; in which also *Lucius*, the first Christian King, desires to be admitted by the Pope to the *Christian Faith*.

But this Epistle is liable to Suspicion, because our most ancient *British* Writers, who take notice of it, say not a Word of the *Roman Laws*; and our later *English* Historians, affirm upon many Reasons, that it is spurious; First, because it bears Date in the Year of Christ 159, whereas *Eleutherius* was not Pope before 1030; 2<sup>dly</sup>, Because many of the Words savour of the *Norman Latinity* and the *English Law*; and that the Scriptures are quoted in it according to *St. Jerem's* Translation, who flourish'd about Two hundred Years after *Eleutherius*; 3<sup>dly</sup>, Because neither *Geoffrey of Monmouth*, *Hoveden*, nor any other of our ancient Historians, take

make any notice thereof. There are besides several Pre-  
 judicial Arguments, that help to destroy the Credit of this Epistle;  
 that the Pope speaks to *Lucius* in the Plural, *Vos estis Vi-*  
*si* which manner was introduc'd by some of the  
 later Writers; that the Stile of the *Roman* Language in  
 the Epistle, does not allow of the Pope's Expression, *Se Leges*  
*etiam non Imperi reprobare*; that the Words *Protectione*  
 and *exemptione* are not of *Roman*, but a modern *English* Stamp;  
 that in the ancient Copies of the *Conqueror's Laws*, this Epi-  
 stle is not to be found; that the *Conqueror's Laws* and *Cu-*  
*stoms of London*, in which this Epistle has been publish'd,  
 are subject to many Objections; and several other grounds  
 of Suspicion, which the Learned Dr. Gerard Langbain, Pro-  
 fess of Queen's College in Oxford, together with his learned  
 Observation upon the *Antiquities and Laws of the Romans in*  
*Britain*, in which, as well as in Universal History, he is  
 most skilful, has communicated to me.

From hence, 'tis evident, the *Britons* were govern'd by  
 the *Roman Laws*, as long as it made a Part of the Empire;  
 'till forsaken by the *Romans*, they were oblig'd to stoop to  
 the *Saxon* and *Danish* Yoke.

Tho' there remains but little Appearance of the *Roman*  
*Laws*, under the *Saxon* and *Danish* Governments, as being  
 intent in propagating their own, the more easily to keep  
 the *Britons* in Subjection; yet it will appear, the best  
 and most religious of their Princes, often imitated the *Ro-*  
*mans* in administering Justice to their Subjects.

Thus under the *Saxon Heptarchy*, Bede tells us, *Ethelbert*  
 King of *Kent*, about the Year of Christ 613, with Advice  
 and Consent of his Wife Men, made certain *Decrees* to be  
 observ'd in Judgments between his Subjects, according to  
 the *Roman Model*; in which he provides in the first Place,  
 against Robbers of Churches, of Bishops, and others; and these,  
*Bede* says, were wrote in *English*, and observ'd in his time.  
 This was the first of the *Saxon Kings* that made *Laws*: Af-  
 terwards two King of the *West-Saxons*, enacted more *Laws*;  
 then one King of the *Mercians*, put out the *Mercian Laws*;  
 and afterwards a third King of the *West-Saxons*, made seve-  
 ral *Laws*; and his Successors *Edward the Elder*,  
*Alfred*, *Edmund*, *Edgar*, *Etheldred*, all Saxons, and *Canute*  
 the Dane, publish'd their several *Laws*, which are yet extant,  
 and have been translated into *Latin*, by *William Lambard*.

But in all these, there are few Judgments agreeable with the *Roman Laws*, which after *Justinian's Time*, were scarce known to the *European Nations*; and the *Saxon Kings* were very active in establishing their Power, and many of them were remarkable for their Religious Zeal; and 'tis to their shining Piety, the Erecting and Founding so many Cathedral Churches, Monasteries, and Colleges is wholly owing. But this could not be expected from the *Danes*; who being Heathens, and invading *England* in the Year 800, not only destroy'd Cities, Towns, Churches and Monasteries, but Laws, Sciences, and all kinds of Learning.

These being extell'd, *St. Edward*, surnam'd *the Confessor*, form'd one *Common Law*, out of those of the *English, Danes*, and *Mercians*, which are still called *the Confessor's Laws*; and of which the *English* afterwards grew so fond, that in the *Norman Times*, whenever the People, oppress'd by the Severity of the *Norman Laws*, murmur'd and grew tumultuous; the Kings used to soothe and pacify them, by promising a Restitution of the *Confessor's Laws*: And in those Days, our Kings at their Coronations, oblig'd themselves by Oath to observe *St. Edward's Laws*.

Whilst the *Saxons* and *Danes* were Masters of *England*, the *Britons* who had fled from their Fury into *Wales*, were govern'd by their own Kings; yet none of their written Laws are extant, before their King *Howel Dha*; who, about 940, having called his Bishops and the most Learned of the Laity together, corrected the *Ancient* and made new Laws; which he commanded *Blegavidus Longuavidus*, a Learned Man for those times, to put into *Latin* and Publish; amongst which, the Eighty fifth Article highly commends the *Roman Law*, for providing, that where the Number of Witnesses is not defin'd, Two shall suffice; and for not admitting the Testimony of One: Yet that very Law mentions several Persons, whose sole Evidence is to be taken, as of the Lord between two Tenants, of an Abbat between two Monks, of a Father between two Children, of a Priest in a Matter attested before him, of a Virgin in a Rape, of a Thief impeaching his Accomplices at the Gallows; and some others. Nor can we expect much Light concerning the *Roman Laws* in these Ages, when *Justinian's Books* lay buried, and there was such an amazing Neglect of the Sciences over all *Europe*. The *Danes* especially destroy'd all kind

of the *Roman* Jurisprudence in this Nation; and those few *Roman* Remains which are to be seen in the Time of the *Saxons*, are borrow'd from the *Theodosian Code*, and Fragments of *Justinian* and *Ulpian*, which with some Parts of the *Germanic* Law, were then extant in *Europe*.

We therefore proceed to the *Norman* Period, in which the first Kings made many Alterations in the Government, abrogating former *Laws* and enacting several new ones; and laid the Foundation of the Government under our present Kings, who derive their Title and Succession from him. Now that the *Normans* introduc'd the Use and Authority of the *Civil Law* in several Cases amongst us, is plain from what follows.

*William* Duke of *Normandy*, having got Possession of the Crown of *England*, tho' he gave out he was Lawful Heir by *Edward's* express Promise, and as his Kinsman; yet he was not so nearly allied to *Edward* as *Edgar*, Sirnam'd *Etheling*, which signifies the Peoples Darling: And therefore, to strengthen his Cause of making War, he added another Reason, viz. the Death of *Alfred*, *Edward's* Brother, and Banishment of *Robert* Archbishop of *Canterbury*; from all which Causes, he concluded his War to be just against *Harold* and the *English*. But as soon as he had got the Crown upon his Head, he made several Alterations in their *Laws*, and instituted new Forms and Methods in the Courts of Justice; turning many of the *Allodial* Lands belonging to the *English* into *Feudal* Tenure, and imposing many Taxes and Tributes, to which the *English* had been Strangers till his Time: At length dying, and disinheriting his Eldest Son *Robert*, he made his Second Son *William*, Sirnam'd *Rufus*, Heir to the Crown of *England*.

This *William*, commonly call'd the *Conqueror*, in the Beginning of his Reign, was prevail'd upon by his Nobles to command *Edward the Confessor's Laws* to be observ'd, with such as he should add thereunto. But the Kingdom being divided, when he applied himself to make new *Laws* out of such as were borrow'd by the *Mercians*, *Danes*, and *East Saxons*, which were the chief People in this Nation, he preferr'd those of the *West-Saxons*, because they came nearest to the *Laws* of the *Normans*, who were originally descended from the *Danes*; these he mix'd with the *Laws* of *Normandy*, and then publish'd them in his

his own Name ; and many of them are still in force among us. And notwithstanding his Successors, *William II. Henry I. Stephen, Henry II.* and others after them, always pacified the People when they grew uneasie on account of the *Norman* Innovations, by promising to observe *St. Edward's Laws* ; yet they never were so good as their Word, only the Barons got from *K. John* and *Henry III.* the Charter of *Liber-ties*, by which the Severity of the *Laws* before in use was moderated ; which they call'd the *Great Charter*, and which is to this time highly valued by us.

The *Conqueror's Laws* at first seem'd harsh to the *English*, and they often attempted to shake off the Yoke, but Time and Custom made them easie and familiar, and till Degrees, acceptable to the People ; for the Force of a received Custom, is very great in all Places ; and therefore, a *Law* is compared to a Tyrant, but a *Custom* to a good King : And *Laws* which are given by *Prescript*, have a kind of Servitude in them ; whereas *Customs* receiv'd by Consent, govern those that are still free.

But above all, the Hardships introduc'd by the *Laws* of the *Conqueror*. This seem'd the most intolerable to the *English*, that whereas under their former Kings, the *Laws* were writ either in *Latin* or the *Saxon* Language, he order'd all his *Laws* and Proceedings in the Courts of Justice, to be writ in the *Norman* Dialect ; which neither the *English* nor *French*, many of whom were his Subjects, could understand : And moreover, that Children should be taught the same in the Schools ; which *St. Augustine* charges the *Romans* with as a Hardship, they having order'd the Nations they conquer'd, to make use of the *Latin* Tongue in all their Judicial Proceedings : Yet this continu'd here till *Edward* the Third's time, when a *Law* was made, that all Actions and Pleadings in the Royal Courts of Judicature, should be in the *English* Tongue.

That the *Customs* of *Normandy* were mix'd with those of *England* by the *Conqueror*, is evident in many particulars ; and this the *French* say, was the Reason that *Charles* the VI. and VII. Kings of *France*, after recovering *Normandy* from *Henry VI.* whose Ancestors had held it from the *Conqueror's* Time, did not immediately reform the *Customs* of *Normandy*, as he did those of other Provinces, because they had not been alter'd by the *English*, as agreeing with their own

own native *Customs*; the first that reform'd the *Customs* of *Normandy*, was *Henry III.* King of *France*, in 1183, till which time, the ancient *Customs* of that Countrey continu'd in force.

The *Conqueror* making use of his Absolute Power, introduc'd several new Forms, and either chang'd the Old, or erected New Courts of Justice: There is indeed some mention of *Chancellors* in the *Saxon* Times, but the Court of *Chancery* was instituted under the *Conqueror*, and continued by his Successors; in which, a *Chancellor* appointed by the King presides, and from him all Original Writs and Patents issue: It is the first in Dignity of all the great Offices. Out of this Court also come *Feudal Inquisitions*; and the *Chancellor* has Power of moderating the Rigour of the Law, and granting Relief in all Cases of Fraud and Deceit cognizable before him, in the same manner as the *Prætor* aided, supplied, and corrected the *Roman Law*: And tho' some Learned Men amongst us, have been of Opinion, that this Power was not granted in so full extent to the *Chancellors* by the *Conqueror*, but that it came to its present Grandeur by Degrees, in the Course of several Ages; yet, 'tis certain the *Chancellors* had the same Power under *Henry II.* from what *John of Salisbury*, Contemporary with *Thomas à Becket*, says in his Book,

*Quærendus Regni tibi Cancellarius Angli  
Primus sollicita mente petendus erit  
Hic est qui Regni Leges Cancellat iniquas;  
Et mandata pii Principis æqua facit,  
Siquid est cæst populo, vel moribus est inimicum;  
Quicquid id est, per eum definit esse nocens.*

And *Alexander Neckham* says of *Becket*, That he was prais'd for cancelling unjust Laws.

In the *Conqueror's* Reign, the Court of *King's Bench*, for determining Criminal and Civil Causes between the King and the Subject was erected; and likewise the Court of *Common Pleas*, for judging of Matters between the Subjects; as also the Court of *Exchequer*, in which all Matters relating to the Treasury, Fines, Taxes, Confiscations, and the like, are examin'd and determin'd: And tho' some have thought that these Courts, especially the *King's Bench*,  
were

were of an older Date; yet 'tis most certain they have subsisted among us from the *Conqueror's* Time.

But the *Conqueror* exerted his Power in nothing more than appointing the Terms for distributing Justice, and regulating the Method of Evidence, for whereas in other Parts of *Europe* the Courts of Justice are always open, except in Harvest and Vintage Seasons, and Holidays; the *Conqueror* established Four stated Terms of the Year, of so many Days each; out of which, no Prosecution could be carried on in any of these Supreme Courts: He also appointed all Evidence of Facts, to be heard and determin'd by Twelve sworn Men, whom we call *the Jury*; the Points of Law, if any should arise, being left to the Judges: Of which kind of Judgment, altho' there be some faint Appearance under the *Saxon* Government, long before the *Conqueror's* Time, yet it was by him reduc'd to a Method, and continues in the same to this Day.

The *Conqueror* also distinguish'd the Ecclesiastical from the Lay Courts; for when under the *Saxon* Administration, the *Alderman* or President together with the *Bishop*, held a Monthly Court of Justice, called the *Centenary* or *Hundred*. He commanded the *Bishops* and *Archdeacons*, not to interfere any more in the *Hundred*, but to confine themselves to some Place appointed by the *Bishops*, and there to judge according to the *Canon* or *Episcopal Laws*; and all were oblig'd to obey their Sentence upon Pain of Excommunication, and the King's Displeasure: The *Sheriffs* and other Officers being charg'd not to take Cognizance of any Matter belonging to the Spiritual Jurisdiction.

During the *Conqueror* and his Son *William Rufus's* Reigns, the *Civil Law* was not heard of in *England*; for the *Pandects* were not restored by the Emperor *Lotharius* till the Year 1128, which was the Twenty eighth of our *Henry I.* and *Irnerius*, after long teaching the *Civil Law* at *Bononia*, died there in 1190. At the very same that he began to profess it in *Italy*, *Vacarius* did the same here; for so *Gerardus of Dover*, writes in the Life of *Theobald* Archbishop of *Canterbury* under *Henry I.* *Tunc Leges & Causidici in Angliam primo vocati sunt quorum primus Magister Vacarius hic in Oxenfordia Legem docuit.* Now *Vacarius* read Law in the Year 1149, which was the Fourteenth of King *Stephen*, as appears from the *Norman History*, written by *Andrew Quercetanus*.

speaks thus of *Vacarius*; *Magister Vacarius* *vir bonus & juris peritus cum Leges Romanas in Angliam introduxisset* 1149; in *Anglia Discipulos doceret* *et magis quam pauperes, ad eum causa discendi confluxerunt* *pauperum de Codice & Digestis excerptos Libros comp. suit, qui sufficiunt ad omnes Legum lites* *que in Scholis frequentari solent, siquis eos perfecte noverit.* And the Civil Law was profess'd here by *Vacarius*, before *Placentinus* profess'd it in France, who after *Vacarius's* Death began to read upon it at *Montpellier*, in the Year 1196.

The Learned Mr *Selden* speaks very much in Commendation of this *Vacarius*, he being him to be the *Rogerus* who is reckon'd amongst *Isidore's* Scholars, and who wrote the Treatise *De Prescriptionibus*, so highly esteem'd and prais'd by the Interpreters; and that he was the Author of that Summary, which excited *Placentinus* to make his after him; and Age another, which all the Writers allow to be the best Summary of the Civil Law. Besides, 'tis plain this *Vacarius* was a Person of repute, from his being afterwards made Abbat of *Beck* in Normandy, and then upon the Death of *Theobald*, elected Archbishop of *Canterbury*; which See, either out of Religion, or fondness of a Monastick Life he refus'd, and died in the Monastery of *Beck*, in the Year 1180.

In the same Reign, *Theobald* Archbishop of *Canterbury* sent *Thomas Becket* to *Bologna* in *Italy*, there to Study the Civil Law, in order to qualify himself for Publick Business; who, upon his return was made Doctor of Law at *Oxford*, and is reckon'd one of the principal Civilians of that University: He was afterwards sent by the same *Theobald* to Pope *Celestine*, to move him for the Revocation of the Legatine Power granted to *Henry* Bishop of *Winchester*, the King's Brother; and Three Years after King *Stephen's* Death, by the Interest of *Theobald*, made Chancellor of England, by *Henry II.*

But so far as almost all the Clergy and Laity in King *Stephen's* time, applied themselves to the Study of the Civil Law, and the Number of Students became incredible; *Lines*, and Masters of Arts, either moved by Envy, or of ingratiating themselves with the Bishop of *Winchester*, who was *Theobald's* declar'd Enemy, prevail'd with *Stephen*, by an Edict, to forbid teaching the Civil Law in

in *England*, and making use of *Law-Books*; so *Vacarius* was silenced: Which Prohibition some will have to be understood of *Gratian's Decree*, at that time not publish'd, nor did *Vacarius* read upon the *Decree*, but the *Law*, which *Salisbury* says *Theobald* brought into *England*. But *Stephen's* Prohibition was of little Signification, for *John of Salisbury*, who was famous in those Days, writes, that the greater Opposition the Study of the *Law* met with from the Wicked, the more it flourish'd and grew into repute; and immediately after King *Stephen's* Death, the Study of the *Roman Laws* began to revive, and *Becket* was made Chancellor upon *Theobald's* Recommendation. ✓

In those Days, every one that affected Learning, both Civil and Ecclesiastical Persons, eagerly pursu'd the Study of the *Civil Law*, as the High Road to Rewards and Preferments; and the Authors of those Times, as *Jo. Sarisburiensis*, *Pet. Blesensis*, and *Girald. Cambrensis*, all shew by their Writings, that they were skill'd in the *Civil Law*; which is the Reason that the Professors of Divinity, Philosophy, and Arts of that Age have left grievous Complaints against the *Roman Laws*, the Admission of which, had extinguish'd all other Studies; that those who applied themselves to the *Law*, did not qualify themselves for it as they ought, by the previous Knowledge of other Arts; and that the Clergy were over diligent in following it: All these Faults, *Giraldus Oxoniensis* blames in the Students of his time; and tells us of a certain Clerk called *Martin*, who reprehended the *Oxonians* in a Publick Assembly, for suffering the Imperial *Laws* to smother the rest of the Sciences, as *Minervius* a famous Orator of *Paris* had foretold: All which, *Giraldus* wrote under *Henry II.* for he Dedicated his Works to *Baldwin*, Archbishop of *Canterbury*, who held that See in his Reign. And *Daniel Morley*, who travell'd first into *Portugal*, and then to *Tholouse* to Study; after he return'd to *Oxford*, where he says the Study of the *Civil Law* was in great vogue; complains, that *Aristotle* and *Plato* were shut out of Doors for *Sejus* and *Titius*, and *Ulpian's* Traditions deliver'd in Golden Letters: And *Roger Bacon*, a great Philosopher and Mathematician of the same Age, blames the Prelates for neglecting the Study of Divinity, and that the Cavils of the *Law* had obscur'd Philosophy; putting them in mind at the same time of King *Stephen's* Pro-

Prohibition; and that the *Regulars*, viz. the *Franciscans* and *Dominicans*, tho' otherwise very ignorant, were famous for their great Skill in the *Law*; and the *Secular Priests*, out of Covetousness and a Desire of Preferment, had for Forty Years addicted themselves to the Study of the *Law*; and not wrote one single Treatise in Divinity all that time.

In the Reign of *Henry III.* *Stephen Langton*, a celebrated Professor of Philosophy and Divinity in *Paris*, and afterwards Archbishop of *Canterbury*, rattles off the Monks of his time, for affecting to be called *Lawyers* and *Decretists*, and forsaking the Field of the true *Boox*, that is, the Holy Scriptures, and betaking themselves to *Secular Knowledge* for *Worldly Interest*. And *Robert Holcot*, of the Order of Preachers at *Northampton*, complains of the vast Numbers that flock'd to the Study of the *Civil Law*; *Leges & Canones istis temporibus innumerabiliter sunt sacunde, concipiunt divitias & parviunt dignitates ad illas confluunt, quasi tota multitudo Scholarum his diebus.* Now *Morley* flourish'd in the Reign of *Richard I.* *Neckhamus* and *Longtonus* under *Henry III.* and *Holcot* under *Edward III.* And *Eatred* Abbat of *Ri----*, in the Diocese of *York*, and *Hugo de St. Victoire*, writing of the Abuses in Monasteries, reckon up Twelve, in which *Monachus Causidicus*, or a *Monk-Lawyer*, has the Fifth Place.

But the flourishing State of the *Civil Law* at *Oxford* at that time, is sufficiently evident from the Professors of it, whose Memory is preserv'd to this day: For soon after *Irnerius*, there were many famous Professors of it at *Oxford*, who were in great reputation, even with the *Italians*.

Amongst them is *Aldricus*, Professor of Laws at *Oxford*; whose Sayings are often quoted by *Accursius* in his Glosses, and who was the Author of many Learned Books upon the *Civil Law*.

After him, *Richard*, surnamed the *Englisman*, and *William de Dororeda*, were, according to *Jo. Andreas*, Professors of Laws at *Oxford*. The first of them wrote a *Concise* Treatise, entituled, *Summa Ordinis Judiciorum*; the second, another *De Ordine Judiciorum*, and is by *William* and others called *William of Drogheda*.

After these, came *Alanus*, *Gulielmus*, *Jo. Severleus*, Professor of Laws at *Oxford*, who publish'd Lectures upon the *Law*, *Stephanus Anglus* and the Famous *Mylius*, with many

many others : And the Universities so abounded with Students of the Law, that *Matth. Paris* reports a Constitution of Pope *Innocent IV.* then publish'd, forbidding the Admission of any Advocate or Professor of Laws to any Ecclesiastical Dignity, and the reading of the *Civil Law* for the future in the Kingdoms of *France, England, Scotland, Spain* and *Hungary*, notwithstanding the respective Kings and Princes should consent thereto : But these Princes still preserved the Imperial Laws ; and our Kings, especially *Edward I.* and *Edward III.* were great Friends and Favourers of the Students and Professors thereof.

In *Edward the Third's* Reign, when the Chapter of *Winchester* had elected *William de Raleigh* for their Bishop, against the King's Inclinations, he appeal'd from their Election to the *Roman Pontiff*, and sent his Appeal to the Readers of the Law, and other Men skilful in that Science at *Oxford* for their Opinion, who approved of it.

In the same Reign, when *Masters* and *Bachelors* in *Divinity* and *Arts* at *Oxford*, trusting in their Numbers, made certain Statutes against the *Doctors* and *Bachelors* of *Laws*, relating to the Answers of the *Bachelors* in both Faculties, and had proceeded to a Sentence of *Proscription* against such as refused to submit to them, the King, upon Complaint of the *Doctors* and *Bachelors* of *Laws*, appointed the Bishops of *London* and *Ely*, and others his Delegates, to examine the matter ; who having heard the Parties, avoided the Statutes, and revoked the Sentence ; and the same was afterwards ratified by the King's Charter, wherein he promises his singular Favour and Protection to the *Doctors* and *Students* of the *Civil Law*. All which was afterwards confirmed by the Charter of *Richard II.*

But the Lawyers of other Countries relate, that our King *Edward I.* out of his Care to have the *Civil Law* taught in *England*, (a Circumstance omitted by our own Authors) invited *Francis Accursius*, Son of the Famous *Accursius* who wrote the *Glosses*, from *Bologna*, where he profess'd the Law, into *England* to teach it at *Oxford* ; who taking *Tholouse* in his Way, read Publick Lectures there upon the Famous Law. *L. unic. C. de Senten. que pro eo quod interest.* Of which *Bartolus* takes notice in his Commentaries upon the same ; and he was called the  
King

King of *England's Advocate* by him, and was sent to read *Law at Oxford*; and there is still extant a Precept to the Sheriff of *Oxfordshire* to put him in Possession of the Royal Mannour at that Place, for him and his Family to dwell in. He had accordingly the Mannour of *Marlegn* given him for that purpose, which then was in the King's hands, by reason of the Minority of *Hugo Le Dispense* Son of *John* deceas'd, who held the same *in Capite*; in which Precept the King calls *Francis Accursius* his Trusty and Well-beloved Secretary: And the same *Accursius* seems to be described in another Letter, wherein he is called *Francis of Bologna, Doctor of Laws, and Counsellor to the King of England*. But whether he taught the *Law at Oxford*, is not certain: For all that the *Italian Authors* say of him, is, that fearing his Goods should be confiscated, he return'd to *Bologna*.

The same King *Edward*, when, upon the Death of *Alexander* King of *Scotland*, there arose that arduous Question between the *English* and *Scotch*, concerning the direct Dominion of all *Britain*, and the Parliament was summon'd to meet at *Norham* upon *Tweed*; sent for all the *Canonists* and *Civilians* throughout his Dominions; because he look'd upon them to be the most proper Judges of the Affair in Dispute.

Another remarkable Monument is the Letter of King *Henry* to the other University of *Cambridge*; wherein he commands the Students in the *Civil* and *Canon Law*, diligently to attend the Publick Lectures in their respective Faculties; and to pay the *Ordinaries* and *Beadles* belonging to the same their Annual Salaries.

This Letter, *Caius*, in his Defence of the Antiquity of this University, says, was wrote by *Henry I.* in the Year 1101. and is still preserv'd in their Registry: But it is utterly inconsistent with the History of those Times: For *Justinian's Books* were not then recover'd by *Lotharius*; nor had *Gratian* publish'd his *Edict*; nor did any of our Kings take upon them the Stile and Titles of *Lord of Ireland*, before *Henry II.* nor of King of *France*, before *Edward III.* So that this Letter must have been from *Henry V.*

From what has been said, it is plain, th  
*Civil Law* has flourish'd in this Kingdom  
 of King *Stephen*; that our Kings have ever  
 Royal Protection, and since the Reign of *He*  
 an Annual Salary for the Maintenance of *R*  
 the *Civil Law*, who before were supported by Contribu-  
 tions from their Audience. And in the University of *Ox-*  
*ford* King *James I.* besides the Yearly Stipend, added a  
*Prebendary* in the Church of *Salisbury* towards the Support  
 of the *Professors* of the *Civil Law* in that University: Be-  
 sides which, several of the Founders of Colleges in both  
 Universities have appropriated many Fellowships for the  
 Maintenance of Students in the *Civil Law*.

When the Episcopal Power decreas'd, the Revenues of  
 the Church began to be diminish'd, and the Study of the  
*Civil Law* languishing for want of Encouragement, *Edward*  
 the Sixth, a Prince endow'd with all kinds of Royal Ver-  
 tues, and a great Encourager of Learning, took care to  
 to revive it: For in the second Year of his Reign having  
 appointed the Earl of *Warwick*, the Bishops of *London*, with  
*Rocheſter* and Lord *Paget* Comptroller of his Household, and  
 several other Great Men, to visit both Universities, he gave  
 them Instructions, That whereas it had been represented  
 to him, that the Study of the *Civil Law* in both Universi-  
 ties did not only slacken, but was in danger of being to-  
 tally extinguiſh'd; therefore they should use all their Pow-  
 er to revive and encourage the same.

So much for the *Civil Law* in the *Schools* and *Universities*.  
 It remains, that we shew, of what Use and Authority  
 it is in the Courts of Justice.

The Kings of *England*, above all other Princes of *Eu-*  
*rope*, boast of their Independenc, of the *Roman Empire* and  
 its Laws; because the *Romans* had no other Right, but  
 that of Arms, to *Britain*; wh ch, at last, they relinquish'd  
 to the Natives. Hence it is, that the *Italian*, *Spanish*, and  
 Lawyers of other Countries commonly assert, that our  
 Kings acknowledge the Emperor neither in Law nor Fact,  
 have no Superior in their Dominions but God alone; exer-  
 cise all Rights of Sovereignty; are Monarchs, and, as Sove-  
 reign

reign Princes, no Appeal can lie from them; that since *Constantine the Great*, they have Power of wearing the Imperial Crown, and in the Ceremonial Books of the Church of *Rome*, are set down among the few Kings who are Crown'd and anointed by their own *Laws*: Therefore *Cajacius* had no Foundation for saying, the Kings of *England* were once *Feudataries* to the Emperor. but those of *France* never; whereas both *France* and *England* shook off the Imperial Yoke in the same Age. But the *Britons* make another Tide, that is, of a Derelict; for they were utterly abandon'd by the *Romans*, whose Assistance they implor'd against the *Scots* and *Picts*, and that they might be intirely a free People, did not permit the *Roman Laws* to be mix'd with their own.

For this Reason, perhaps, our Interpreters say, that when other Princes or Private Persons mention the *Law* in *Bargains, Contrasts, Statutes, Compromises, Wills*, or other Acts whatsoever, it is to be understood of the *Roman Civil Law*, which is common to all Nations; but when the King of *England* mentions the *Law*, his own, that is, the *Law of England*, is always intended: And therefore, *Edward II.* made a *Law*, that the Imperial *Notaries* should not exercise their Office in the Kingdom of *England*, lest he should thereby seem to acknowledge a Dependence upon the Empire.

But our *Lawyers* do not allow the Kings of England the same Independency in relation to the Pope, to which See they say they are *Fendataries*, and that King *John* surrendered and acknowledg'd himself to be a Vassal of Pope *Innocent III.* Wherefore, when *Alexander III.* allow'd the Question concerning Possession of Lands in *England* to be determinable by *Henry II.* *Johannes Hestiensis* observes, that if it had happen'd in King *John's* Reign, the Pope, without derogating from the Royal Authority, might have taken upon him to decide the Question; because that King had made his Kingdom *Patronary* to the See of *Rome*: And therefore, all *English* *Monasteries* apprehended in *England*, were not to be *dispossessed* without here by the Pope's *Marshall*: But these *Popes* have no other Proof for the Popes have no other Proof of a certain Tax by *Ina* one of our *Kings*, from whence they pretend our

Kings are tributary to them: Besides, there is a wide Difference between being Tributary and Feudatary; for *Cujacius* himself allows, that *Charles* King of *France* paid a Tax to the Pope, and yet all the *French Lawyers* assert their Kings are more independant than any, of Foreign Jurisdiction: But our Kings could in neither of these Cases oblige their Successors nor any ways impair their Rights, without the Consent of Parliament.

The *English* have ever preserv'd their *Laws* with the utmost Exactness; and when any Attempt has been made in Parliament to change or moderate them with the Equity of the *Roman Law*, it has been strenuously oppos'd, of which there are several Instances in the Journals; Thus when the Bishops in *Henry* the Third's time, moved for an Act to Legitimate Children by subsequent Marriage, as *Justinian* has, upon very good and sufficient Reasons set forth, in the *Constitution* for that purpose, and the Church allow'd the same; the Earls and Barons unanimously answer'd, *Nolumus Leges Angliæ mutari, quæ huc utque usu sunt approbatæ*: We will not suffer the *Laws* of *England*, hitherto approved by use, to be changed. In the Parliament under *Richard II.* when *Thomas* Duke of *Glocester*, and others of the Nobility accused *Alexander Nevil* Archbishop of *York*, *Robert de Vere* Duke of *Ireland*, and others of Treason, and the Common *Lawyers* and *Civilians* were requir'd to give their Opinion; they answer'd, that the Complaint or Accusation was not regular, either according to the *Law* of *England* or the *Civil-Law*: But the Earls and Barons said it was according to the *Usage* of Parliament, and protested they would never suffer the Kingdom of *England* to be govern'd by the *Roman Law*. And tho' 'tis not unlikely this might have been the Effect of Passion, and the Heat of those factious Times, yet it has been ever since duly observ'd; and all Authority and Use of the *Civil Law*, utterly excluded from the Courts of Justice, wherein the *Law* of *England* is practis'd.

The Courts of Justice in this Kingdom proceed differently, some according to the mere *Law* of *England*; as the Court of King's Bench, Common Pleas, and other inferior Courts depending on them; others do not follow the mere *Law* of *England*, but proceed according to Equity and good  
Con-

Conscience; as the High Court of *Chancery*, and Court of *Requests*; of which I shall speak separately.

The Courts which follow the mere *Law of England*, have nothing in them common with the *Roman Civil Law*; for they admit of no Proof but what is given by the Evidence of living Witnesses in Court; of which our Jury of Twelve Men, who are sometimes ignorant both of *Law* and *Letters*, are Judges; the Points of *Law* only arising upon the Fact, being left to the Direction of the Judges.

Now the *Law of England* consists of certain *Customs*, (and therefore is called *Customary* and *Unwritten*,) and the *Statutes* enacted by the King, in and with the Advice of his Parliament; wherein, if any Cases are omitted, or Difficulties arise from the Ambiguity or Obscurity of the *Laws*, which may require Explanation, the Judges have not recourse to the *Civil Law*, as in other Nations of *Europe*, but are left to their own Judgments and Consciences, unless the Difficulty be very great, and then it is refer'd to the Parliament.

To this *Law of England*, we add the Writings of certain famous *Lawyers*; as *Glanvil*, *Bracton*, *Briton*, *Thornton*, and *Fleta*, who have explain'd the *Customs* and *Laws* of *England* in their Works, as *Papinian*, *Ulpian*, and *Paul*, did those of the *Prators Edicts* and *Constitutions*; to which afterwards were added the Yearly Reports of adjudge'd Cases, in the Royal Courts of Justice under our Princes, from the Time of *Edward III.* wherein the Arguments and Reasonings of the several Judges are reported, very often with great Accuracy and Judgment; and these have since been enlarg'd, by the Reports of *Dyer*, *Plowden* and *Coke*, all celebrated *Lawyers*, of Cases adjudg'd in their Times: And these Books of Reports, are now used as *Commentaries* and *Interpreters* of the *Law of England*.

The first Writer upon the *English Law*, is *R. Glanvil*, who was Chief Justice under *Henry III.* after him, *Henry Bracton*, likewise Chief Justice under *Henry III.* then *John Briton*, Justice of *England*. And under *Edward I.* *Gilbert Thornton*, Chief Justice of *England*, abridged *Bracton*; about the same time, an uncertain Author, called *Fleta*, lately published a celebrated *Selden*, reviv'd the Name of *Thornton*, who was buried in Oblivion. Yet neither the Writings

of these Learned Men, nor the Reports before mentioned, have the Authority of *Law*; for these Treatises were written by Men that had no Power of making *Laws*; nor are the Judges for the time being, oblig'd to follow the Opinions of their Predecessors, unless they find the Case agrees in all Point with that before them: For no one has a Power over his Equal; nor a preceding Judge, any Right or Authority over his Successor; their Powers being in all things alike, and their Judgments to be directed by the *Laws*, not by Precedents, as *Justinian* has observ'd.

All these Common *Lawyers*, were excellently well versed in the *Civil Law*, from whence they have borrow'd a great deal, both to explain and illustrate the *Law of England*. *Bracton* was Professor of *Civil Law* at *Oxford*, and *Britten* Doctor of *Laws*; and both *Glanvil* and *Bracton* began their Books in the same Words and Method, as *Justinian* does his *Institutes*; and their Treatises often quote the *Civil Law*, and apply the Authority thereof, not only in deciding Private Matters, but such as relate to the Publick Administration. And so much was the Study of the *Civil Law* in fashion for the Space of Two hundred Years, between the Reigns of *Stephen* and *Edward III.* that it was frequently cited, not only in the Universities, but at the Bar, in Pleadings, Reports, and Judgments of Causes, which *Selden* has shewn by many Examples in his Writings upon *Fleta*; the Professors of the *Civil Law* were in so high Esteem in those times, that under *Henry II.* there were several famous for their Skill therein, who were also Clerks; as *Simon de Patshull* Dean of *St. Paul's*, *Philip Lovell*, *John Mansell*, and many others, advanc'd to be Judges in the Supream Courts of Justice.

The Courts which do not proceed by the mere *Law of England*, but according to Equity and Conscience, are first, the High Court of *Chancery*, in which there are many Things that agree with the *Civil Law*. In this Court, Actions are carried on by Petition or Bill, Witnesses secretly examin'd, the Acts or Decrees of Court written in *English*, not in *Latin* or *French*; there is no Jury, but all Sentences are pronounc'd by the Chancellor; the greatest part of whom, since *Tho. Becket*, under *Henry II.* were *Bishops* or Clerks, and learned in the *Civil Law*. All the

Reign of *Henry VIII.* when *Lord Rich*, the first Common Lawyer, was by him made *Chancellor*; after whom, some *Bishops* Civilians, but chiefly Common Lawyers were by our Kings advanc'd to that High Office.

The *Assessors*, or *Masters* in this Court, were also generally Doctors of the *Civil Law*; and 'tis plain the *Clerks* were all well skill'd therein, from the Book of Original Writs, which is deservedly called the Foundation of the *Laws of England*, and Register of the High Court of *Chancery*, resembling the Book of *Actions*, publish'd for the Benefit of the *Roman People* by *Cneius Flavius*; who, as a Reward for his Service, from the Condition of a manumitted Freeman, was made Tribune of the People, and a Senator.

That these Writs and Rescripts were written with great Brevity, Accuracy, and Judgment, by Persons skill'd in the *Roman Laws*, is obvious to any one that reads them, and is what our late Attorney-General *Noy* has often observ'd to me: The Care of making these, is by Statute committed to the Clerks of this Court; who being all *Civilians* and *Clerks*, and therefore prohibited to marry, a Law was afterwards enacted in their Favour, for enabling them to enjoy their Employments, and reap the Benefit of their Studies after Marriage.

The *Keepers of the Privy Seal* also, in the Court of *Requests*, were formerly all Bishops or Prelates, learned in the *Roman* or both *Laws*; and the *Masters of Requests*, who by the Jurisdiction of the said Court, had Power of judging and determining according to Equity and good Conscience, were also Professors of the *Civil Law*; for there is no Law so well adapted to the Practice of all Courts, where *Customary Law* is not observed, as the *Civil Law* of the *Romans*; which contains the most ample Rules about *Contracts*, *Wills*, *Offences*, *Judgments*, and all Human Actions.

To be short, our Kings have ever cast a favourable Eye upon the *Bishops*, *Clerks*, and Professors of the *Civil Law*; transferring them generally to the chief Offices of the Government, as our Historians do witness: And 'n the Reign of *Henry VIII.* all the great Employments, as *Chancellor*, *Privy Seal*, of the *Rolls*, of the *Ward*, *Exchequer*, were all in their Hands.

But to return to my purpose: The Courts, in which, by the Custom of *England*, they proceed by the *Civil Law* only, are reducible to Three Heads; viz. the Court of Chivalry, or Military Court, under the Constable and Marshal of *England*; the Court of Admiralty, and the Ecclesiastical Courts, under the *Archbishops*, *Bishops*, and *Archdeacons*; which have all hitherto continued in the Hands and Direction of *Civilians*.

In the Military Court, the Judges are the Constable and Marshal of *England*; who are of equal Authority as to giving Judgment: But the Executive Part is wholly in the Marshal. There is no Appearance of these Officers under our *Saxon Kings*; they were introduc'd after the Conquest by the *Normans*, in Imitation of the *French*, who copied after the *Romans*, and anciently had their Constables and Marshals, from the time of *Charlemagne*; much resembling the Masters of Horse, and Captains of the Body Guards among the *Romans*, as the *French Historians* do testify.

These, with us, were always reckon'd Offices of the highest Honour, that of the Constable being generally conferr'd upon the King's Brethren, Uncles, or some other of the chief Nobility; and the same was Hereditary in the Family of the *Staffords*, Dukes of *Buckingham*, till it ceased in the Time of *Henry VIII.* So great was the Constable's Authority, that it became suspected by some of our Kings; and Chief Justice *Finex*, being ask'd by *Henry VIII.* how far the Constable's Power reach'd, declin'd giving a direct Answer, and said, The Decision of that Question belong'd to the *Law of Arms*, and not to the *Law of England*. And from thence forward, that Office was seldom given to any by our Kings, and then only *pro hac vice*.

The Office of Marshal of *England*, has likewise antiently been fill'd by many of the Chief Nobility; but *Thomas Mowbray*, Duke of *Norfolk*, was the first that had the Grant of it under the Title of Earl Marshal of *England*, from *Richard II.* and the same Family is in Possession of it at this Day.

The Constable and Marshal, in the Military Court, have Cognizance of Crimes committed out of the Kingdom, of Contracts made beyond Sea, and Matters relating to War and Arms, either within or without the Kingdom of *England*.

If one *Engliffman* accuse another of Treason acted in Foreign Parts, the Trial is before the Constable and Marshal; and the Proof by Witnesses, or according to the Ancient Usage of this Court, by single Combat. If one of the King's Subjects kill another in *Scotland*, or any other Countrey, he cannot be tried in any of the Courts which use the Law of *England*, but before the Constable and Marshal; nor are these Matters cognizable by the Parliament. Therefore, when the famous Sea-Captain, Sir *Francis Drake*, had commanded *Dourish* to be put to Death in *America*, in the Twenty fifth of *Eliz.* the said *Dourish's* Brother and Heir petition'd the Queen for Justice; and the Judges being consulted thereupon, were of Opinion, that the Fact was cognizable only before the Constable and Marshal: But the Queen, for weighty Reasons, refusing to appoint a Constable for that purpose, the Prosecution dropt. And lately, when *William Holmes*, an *Engliffman*, killed *Wife*, another *Engliffman*, in the Island of *Terra Nova* in *America*, Anno 1632, and *Wife's* Widow had leave to prosecute for the Death of her Husband; the Earl of *Lindsey* constituted Constable for that Occasion, and Earl *Arundel*, Earl Marshal of *England*, condemn'd *Holmes* by Sentence publicly pronounced in the Court Military, in the Month of *April* 1633, to suffer Death, which had been put in Execution, if the King had not thought fit to grant him a Pardon.

If an *Engliffman* wounds another of the same Countrey in *France*, and he dies of his Wounds after his return to *England*, the Criminal cannot be tried by the Law of *England*, but the Prosecution must be in the Constable's Court; and tho' some Statutes have brought Treason in certain Cases, under the Cognizance of the Judges of the King's Bench, or Commissioners specially appointed by the King; yet the Jurisdiction of the Constable and Marshal are not understood to be taken away thereby.

The Cognizance of Contracts made in Foreign Countreys, belongs also to this Court. *Peuntney*, in *Henry* the Fourth, brought his Action in this Court against *Bornes*, for Ten Thousand and twenty Pounds *Engliff*, lent him at *Gascoigny*, as may be seen in our *Engliff*; and amongst the Records in the Tower, are abundance of Instances of Judgments given in this Court,

Court, upon Civil Contracts made beyond Sea, especially in the Reigns of *Edward III. Richard II. Henry IV. V. and VI.* when our Kings were in Possession of *Northandy, Aquitaine, Gascoigny, Anjou*, and several other large Provinces in *France*; all which are taken notice of by our *Lawyers*. And 'tis an Opinion generally receiv'd, that the Cognizance of all Foreign Contracts belongs to this Court, as that of those made in the Kingdom of *England*, does to the Common Law Courts.

But this was afterwards chang'd, and the Cognizance of these Matters brought into the Courts of *Common Law*, by a Fiction declaring such Contracts to be made within the Kingdom: For now the *Law* is, that if one *Englishman* robs another beyond Sea, or enters into Covenants there, the Matter may be tried in any of the King's Courts, by supposing the Crime to have been committed, or the Contract made in some Place within the Kingdom; in the very same manner as the *Romans* preserv'd the Validity of those Persons last Wills who were taken Captive by the Enemy, by the Fiction of *Postliminy* and of the *Law Cornelia*: For when a *Roman* by falling into the Hands of the Enemy lost his Liberty, with all the Rights of a *Citizen*, and his Will, if he had made any, became void thereby; if he happen'd to return Home, he was by this Fiction supposed never to have been taken Captive, but to have been all the while in the City: But if he died in his Captivity, then the Fiction of the *Law Cornelia* came in to his Aid, and supposed he dy'd before he was taken, and was a *Citizen* in full Possession of all his Rights at that time. Yet there was this Difference between those and our Modern Fictions, that theirs were introduc'd by the *Roman Laws*, in favour of the Last Wills made by their Citizens; not by the Practice alone of *Lawyers*.

All Controversies relating to War and Arms, are determin'd in the Constable's and Marshal's Court. If a Foreigner, coming into *England*, raises a War against the King, he is not punishable by the *Law* of the Land, but by a *Court Marshal*: And for that Reason they are called the *Keepers of the Common Peace of the Kingdom*; which in Matters of War and Arms is committed to their Charge.

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And as there are but two Degrees of Nobility with us, viz. those of the first Rank, as Dukes, Marquisses, Earls, Viscounts, and Barons; and the second, as Knights and those we call Gentlemen: So these are distinguish'd from the common People by Arms and Ensigns, concerning which, all Controversies are cognizable in the Military Court; and there have been frequently very warm Disputes in this Court about the Right of Arms, when Two Families have claim'd the same, and one endeavour'd to exclude the other from that Right. Such were those Causes between *Reginald Grey*, of *Ruthin*, and *Edward Hastings*; between *Richard Scrope* and *Grovenor*, between *Thomas Bedwin* and *Nicholas Singleton*, and many others; which after long Strife have sometimes been decided by Sentence of the Judges, and sometimes by Combat: For when Two or more assume the same Arms and Ensigns, or any one pretends another has no Right to bear Arms, not being a Noble or Gentleman, or if any Man complains of Injury done him, by Diminution of his Honour, and calling his Right of bearing Arms in question. All these Matters are to be tried in the *Constable's Court*; the Dignity of which is very much augmented, by the ministerial Officers of the same; namely, *Garret King at Arms*, who regulates the Solemnities of the august Order of the Garter; *Clarenceux King at Arms*, for the South; and *Norrey King at Arms* for the North: And under them, Six inferior Officers, whom we call *Heralds*, whose chief Business it is, to be the Messengers of Peace or War, to adjust the Order of Precedence, make our Genealogies, and Arms of Families, to Order the Solemnities at the Coronations of our Kings, and of Duels before the Constable and Marshal; to lead up the Funerals of Noblemen and Gentlemen who are bur'd publicly; besides many other Things incumbent upon them by their Office. And all these are associated in one College, endow'd with many Privileges by our Kings; and exercise their Offices under the Power and Jurisdiction of the Constable and Earl Marshal.

Now the Use and Authority of the *Civil Law* in this Court, is allow'd by all our Common *Lawyers*; and therein is term'd the *Law of the Kingdom*, the *King's Law*, and the *Law of the Land*: And it is confess'd, that the Causes cogni-

cognizable in this Court, are to be tryed by the *Civil Law* and *Custom of Arms*, and not by the *Common Law* of *England*: For which Reason, such Criminals as are condemn'd in this Court, neither forfeit Estate, nor Blood.

When the Constable and Marshal are otherwise employ'd by the Publick, some Doctor, or other expert Civilian, is appointed to preside in this Court; and under *Edward IV.* there was a *Promoter of Royal Causes* constituted in this Court; which Employment, King *Charles* in the Seventh Year of his Reign was pleas'd to confer upon *Me*, by his Letters Patent under the Great Seal of *England*; for all Causes therein, are prosecuted according to the Form prescribed by the *Civil Law*, that is, by Libel or Petition, Witnesses secretly examin'd, Exceptions, Replications, and all other Things, done according to the Rules of the *Civil Law*; Sentences and Appeals put into Writing: And for the Honour of this Court, when any Declinatory Exception is made to the Jurisdiction thereof, the same is made to the Privy Council; and all Appeals from Definitive Sentences, to the King himself, and not to the *Chancellor*; who generally appoints some of the Peers, and Doctors of *Civil Law* for his Delegates. All this is to be made out by the Publick Acts of this Court, which are to be seen amongst the Records in the Tower; in which we may also meet with several learned Quotations out of the *Civil Law*.

Secondly, In the *Admiral Court*, the High Admiral of *England* is Judge, or his Lieutenant or others delegated by him: Now the *French* affirm, that this Office of Admiral had its Original from them, and from thence grew in fashion in other Countries; it does not indeed appear that we had any Admiral under the *Conqueror*, and several of his Successors Reigns, till *Edward* the First's Time; from which Date, our Kings have generally made some of the chief Nobility Admirals of *England*: Because in a Kingdom almost surrounded by the Ocean, it was necessary his Power should be very great, to whom the Safeguard of the Sea, and Coasts thereof, are committed: For all Crimes done upon the Sea, and Civil or Marine Transactions there, are cognizable in this Court; the Sea being with-  
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out the Dominion of the *Common Law*, and under the Power of the Admiral, as our *Common Lawyers* themselves acknowledge.

In this Court, the Admiral administers Justice according to the *Civil Law* and *Customs* of the Court; for the *Common Lawyers* do themselves allow, the *Civil*, exclusive of the *Common Law* to be in use here: And therefore, Offenders condemn'd therein for Murder, Theft, Piracy or other Crimes, except Treason, forfeit neither Blood nor Estate. But because the judging of Crimes in this Court by the *Civil Law* proved inconvenient, the accused Person not being subject to Conviction, but by his own Confession, or Eye-Witnesses of the Fact, which can seldom be expected in Matters done at Sea; by which means, Offenders of the most criminal Nature often escap'd with Impunity: It was therefore enacted under *Henry VIII.* that the *Civil Law* should be so far laid aside, and Matters of Fact, in criminal Cases should be determin'd by a Jury of Twelve Men, as in the *Law of England*.

Besides the *Civil Law* in the Admiral Court, the *Laws of Oleron*, made by *Richard I.* who was in Possession of that Island, are in use; and also the *Marine Constitutions*, publish'd by several Princes at *Rome, Pisa, Genoa, Marseilles, Barcelona, Messina*, and other Places; together with the *Customs* set down in the Publick Acts of that Court. And lastly, under this Court may be reckoned the *Court-Merchant*; in which all Controversies about Contracts between Merchants, are determin'd in Equity and good Conscience, according to the Rules of the *Civil Law*.

Thirdly, In the Ecclesiastical Courts, the *Archbishops, Bishops, Archdeacons* or *Vicars-General, Commissaries* or *Officials* appointed by them, are Judges; whose distinct Power is deriv'd from the Conqueror, who separated the Episcopal from the Secular Jurisdiction: These, by the Indulgence of our Kings and *Custom of England*, have the Cognizance of many Causes both Criminal and Civil; as Blasphemy, Apostacy, Heresie, Schism, Simony, Incest, Adultery, Whoredom, Fornication, Chastity attempted, Sacred Orders, Infratutions to Ecclesiastical Benefices, or Relinquishment of the same; Performance of Divine Service, Matrimony, Divorce,

voce, Tithes, Offerings, Mortuaries, repairing of Churches, Dilapidation of Parsonage-Houses, Pensions, Procurations, Wills, Codicils, Legacies, Succession to Intestates by Administration, and several other Matters which are exactly taken notice of by our *Lawyers*: All these are determin'd in this Court by the *Civil* and *Canon Law*, together with the Provincial *Constitutions* of *Canterbury*, and those of the Pope's Legates sent hither to our Kings; from all which our Ecclesiastical Law is taken, and by which it is allowed, all these Causes are to be decided.

As to the *Civil Law* there is no dispute, for it has been receiv'd by the Consent of all, and in this Court is called the *Law of the Land*; but for the *Canon Law* there has been some Difficulty, ever since the Reign of *Henry VIII.* The Power of the Bishops and Prelates before his time, and the Deference of our Kings to See of *Rome* was so great, that most part of the Decretal Epistles contain'd in the *Canon Law* were directed to the *English*.

But after *Henry VIII.* had thrown off the Pope's Surrender, it was propos'd in Parliament to abrogate the *Canons*, and make a new Ecclesiastical Law; the Care thereof being committed to Thirty Persons, of the highest Characters and Reputation in *Divinity*, *Civil* and *Common Law*; who, either finding themselves unequal to the Task, (for 'tis not the Work of a few, nor of one Age,) or for other Reasons, went no farther than drawing the Plan or Project of a new Law, which was rejected; so the old *Canon Law* was confirm'd by a *Statute*, excepting such Articles thereof as were repugnant to *Holy Writ*, the King's Prerogative, the Law, Customs and Statutes of *England*; and the same is still in use, as in the Dominions of other Princes.

After this *Canon Law*, we receive the Archbishop of *Canterbury's Constitutions*, made in his Provincial Councils; of which, those that *Stephen Langton* directed to *Henry Chicheley*, have been illustrated with learned Commentaries, by Doctor *William Lywood*, made Official by Archbishop *Chicheley*; who was also a great Lawyer in the Court of *Canterbury*; and he deserves the more to be remember'd, because he was the first of the few *English* Writers that have written upon the *Civil Law*. Whilst he was Official, he was sent Embassador by *Henry V.* to the Kings of *Spain* and *Portugal*;

from

from whence he return'd, after the King's Death, to his Place of *Official*, and was made Keeper of the Privy-Seal, and Bishop of *St. David's*.

Next are the *Legatine Constitutions*, made by the Pope's Legates: First by *Otto*, and then *Orthoben*, sent hither by *Clement IV.* whom also he succeeded in the Papal Chair; upon which, *Jehn de Arbo*, Doctor of both *Laws*, has given us *Glosses* and *Commentaries*.

By all these they proceed in the Ecclesiastical Courts, according to the Rules of the *Civil* and *Canon Law*; the Action is propounded by Libel, after Suit contested; the Witnesses are examined in private, Exceptions and Replications are given, and the Terms of Causes prescrib'd by both *Laws* observ'd; the Sentences are in Writing, and Appeals lye from the Bishop to the Archbishop, from the Archdeacon to the Bishop, or directly to the Archbishop; from whom, as it was usual to Appeal to the Pope till the Reign of *Henry VIII.* so ever since Appeals are carried to the King in *Chancery*; where Delegates being appointed, either confirm or revoke the Sentence by the *Civil* and *Canon Law*; and the *Common Lawyers* acquiesce in such Sentences, and do not take upon them to examine the same, unless they find Cause for a Royal Prohibition. V

And to encourage the Study of the *Civil Law* among us, after the Pope's Supremacy was abjur'd, the Doctors of *Laws* were allow'd to exercise Ecclesiastical Jurisdiction, tho' not in Orders, or married, which is contrary to the *Canon Law*.

Among the Courts of *England*, wherein Justice is administred by the *Roman Laws*, we must not forget the Two Universities of *Oxford* and *Cambridge*, honour'd by our Kings with great Privileges; from whence the Students cannot by any Prosecution be drawn to the Court of *Common Law*, but are to be judg'd by the Chancellor of the University or his Commissary, in all personal Actions of Debt, Accompts, Contracts, Injuries, and any Crimes, except Murder and Mafaim. And the same Privileges are granted to the Chancellor of *Oxford*, by *Richard II.* within the Liberties of the University; if either of the Parties be a Student, or any ways belonging to them: This University had many other prior Privileges, granted by King *John*, *Henry III.* *Edward*

ward I. and Edward III. with a Power from the Popes and Archbishops of *Canterbury*, to Imprison, Proscribe, Excommunicate, and Suspend all Contumacious Persons. And the University of *Cambridge*, have the same; altho' most of their Charters have been lost or consum'd in the War under *Henry III.* and Fire set to the University by the Townsmen, in *Richard the Second's* Time. In all these Matters the Chancellor determines according to the *Civil Law*, and Custom of the University; which Privilege is specially granted to that of *Cambridge*, by the Statutes thereof, made in *Q. Elizabeth's* Reign: From whom there lies an Appeal to the Regents, and then to the King.

Lastly, I cannot forbear mentioning, to the Honour of the *Civil Law*, that after *Lotharius* had restor'd it, the same began to be taught under King *Stephen*; and the succeeding Kings, upon Embassies, sent Professors of the *Law*, either by themselves, or as Collegues with Noblemen; to make Alliances, Contracts, and transact other Business with Foreign Princes; it being a Rule with them, to employ *Civilians* on those Occasions: Nor indeed are others so fit for that Purpose, the *Civil Law* being common to all Christian Princes; which is evident from the Instruments of these Publick Treaties still to be seen among the Records. And *Q. Elizabeth* also employ'd *Civilians*, as her Secretaries of State, Privy-Counsellors, Embassadors, and in other Publick Offices: But in the latter End of her Reign, her Chief Ministers chose rather to use an *Amanuensis*, in transcribing Leagues and Contracts, than the Assistance of skilful *Civilians*; which continu'd also in the succeeding Reigns: Having, perhaps, fallen upon that Ancient Caution in relation to Wills, *A testamento dolus Malus & Jurisconsultus abesto*. Thus are the *Civilians* excluded both from Publick and Private Business.

As for my self, I have done my Part in shewing how highly the *Civil Law* was once esteem'd and regarded by the *Englishs*; and that both the *English* and *French Lawyers*, *Foreatulus* and *Chopinus*, were true Prophets; in foretelling, That one time or other, the *Civil Law* would be no longer in use in this Kingdom.

T H E  
H I S T O R Y  
Of the O R I G I N E of the  
*FRENCH LAWS.*

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*Translated from the FRENCH.*

By J. B. E(q);

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With a P R E F A C E and N O T E S,  
shewing, The A N A L O G Y of the L A W S  
of the A n t i e n t G A U L S and B R I T O N S.

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L O N D O N,

Printed for D. BROWNE, at the *Black Swan*,  
and F. CLAY, at the *Bible*, without *Temple-Bar*.  
M D C C X X I V.



To the Right Honourable

DAVID,  
*Lord MILSINTOWN.*

MY LORD,



Among all the Improvements and Accomplishments which young Noblemen acquire in their Travels, none is more instructive or serviceable in  
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## DEDICATION.

the Conduct of their Lives, (whether we consider them Abroad or at Home, in Publick or Private Capacities,) than a competent Knowledge of the Laws of Foreign Countries, and the Principles upon which they are grounded.

For this Reason, I doubt not, but your Lordship, while you were in *France*, made it a Part of your Study and Observation, and added it to those Endowments which naturally adorn your Mind, and shew you are descended from Noble and Wise Parents.