

AN
ANALYSIS
OF THE
LAWS
OF
ENGLAND.

TO WHICH IS PREFIXED
AN INTRODUCTORY DISCOURSE
ON THE STUDY OF THE LAW.

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P R E F A C E.

IT hath often been observed with Concern, that the Study of the Laws of our Country hath been totally neglected in the usual Education of ENGLISH Gentlemen; and, in particular, that no Opportunities of cultivating this Branch of Learning have hitherto been afforded in those excellent and illustrious Seminaries, wherein every other Science is taught in it's utmost Perfection. To remedy, in some little Degree, so just a Complaint, the Compiler of the following Sheets was induced about three Years ago* to institute, and since to continue, a Course of Lectures, calculated for the Promotion of this Study in the University of OXFORD. And as he was encouraged to enter upon this Undertaking by Gentlemen, both in the University and out of it, for whose Learning and Judgment the World has the highest Deference; so he cannot but acknowlege, with due Gratitude, the favorable Reception which hath been given it: A Mark of Approbation, which he is sensible must be attributed entirely to the Propriety of the Design, and not to the Manner of it's Execution.

* Nov. 6. 1753.

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In order to render this Attempt more extensively useful, he thought it incumbent upon him to accommodate his Lectures, not only to the Use of such Students, as were more immediately designed for the Profession of the common Law; but also of such other Gentlemen, as were desirous of some general Acquaintance with the Constitution and legal Polity of their native Country. He therefore made it his first Endeavour, to mark out a Plan of the Laws of ENGLAND, so comprehensive, as that every Title might be reduced under some or other of it's general Heads, which the Student might afterwards pursue to any Degree of Minuteness; and at the same time so contracted, that the Gentleman might with tolerable Application contemplate and understand the Whole. For if this was successfully performed, he apprehended he should then be enabled, with greater Perspicuity and Ease, to execute the Remainder of his Design; in deducing the History and Antiquities of the principal Branches of Law, in selecting and illustrating their fundamental Principles and leading Rules, in explaining their Utility and Reason, and in comparing them with the Laws of Nature and of other Nations.

In the Pursuit of these his Endeavours, he found himself obliged to adopt a Method in many respects totally new. The most early, and indeed the most valuable, of those who have laboured in reducing our Laws to a System, are GLANVIL and BRACTON, BRITTON and the Author of FLETA: But these, and all others who preceded King HENRY the eighth, are so occupied in antient (he does not say, useless) Learning, that it had been but an awkward Attempt to engraft on their Stock the Improvements of later Ages. — FITZHERBERT, and BROOK, and the subsequent Authors of Abridgments, have chosen a Method, the least adapted of any to convey the Rudiments of a Science; namely, that of the Alphabet. — Lord BACON, in his Elements, hath purposely avoided any regular Order; selecting only some distinct and dis-joined Aphorisms, according to his own Account of them; which however he hath expounded in so excellent a Manner, that the Narrowness of his Plan is therefore the more to be regretted. — The Institutes of Sir EDWARD COKE are unfortunately as deficient in Method, as they are rich in Matter; at least, the two first Parts of them; wherein,

thrown together an infinite Treasure of Learning in a loose desultory Order. — Dr COWEL hath indeed endeavoured to reduce the Law of ENGLAND, in his Latin Institutions, to the Model of those of JUSTINIAN: And we cannot be surprized, that so forced and unnatural a Contrivance should be lame and defective in it's Execution. — Sir HENRY FINCH's Discourse of Law, is a Treatise of a very different Character: His Method is greatly superior to all that were before extant; his Text is weighty, concise, and nervous; his Illustrations are apposite, clear, and authentic. But, with all these Advantages, it is not sufficiently adapted to modern Use; since the subsequent Alterations of the Law, by the Abolition of military Tenures, and the Disuse of real Actions, have rendred near half of his Book obsolete. — Dr WOOD has effectually removed this Objection, but has fallen into the contrary Extreme; his Institute being little more than FINCH's Discourse enlarged, and so thoroughly modernized, as to leave us frequently in the Dark, with regard to the Reason and Original of many still subsisting Laws, which are founded in remote Antiquity. And as in some Titles his Plan is too contracted, in others also it seems to be too diffuse. Upon the Whole however his Work is undoubtedly

edly a valuable Performance; and great are the Obligations of the Student to him, and his Predecessor FINCH, for their happy Progress in reducing the Elements of Law from their former Chaos to a regular methodical Science. Yet, as neither could be followed entirely in the proposed Course of academical Lectures, it was judged the most eligible Way not to adopt them in Part; especially as there were extant the Outlines of a still superior Method, sketched by a very masterly Hand.

For, of all the Schemes hitherto made public for digesting the Laws of ENGLAND, the most natural and scientific of any, as well as the most comprehensive, appeared to be that of Sir MATTHEW HALE, in his posthumous Analysis of the Law. This Distribution therefore hath been principally followed; with what Variations, the learned Reader will easily perceive from the ensuing Abstract; and it may be no unprofitable Employment for the Student to learn by comparing them. For these the Compiler thinks it unnecessary to give his Reasons: For, since those who have gone before him have successively deviated from each other's Plan; he hopes to be excused, if, in order to adapt some things the better to his own Capacity, he frequently

quently departs from them all; having in general rather chosen, by compounding their several Schemes, to extract a new Method of his own, than implicitly to copy after any.

Indeed had he closely adhered to HALE's, or any other Distribution, it might probably have rendered the Task he had undertaken less laborious; at least, it would have saved him the Trouble of the present Publication. For he soon became sensible of one Inconvenience attending his Deviation from former Systems: That, in a Course of oral Lectures, on a Science entirely new, and sometimes a little abstruse, it was not always easy for his Audience so far to command their Attention, as at once to apprehend both the Method and Matter delivered: And, whenever, through Inattention in the Hearers, or (too frequently) through Obscurity in the Reader, any Point of Importance was forgotten or misunderstood, it became next to impossible to gather up the broken Clue, without having some written Compendium to which they might resort upon Occasion. These Considerations gave Birth to the following ANALYSIS, which exhibits the Order, and principal Divisions, of his Course; and is only to be considered as a larger Syllabus, interspersed with a few Definitions and general Rules,

Rules, to assist the Recollection of such Gentlemen as have formerly honoured him with their Attendance; or such as may hereafter become his Auditors, till this Task shall fall into abler Hands, and the Province, which he originally undertook in a private Capacity, shall be put upon a public Establishment.

To the ANALYSIS is subjoined an APPENDIX, consisting of such Tables, Copies of Instruments, and Forms of judicial Proceedings, as were judged to be necessary for explaining certain Principles, and Matters of daily Practice; of which it was however impracticable to convey any adequate Idea by verbal Descriptions only. In the Explanation of one of these, the Table of Descents, the Compiler hath been obliged to enter into a minute Discussion of a Point liable to some Controversy: This he could have wished to have avoided; but was fearful, of either appearing to mislead the Student, had no Notice been taken of Justice MANWOOD'S Doctrine; or perhaps of really misleading him, had that Doctrine been followed in constructing the Table.*

** This related to the four first Editions of the ANALYSIS. In the present Edition the Tables are omitted; and the Student is referred to the supplemental Volume of LAW TRACTS, where these Matters are discussed more at large.*

With

*With regard to the Book in general, if by any Accident it should fall into other Hands than those for whose Use it is designed, the Author hopes it will meet with that Candor which is ever the Companion of sound Learning. The Gentlemen of his own Profession, he is confident, will suspend their Censures of whatever (in this Abstract) may appear either dubious or unwarrantable; at least till they are informed how far (in the Work at large) it is guarded by Restrictions, qualified by Exceptions, or supported by Reason and Authority. And in the end, he must beg Leave to apply to his whole Understanding, as well as to this trifling Performance, the Words of his Master LITTLETON: “Jeo ne voill que
 “tu crez, que tout ceo que jeo ay dit en lez
 “ditez Lyvers soit LEY; quar jeo ne ceo voill
 “emprendre, ne presumer sur moy. — Nient
 “meyns, coment que certen Choses, queux
 “font motes et specyfieez en lez dites Lyvers,
 “ne sont pas LEY, uncore tielx Choses ferront
 “toy plus apte et able de entendre et apprendre
 “lez Argumentez et lez Reasons del LEY.*

*Thus much he thought it necessary to premise before the former Editions of the ANALYSIS, in 1756 and 1757. But the Book having, by
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some means or other, met with a more general Reception out of the University than he ever apprehended it could have done, and another Impression being called for, he thought it incumbent upon him, by revising and correcting what Inaccuracies had formerly escaped him, and adding a greater Variety of Precedents and Forms in the APPENDIX, to make it in some degree less unworthy the public Regard. When this was done, and the Sheets were just ready for Publication, he received the very singular Honour from the University of being elected their first Professor of municipal Law, upon the public Establishment hinted at in a former Page, with an ample Endowment from the Effects of the late Mr VINER. His introductory Lecture upon that Occasion being ordered to the Press, at the instance of the Governors of the University, was also thought proper to be prefixed to this Work; not only on account of their evident Connexion with each other, but also to relieve the Attention of the Reader by some Enquiries more interesting and amusing, than the dry Method of analytical Distribution, or the dull Forms of Conveyancing and Entries.

ALL-SOULS COLLEGE.

2 Nov. 1758.

A
DISCOURSE
ON THE
STUDY OF THE LAW,
READ IN THE PUBLIC SCHOOLS
AT
OXFORD,
OCTOBER XXV, M.DCC.LVIII.

A

D I S C O U R S E

ON THE

STUDY OF THE LAW.

MR VICE-CHANCELLOR, AND GENTLEMEN
OF THE UNIVERSITY,

THE general expectation of so numerous and respectable an audience, the novelty, and (I may add) the importance of the duty required from this chair, must unavoidably be productive of great diffidence and apprehensions in him who has the honour to be placed in it. He must be sensible how much will depend upon his conduct

duct in the infancy of a study, which is now first adopted by public academical authority; which has generally been reputed (however unjustly) of a dry and unfruitful nature; and of which the theoretical, elementary parts have hitherto received a very moderate share of cultivation. He cannot but reflect that, if either his plan of instruction be crude and injudicious, or the execution of it lame and superficial, it will cast a damp upon the farther progress of this most useful and most rational branch of learning; and may defeat for a time the public-spirited design of our wise and munificent benefactor. And this he must more especially dread, when he feels by experience how unequal his abilities are (unassisted by preceding examples) to complete, in the manner he could wish, so extensive and arduous a task; since he freely confesses, that his former more private attempts have fallen very short of his own ideas of perfection. And yet the candour he has already experienced, and this last transcendent mark of regard, his present nomination by the free and unanimous suffrage of a great and learned university, (an honour to be ever remembered with the deepest and most affectionate gratitude) these testimonies of your public judgment must entirely supersede his own, and forbid him to believe
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himself totally insufficient for the labour at least of this employment. One thing he will venture to hope for, and it certainly shall be his constant aim, by diligence and attention to atone for his other defects; esteeming, that the best return, which he can possibly make for your favourable opinion of his capacity, will be his unwearied endeavours in some little degree to deserve it.

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

quently connected with the civil, it is difficult to meet with a person of liberal education, who is destitute of a competent knowlege in that science, which is to be the guardian of his natural rights and the rule of his civil conduct.

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

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

WITHOUT detracting therefore from the real merit which abounds in the imperial law, I hope I may have leave to assert, that if an Englishman must be ignorant of either the one or the other, he had better be a stranger to the roman than the english institutions. For I think it an undeniable position, that a competent knowlege of the laws of that society, in which we live, is the proper accomplishment of every gentleman and scholar; an highly useful, I had almost said essential, part of liberal and polite education. And in this I am warranted by the example of

antient Rome; where, as Cicero informs us^a, the very boys were obliged to learn the twelve tables by heart, as a *carmen necessarium* or indispensable lesson, to imprint on their tender minds an early knowlege of the laws and constitutions of their country.

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

AND, first, to demonstrate the utility of some acquaintance with the laws of the land, let us only reflect a moment on the singular frame and polity of that land, which is governed by this system of laws. A land, perhaps the only one in the universe, in which political or

^a De Legg. II. 23.

civil liberty is the very end and scope of the constitution^b. This liberty, rightly understood, consists in the power of doing whatever the laws permit^c; which is only to be effected by a general conformity of all orders and degrees to those equitable rules of action, by which the meanest individual is protected from the insults and oppression of the greatest. As therefore every subject is interested in the preservation of the laws, it is incumbent upon every man to be acquainted with those at least, with which he is immediately concerned; lest he incur the censure, as well as inconvenience, of living in society without knowing the obligations which it lays him under. And thus much may suffice for persons of inferior condition, who have neither time nor capacity to enlarge their views beyond that contracted sphere in which they are appointed to move. But those, on whom nature and fortune have bestowed more abilities and greater leisure, cannot be so easily excused. These advantages are given them, not for the benefit of themselves only, but also of the public: and yet they cannot, in any scene of life, discharge properly their duty either to the pub-

^b MONTESQUIEU'S Spirit of Laws. b. 11. c. 5.

^c *Facultas ejus, quod cuique facere libet, nisi quid vi, aut jure prohibetur.* Inst. I. 3. 1.

lic or themselves, without some degree of knowledge in the laws. To evince this the more clearly, it may not be amiss to descend to a few particulars.

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

AGAIN, the policy of all laws has made some forms necessary in the wording of last wills and testaments, and more with regard to their

^d Education, §. 187.

attestation. An ignorance in these must always be of dangerous consequence, to such as by choice or necessity compile their own testaments without any technical assistance. Those who have attended the courts of justice are the best witnesses of the confusion and distresses that are hereby occasioned in families; and of the difficulties that arise in discerning the true meaning of the testator, or sometimes in discovering any meaning at all: so that in the end his estate may often be vested quite contrary to these his enigmatical intentions, because perhaps he has omitted one or two formal words, which are necessary to ascertain the sense with indisputable legal precision, or has executed his will in the presence of fewer witnesses than the law requires.

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

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

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

INDEED it is really amazing, that there should be no other state of life, no other occupation, art, or science, in which some method of instruction is not looked upon as requisite, except only the science of legislation, the noblest and most difficult of any. Apprenticeships are held necessary to almost every art, commercial or mechanical: a long course of reading and study must form the divine, the physician, and the practical professor of the laws: but every man of superior fortune thinks himself *born* a legislator. Yet Tully was of a different opinion: “It is necessary, says he^e, for a senator to be “thoroughly acquainted with the constitution; “and this, he declares, is a knowlege of the “most extensive nature; a matter of science, “of diligence, of reflexion; without which no “senator can possibly be fit for his office.”

THE mischiefs that have arisen to the public from inconsiderate alterations in our laws, are

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

too obvious to be called in question; and how far they have been owing to the defective education of our senators, is a point well worthy the public attention. The common law of England has fared like other venerable edifices of antiquity, which rash and unexperienced workmen have ventured to new dress and refine, with all the rage of modern improvement. Hence frequently it's symmetry has been destroyed, it's proportions distorted, and it's majestic simplicity exchanged for specious embellishments and fantastic novelties. For, to say the truth, almost all the perplexed questions, almost all the niceties, intricacies, and delays (which have sometimes disgraced the english, as well as other, courts of justice) owe their original not to the common law itself, but to innovations that have been made in it by acts of parliament; "overladen (as lord Coke expresses it) with "provisoes and additions, and many times on a "sudden penned or corrected by men of none "or very little judgment in law." This great and well-experienced judge declares, that in all his time he never knew two questions made upon rights merely depending upon the common law; and warmly laments the confusion introduced by ill-judging and unlearned legislators.

¹ 2 Rep. Pref.

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“But if, he subjoins, acts of parliament were
 “after the old fashion penned, by such only as
 “perfectly knew what the common law was
 “before the making of any act of parliament
 “concerning that matter, as also how far forth
 “former statutes had provided remedy for for-
 “mer mischiefs and defects discovered by ex-
 “perience; then should very few questions in
 “law arise, and the learned should not so often
 “and so much perplex their heads to make
 “atonement and peace, by construction of law,
 “between insensible and disagreeing words, sen-
 “tences, and provisoes, as they now do.” And
 if this inconvenience was so heavily felt in the
 reign of queen Elizabeth, you may judge how
 the evil is increased in later times, when the
 statute book is swelled to ten times a larger
 bulk; unless it should be found, that the pen-
 ners of our modern statutes have proportion-
 ably better informed themselves in the know-
 ledge of the common law.

WHAT is said of our gentlemen in general,
 and the propriety of their application to the
 study of the laws of their country, will hold
 equally strong or still stronger with regard to
 the nobility of this realm, except only in the
 article of serving upon juries. But, instead of
 this,

this, they have several peculiar provinces of far greater consequence and concern; being not only by birth hereditary counsellors of the crown, and judges upon their honour of the lives of their brother-peers, but also arbiters of the property of all their fellow-subjects, and that in the last resort. In this their judicial capacity they are bound to decide the nicest and most critical points of the law; to examine and correct such errors as have escaped the most experienced sages of the profession, the lord keeper and the judges of the courts at Westminster. Their sentence is final, decisive, irrevocable: no appeal, no correction, not even a review can be had: and to their determination, whatever it be, the inferior courts of justice must conform; otherwise the rule of property would no longer be uniform and steady.

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

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

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

THE roman pandects will furnish us with a piece of history not unapplicable to our present purpose. Servius Sulpicius, a gentleman of the patrician order, and a celebrated orator, had occasion to take the opinion of Quintus Mutius Scaevola, the oracle of the roman law; but for want of being conversant in that science, could not so much as understand even the technical terms, which his counsel was obliged to make use of. Upon which Mutius Scaevola could not forbear to upbraid him with this memorable reproof^s, “that it was a shame for a patrician, a nobleman, and an orator, to be ignorant of that law with which he was so closely connected.” Which reproach made so deep an impression on Sulpicius, that he immediately applied himself to the study of the law; wherein he arrived to that proficiency, that he left behind him about a hundred and fourscore volumes of his own compiling upon the subject; and became, in the opinion of Cicero^h, a much more complete lawyer than even Mutius Scaevola himself.

I WOULD not be thought to recommend to our english nobility and gentry to become as

^s Ff. I. 2. 2. §. 43. *Turpe esse patricio, & nobili, & causas eranti, jus in quo versaretur ignorare.*

^h Brat. 41.

great lawyers as Sulpicius; though he, together with this character, sustained likewise that of an excellent orator, a firm patriot, and a wise indefatigable senator; but the inference which arises from the story is this, that ignorance of the laws of the land hath ever been esteemed dishonourable, in those who are entrusted by their country to maintain, to administer, and to amend them.

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

abroad, or exerting their senatorial abilities in the councils of the nation at home.

NOR will some degree of legal knowlege be found in the least superfluous to persons of inferior rank; especially those of the learned professions. The clergy in particular, besides the common obligations they are under in proportion to their rank and fortune, have also abundant reason, considered merely as clergymen, to be acquainted with many branches of the law, which are almost peculiar and appropriated to themselves alone. Such are the laws relating to advowsons, institutions, and inductions; to simony, and simoniacal contracts; to uniformity, residence, and pluralities; to tithes and other ecclesiastical dues; to marriages (more especially of late) and to a variety of other subjects, which are consigned to the care of their order by the provisions of particular statutes. To understand these aright, to discern what is warranted or enjoined, and what is forbidden by law, demands a sort of legal apprehension; which is no otherwise to be acquired than by use and a familiar acquaintance with legal writers.

FOR the gentlemen of the faculty of physick, I must frankly own that I see no special reason,

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why they in particular should apply themselves to the study of the law; unless in common with other gentlemen, and to complete the character of general and extensive knowledge; a character which their profession, beyond others, has remarkably deserved. They will give me leave however to suggest, and that not ludicrously, that it might frequently be of use to families upon sudden emergencies, if the physician were acquainted with the doctrine of last wills and testaments, at least so far as relates to the formal part of their execution.

BUT those gentlemen who intend to profess the civil and ecclesiastical laws in the spiritual and maritime courts of this kingdom, are of all men (next to common lawyers) the most indispensably obliged to apply themselves seriously to the study of our municipal laws. For the civil and canon laws, considered with respect to any intrinsic obligation, have no force or authority in this kingdom; they are no more binding in England than our laws are binding at Rome. But as far as these foreign laws, on account of some peculiar propriety, have in some particular cases, and in some particular courts, been introduced and allowed by our laws, so far they oblige, and no farther; their authority being wholly

wholly

wholly founded upon that permission and adoption. In which we are not singular in our notions; for even in Holland, where the imperial law is much cultivated and its decisions pretty generally followed, we are informed by Van Leeuwenⁱ, that “it receives its force from
“ custom and the consent of the people, either
“ tacitly or expressly given: for otherwise, he
“ adds, we should no more be bound by this
“ law, than by that of the Almain, the Franks,
“ the Saxons, the Goths, the Vandals, and other
“ of the antient nations.” Wherefore, in all points in which the different systems depart from each other, the law of the land takes place of the law of Rome, whether ancient or modern, imperial or pontifical. And in those of our english courts wherein a reception has been allowed to the civil and canon laws, if either they exceed the bounds of that reception, by extending themselves to other matters, than are permitted to them; or if such courts proceed according to the decisions of those laws, in cases wherein it is controlled by the law of the land, the common law in either instance both may, and frequently does, prohibit and annul their proceedings^k: and it will not be a sufficient

ⁱ Dedicatio corporis juris civilis. Edit. 1663. ^k HALE'S Hist. C. L. c. 2. SELDEN in Fletam. 5 Rep. Caudrey's Case. COKE on Artic. Cler. 2 Inst. 599.

excuse for them to tell the king's courts at Westminster, that their practice is warranted by the laws of Justinian or Gregory, or is conformable to the decrees of the Rota or imperial chamber. For which reason it becomes highly necessary for every civilian and canonist that would act with safety as a judge, or with prudence and reputation as an advocate, to know in what cases and how far the english laws have given sanction to the roman ; in what points the latter are rejected ; and where they are both so intermixed and blended together, as to form certain supplemental parts of the common law of England, distinguished by the titles of the king's maritime, the king's military, and the king's ecclesiastical law. The propriety of which enquiry the university of Oxford has for more than a century so thoroughly seen, that in her statutes^l she appoints, that one of the three questions to be annually discussed at the act by the jurist-inceptors shall relate to the common law ; subjoining this reason, “ *quia juris civilis*
“ *studiosos decet haud imperitos esse juris muni-*
“ *cipalis, & differentias exteri patriique juris*
“ *notas habere.*” And the university of Cambridge, in her statutes^m, has declared herself to the same effect.

^l Tit.VII. Sect. 2. §. 2.
 lican. in Proëmio.

^m COWELLI Instit. Jur. Ang-

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

SIR John Fortescue, in his panegyric on the laws of England, (which was written in the reign of Henry the sixth) putsⁿ a very obvious question in the mouth of the young prince, whom he is exhorting to apply himself to that branch of learning; “why the laws of
“England, being so good, so fruitful, and so
“commodious, are not taught in the universi-
“ties, as the civil and canon laws are?” In answer to which he gives^o what seems, with due deference be it spoken, a very jejune and unsatisfactory reason; being in short, that “as the
“proceedings at common law were in his time
“carried on in three different tongues, the eng-

ⁿ c. 47.

^o c. 48.

“lish, the latin, and the french, that science
“ must be necessarily taught in those three seve-
“ ral languages; but that in the universities all
“ sciences were taught in the latin tongue only;
“ and therefore he concludes, that they could
“ not be conveniently taught or studied in our
“ universities.” But without attempting to ex-
amine seriously the validity of this reason, (the
very shadow of which by the wisdom of your
late constitutions is entirely taken away) we
perhaps may find out a better, or at least a more
plausible account, why the study of the muni-
cipal laws has been banished from these seats
of science, than what the learned chancellor
thought it prudent to give to his royal pupil.

THAT antient collection of unwritten max-
ims and customs, which is called the common
law, however compounded or from whatever
fountains derived, had subsisted immemorially
in this kingdom; and, though somewhat alter-
ed and impaired by the violence of the times,
had in great measure weathered the rude shock
of the norman conquest. This had endeared it
to the people in general, as well because it's
decisions were universally known, as because it
was found to be excellently adapted to the ge-
nius of the english nation, In the knowlege of
this

this law consisted great part of the learning of those dark ages; it was then taught, says Mr Selden^p, in the monasteries, *in the universities*, and in the families of the principal nobility. The clergy in particular, as they then engrossed almost every other branch of learning, so (like their predecessors the british druids^q) they were peculiarly remarkable for their proficiency in the study of the law. *Nullus clericus nisi causidicus*, is the character given of them soon after the conquest by William of Malmfbury^r. The judges therefore were usually created out of the sacred order^s, as was likewise the case among the Normans^t; and all the inferior offices were supplied by the lower clergy, which has occasioned their successors to be denominated *clerks* to this day.

BUT the common law of England, being not committed to writing, but only handed down by tradition, use, and experience, was not so heartily relished by the foreign clergy; who

^p In Fletam. 7. 7.

^q CAESAR de bello gal. 6. 12.

^r De gest. reg. 1. 4.

^s DUGDALE Orig. jurid. c. 8.

^t *Les juges sont sages personnes & authentiques, — sicome les archevesques, evesques, les chanoines des eglises cathedraulx, & les autres personnes qui ont dignitez in sainte eglise; les abbex, les prieurs conventualx, & les gouverneurs des eglises, &c. Grand Coustumier, ch. 9.*

came over hither in shoals during the reign of the conqueror and his two sons, and were utter strangers to our constitution as well as our language. And an accident, which soon after happened, had nearly completed it's ruin. A copy of Justinian's pandects, being newly^u discovered at Amalfi, soon brought the civil law into vogue all over the west of Europe, where before it was quite laid aside^w and in a manner forgotten; though some traces of it's authority remained in Italy^x and the eastern provinces of the empire^y. This now became in a particular manner the favourite of the popish clergy, who borrowed the method and many of the maxims of their canon law from this original. The study of it was introduced into several universities abroad, particularly that of Bologna; where exercises were performed, lectures read, and degrees conferred in this faculty, as in other branches of science: and many nations on the continent, just then beginning to recover from the convulsions consequent upon the overthrow of the roman empire, and settling by degrees into peaceable forms of government, adopted the civil law, (being the best written system then extant) as the basis of their several constitutions;

^u Circ. A.D. 1130. ^w LL. Wisigoth. II. 1. 9. ^x Capitular. Hludov. Pii. IV. 102. ^y SELDEN in Fletam. 5. 5.

blending

blending and interweaving it among their own feodal customs, in some places with a more extensive, in others a more confined authority^z.

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

^z DOMAT'S treatise of laws. c. 13. §. 9. Epistol. INNOCENT. IV. in M. Paris. ad A. D. 1254. ^a A. D. 1138.

^b GERVAS. DOROBERN. Act. Pontif. Cantuar. col. 1665.

^c ROG. BACON. citat. per SELDEN. in Fletam. 7. 6. in Fortesc. c. 33. & 8 Rep. Pref.

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

FROM this time the nation seems to have been divided into two parties; the bishops and clergy, many of them foreigners, who applied themselves wholly to the study of the civil and canon laws, which now came to be inseparably interwoven with each other; and the nobility and laity, who adhered with equal pertinacity to the old common law; both of them reciprocally jealous of what they were unacquainted with, and neither of them perhaps allowing the opposite system that real merit which is abundantly to be found in each. This appears on the one hand from the spleen with which the monastic writers^e speak of our municipal laws upon all occasions; and, on the other, from the firm temper which the nobility shewed at the famous parliament of Merton; when the prelates endeavoured to procure an act, to declare all bastards

^d JOAN. SARISBURIENS. Polycrat. 8. 22.
ibid. 5. 16. POLYDOR. VERGIL. Hist. 1. 9.

^e IDEM,

legi-

legitimate in case the parents intermarried at any time afterwards; alleging this only reason, because holy church (that is, the canon law) declared such children legitimate: but “all the
“earls and barons (says the parliament roll ^f)
“with one voice answered, that they would not
“change the laws of England, which had hi-
“therto been used and approved.” And we find the same jealousy prevailing above a century afterwards ^g, when the nobility declared with a kind of prophetic spirit, “that the realm of
“England hath never been unto this hour, nei-
“ther by the consent of our lord the king and
“the lords of parliament shall it ever be, ruled
“or governed by the civil law ^h.” And of this temper between the clergy and laity many more instances might be given.

WHILE things were in this situation, the clergy, finding it impossible to root out the municipal law, began to withdraw themselves by degrees from the temporal courts; and to that end, very early in the reign of king Henry the third, episcopal constitutions were published ⁱ, forbid-

^f Stat. Merton. 20 Hen. 3. c. 9. *Et omnes comites & barones una voce responderunt, quod nolunt leges Angliæ mutare, quæ hucusque usitatae sunt & approbatae.* ^g 11 Ric. 2.

^h SELDEN. Jan. Anglor. l. 2. §. 43. in Fortesc. c. 33.

ⁱ SPELMAN. Concil. A.D. 1217. WILKINS, vol. 1. p. 574, 599. ding

ding all ecclesiastics to appear as advocates *in foro saeculari*; nor did they long continue to act as judges there, nor caring to take the oath of office which was then found necessary to be administered, that they should in all things determine according to the law and custom of this realm^k; though they still kept possession of the high office of chancellor, an office then of little juridical power; and afterwards, as it's business increased by degrees, they modelled the process of the court at their own discretion.

BUT wherever they retired, and wherever their authority extended, they carried with them the same zeal to introduce the rules of the civil, in exclusion of the municipal law. This appears in a particular manner from the spiritual courts of all denominations, from the chancellor's courts in both our universities, and from the high court of chancery before-mentioned; in all of which the proceedings are to this day in a course much conformed to the civil law: for which no tolerable reason can be assigned, unless that these courts were all under the immediate direction of the popish ecclesiastics, among whom it was a point of religion to exclude the municipal law; pope Inno-

^k SELDEN. in Fletam. 9. 3.

cent the fourth having¹ forbidden the very reading of it by the clergy, because it's decisions were not founded on the imperial constitutions, but merely on the customs of the laity. And if it be considered, that our universities began about that period to receive their present form of scholastic discipline; that they were then, and continued to be till the time of the reformation, entirely under the influence of the popish clergy; (sir John Mason the first protestant, being also the first lay, chancellor of Oxford) this will lead us to perceive the reason, why the study of the roman laws was in those days of bigotry^m

¹ M. PARIS ad A. D. 1254.

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

purſued with ſuch alacrity in theſe ſeats of learning; and why the common law was entirely deſpiſed, and eſteemed little better than hereſtical.

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

*“ drææ gloſſatoris, quod tantam peritiam in utroque jure habuit,
“ ut publice in ſcholis legere auſa ſit.*

and

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

FOR, being then entirely abandoned by the clergy, a few stragglers excepted, the study and practice of it devolved of course into the hands of laymen; who entertained upon their parts a most hearty averfion to the civil lawⁿ, and made no scruple to profess their contempt, nay even their ignorance^o of it, in the most public man-

ⁿ FORTESC. de laud. LL. c.25. ^o This remarkably appeared in the case of the abbot of Torun, M. 22 E. 3. 14. who had caused a certain prior to be summoned to answer at Avignon for erecting an oratory *contra inhibitionem novi operis*; by which words Mr Selden, (*in Flet.* 8. 5.) very justly understands to be meant the title *de novi operis nuntiatione* both in the civil and canon laws, (Ff. 39. 1. C. 8. 11. and Decretal. not Extrav. 5. 32.) whereby the erection of any new buildings in prejudice of more antient ones was prohibited. But Skipwith the king's serjeant, and afterwards chief baron of the exchequer, declares them to be flat nonsense; "*in ceux parolx, contra inhibitionem novi operis, ny ad pas entendment :*" and justice Schardelew mends the matter but little by informing him, that they signify a restitution *in their law*; for which reason he very sagely resolves to pay no sort of regard to them. "*Ceo n'est que un restitution en leur ley, par que a ceo n'avomus regard, &c.*"

ner. But still, as the ballance of learning was greatly on the side of the clergy, and as the common law was no longer *taught*, as formerly, in any part of the kingdom, it must have been subjected to many inconveniences, and perhaps would have been gradually lost and overrun by the civil, (a suspicion well justified from the frequent transcripts of Justinian to be met with in Bracton and Fleta) had it not been for a peculiar incident, which happened at a very critical time, and contributed greatly to it's support.

THE incident I mean was the fixing the court of common pleas, the grand tribunal for disputes of property, to be held in one certain spot; that the seat of ordinary justice might be permanent and notorious to all the nation. Formerly that, in conjunction with all the other superior courts, was held before the king's capital justiciary of England, in the *aula regis*, or such of his palaces wherein his royal person resided; and removed with his household from one end of the kingdom to the other. This was found to occasion great inconvenience to the suitors; to remedy which it was made an article of the great charter of liberties, both that of king John and king Henry the third^p, that

“common pleas should no longer follow the
“king’s court, but be held in some certain
“place:” in consequence of which they have
ever since been held (a few necessary removals
in times of the plague excepted) in the palace
of Westminster only. This brought together
the professors of the municipal law, who be-
fore were dispersed about the kingdom, and for-
med them into an aggregate body; whereby a
society was established of persons, who (as Spel-
man⁹ observes) addicting themselves wholly to
the study of the laws of the land, and no longer
considering it as a mere subordinate science for
the amusement of leisure hours, soon raised those
laws to that pitch of perfection, which they sud-
denly attained under the auspices of our english
Justinian, king Edward the first.

IN consequence of this lucky assemblage,
they naturally fell into a kind of collegiate order;
and, being excluded from Oxford and Cam-
bridge, found it necessary to establish a new
university of their own. This they did by pur-
chasing at various times certain houses (now
called the inns of court and of chancery) be-
tween the city of Westminster, the place of
holding the king’s courts, and the city of Lon-

⁹ Glossar. 334.

don; for advantage of ready access to the one, and plenty of provisions in the other'. Here exercises were performed, lectures read, and degrees were at length conferred in the common law, as at other universities in the canon and civil. The degrees were those of barristers (first stiled apprentices' from *apprendre*, to learn) who answered to our bachelors; as the state and degree of a serjeant', *servientis ad legem*, did to that of doctor.

' FORTESC. c. 48. ' Apprentices or Barristers seem to have been first appointed by an ordinance of king Edward the first in parliament, in the 20th year of his reign. (SPELM. Gloss. 37. DUGDALE'S Orig. jurid. 55.)

' The first mention I have met with in our lawbooks of serjeants or countors, is in the statute of Westm. 1. 3 Edw. 1. c. 29. and in HORN'S MIRROR, c. 1. §. 10. c. 2. §. 5. c. 3. §. 1. in the same reign. But M. PARIS in his life of John II, abbot of St. Alban's, which he wrote in 1255, 39 Hen. 3. speaks of advocates at the common law, or countors (*quos banci narratores vulgariter appellamus*) as an order of men well known. And we have an example of the antiquity of the coif in the same author's history of England, A.D. 1259. in the case of one William de Bussy; who, being called to account for his great knavery and mal-practices, claimed the benefit of his orders, which were totally unsuspected; and to that end *voluit ligamenta coiffae suae solvere, ut palam monstraret se tonsuram habere clericalem; sed non est permissus.* — *Satelles vero cum arripens, non per coiffae ligamina sed per guttur eum apprehendens, traxit ad carcerem.* And hence Sir H. Spelman conjectures, (Glossar. 335.) that coifs were introduced to hide the tonsure of such renegade clerks, as were still tempted to remain in the secular courts in the quality of advocates or judges, notwithstanding their prohibition by canon.

THE

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

^u *Ne aliquis scholas regens de legibus in eadem civitate de caetero ibidem leges doceat.* ^w In Flet. 8. 2. ^x 2 Inst. proëm.

IN this juridical university (for such it is insisted to have been by Fortescue¹ and sir Edward Coke²) there are two sorts of collegiate houses; one called inns of chancery, in which the younger students of the law used to be placed, “learning and studying, says Fortescue”, “the originals and as it were the elements of the law; who, profiting therein, as they grow to ripeness so are they admitted into the greater inns of the same study, called the inns of court.” And in these inns of both kinds, he goes on to tell us, the knights and barons, with other grandes and noblemen of the realm, did use to place their children, though they did not desire to have them thoroughly learned in the law, or to get their living by it’s practice: and that in his time there were about two thousand students at these several inns, all of whom he informs us were *filiii nobilium*, or gentlemen born.

HENCE it is evident, that (though under the influence of the monks our universities neglected this study, yet) in the time of Henry the sixth it was thought highly necessary and was the universal practice, for the young nobility and gen-

¹ c. 49.

² 3 Rep. pref.

³ ibid.

try to be instructed in the originals and elements of the laws. But by degrees this custom has fallen into difuse; so that in the reign of queen Elizabeth fir Edward Coke^b does not reckon above a thousand students, and the number at present is very considerably less. Which seems principally owing to these reasons: first, because the inns of chancery being now almost totally filled by the inferior branch of the profession, they are neither commodious nor proper for the resort of gentlemen of any rank or figure; so that there are now very rarely any young students entered at the inns of chancery: secondly, because in the inns of court all sort of regimen and academical superintendance, either with regard to morals or studies, are found impracticable and therefore entirely neglected: lastly, because persons of birth and fortune, after having finished their usual courses at the universities, have seldom leisure or resolution sufficient to enter upon a new scheme of study at a new place of instruction. Wherefore few gentlemen now resort to the inns of court, but such for whom the knowlege of practice is absolutely necessary; such, I mean, as are intended for the profession: the rest of our gentry, (not to say our nobility also) having usually retired to their

^b 3 Rep. pref.