



INSTITUTES OF THE LAW *of* SCOTLAND.

A
Preliminary Dissertation
CONCERNING
LAW in GENERAL, and the
SEVERAL KINDS of it.

LAW is taken in a two-fold Sense:
1. For the Precept or Command of
a Supreme Power, obliging Subjects
to act, or not to act, under a Penal-
ty. 2. For a Science or Collection of such
Precepts.

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CHAP.

C H A P. I.

Of Law considered, as the Command of Sovereign Power.

LA W, in this Sense, may be divided, with Respect to the efficient Cause, into a Law of Nature, and positive Law.

A Law of Nature is the Dictate of Right Reason, which discovers the various Relations, and Duties of Creatures toward their Creator, or one another, and lays them under an Obligation to act in this or that Manner, according to the Circumstances in which they are plac'd. The very Notion of a Law implies that of a Lawgiver; and in this Case there can be no other than God himself the Author of Nature, from whom this Law derives its Authority. The Sting of a disquieted Conscience, or the Terror and Uneasiness arising from any gross-Breach of the Law of Nature, sufficiently declare, that it is not left without a Sanction.

Positive Law is either Divine, or Humane.

A Divine positive Law is the Will of God reveal'd in the holy Scriptures.

Humane positive Law, is that, which derives its force from the Authority of Men, introduc'd, as Occasion required, about Things either consequential from, or left indifferent by the Laws of God and Nature.

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Positive humane Law is distinguished into a Law of Nations, and a civil Law.

The Law of Nations is taken in a two-fold Sense. 1. It signifies an improv'd Dictate of natural Reason, deduc'd by long Experience and Practice, from a Consideration of the Nature of Society, and from Inquiry into the Dispositions of Mankind, Necessity or Convenience; and upon these Considerations observ'd by all civiliz'd Nations. In which Sense the Law of Nations is understood in the *Roman Law*. 2. A Law of Nations is a common Law betwixt different Nations, for regulating the Order of mutual Commerce, which is the modern Acceptation of the Word. This Law ariseth from a tacit or exprefs Compact and Stipulation betwixt Nations, and derives its Authority from that golden fundamental Rule of Society; *Faith is not to be violated.*

A Civil Law is, what the Sovereign Power in every Nation, whether Monarchical, Aristocratical, or Democratical, hath made for their own peculiar Conveniency, to govern the People united by the Ties of Society, under such Authority.

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CHAP.

C H A P. II.

*Of Law considered as a Science, or Collection
of the Precepts of Sovereign Power.*

LAW, in this Sense, is, a Science directing us to know, and do Justice, for the well ordering of Society.

Justice, which is the End of Law, is a constant and perpetual Desire of giving to every one his Due.

There is no authoriz'd Collection of the Laws of Nature and Nations any where, save in the Books of the *Roman Law*. But we find so many different Collections of civil Laws, as there are independent Nations, governed by their own Laws. When the civil Law in general is mentioned, the Law of the old *Romans* is understood, which, for its Excellency, is so called *κατ' ἐξοχήν*; and the Laws of other Nations are term'd municipal Laws.

C H A P. III.

Of the Municipal Law of Scotland.

THE Municipal Law of *Scotland*, which directs to the Knowledge and Practice of what is Justice in *Scotland*, is rais'd upon eleven Foundations. 1. Upon the Law of Nature. 2. Upon the reveal'd Law of God. 3. Upon the Law of Nations. 4. Upon

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Upon the Civil Law. 5. Upon the Canon Law. 6. Upon the Feudal Law. 7. Upon some old Books. 8. Upon Acts of Parliament, and of Convention of Estates. 9. Ancient Customs. 10. Acts of Sederunt, and Decisions of the Court of Session. 11. By-Laws or Statutes of particular Corporations, or Bodies politick. Of each of these I shall discourse particularly in the following Titles.

T I T. I.

The Law of Nature.

OUR Law gives a civil Sanction to some Laws of Nature, for the better Observance thereof: As when it forceth Husbands to alimēt their Wives, and Parents their Children. Others it allows no Effect to: As the Obligations of Love and Charity, Donations betwixt Man and Wife, and Deeds by the latter, without Consent of the former. Some of these again our Law doth qualify; as the Succession of Children to their Parents Heretage, by the Right of Primogeniture.

T I T. II.

The Divine Law.

THE Law of *Scotland* is founded on the revealed Law of God, in so far as, it not only punisheth Breaches of the Moral Law, but

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also annuls all Laws not agreeing with the holy Scriptures (a).

T I T. III.

The Law of Nations.

OUR Law observes the Law of Nations, in so far, as, 1. It orders the Method of maintaining ordinary Commerce, and Correspondence betwixt them. 2. Prevents Infractions of the ordinary Laws of Nations.

1. Necessary Commerce between Nations is founded upon publick Agreements or Treaties, made by the Mediation of Ambassadors, Envoys, &c. to whom great Privileges are indulg'd: As that their Persons, or Domestick Servants may not be arrested, or imprisoned, or their Goods distrenzied, seiz'd or attach'd, provided no Bankrupt Merchant, or Trader have any Benefit of Protection, by putting himself into the Service of any Ambassador, or publick Minister; nor any Servant of theirs be thus privileged, till his Name be registred in the Office of one of the principal Secretaries of State, and thence transmitted and hang'd up in the publick Offices of the Sheriffs of *London* and *Middlesex* (b).

2. Infractions of the Laws of Nations are restrain'd by Reprisals, open War, and other Ways, suited to the Ruptures and Attempts.

[1] Repris-

(a) Act 3. Par. 1. *9a. VI. Act. 5. Sess. 1. Par. III. and M.*
 (b) 7 A. Chap. 12.

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[1.] Reprisals or Letters of Reprisal, is a Warrant or Commission granted by the King, whose Subjects, those under the Dominion of another Prince or State, have injured by Pillage, Piracy, or otherwise, to Seize upon the Goods of all the Subjects of that Other, after Refusal to make just Reparation for the wrong done.

[2.] War, which, in the General, is the State and Condition of those that contend by Force, should commence and be directed by the supreme Authority on both Sides: Whether the War be Offensive or Defensive. There may be so many Causes of a just War, as there are Causes of Civil Actions. At proclaiming of War, Intimation is ordinarily made to Neuters, from what Kind of Commerce with the Enemy they are to abstain, as the carrying counterband Goods to their Ports, transporting their Goods or Merchandize to promote their Trade, and enable them to maintain the War, covering the Enemies Ships and Goods, as belonging to themselves, by Passes and other Documents.

The main private Interest in publick War, is, that which accrueth to Privateers or Capers, by seizing in virtue of Commissions from the Admiral, the Ships and Goods of the Enemy, and such as partake in the War, or carry not themselves as Neuters to the Princes or States engaged therein. The Prizes or Seizures belong to the Privateers who make them, with the

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Burden

Burden of paying a fifteenth Part to the King, and a tenth to the Admiral. The Admiral is the sole Judge in the first Instance of all Prizes taken at Sea. But the Lords of Session may Suspend or Reduce his Decrees. If Adjudication of Prizes by the Admiral be, after they are roused and sold, reduced by the Lords, the Owners of the Privateer are liable *in solidum* for the whole Price received, and not each *pro rata*, only for his Share. Things taken by the Enemy, and retaken from him during the War by the King's Subjects or Souldiers, ought to be restored to the former Proprietors.

T I T. IV.

The Civil Law.

THE Civil Law (which was compil'd by Order of *Justinian* the Emperor) consisting of Imperial Constitutions, older and later, contained in the *Code* and *Novels*, Opinions of the old Lawyers, published in the *Pandeets* or *Digests*, and that Emperor's *Institutes*, which are a short Sum and Elements of the Law, is effectually naturaliz'd in *Scotland*. 'Tis the great Foundation of our Laws and Forms, so twisted therewith, that our Judges have recourse to that excellent Fountain of Equity and Justice, where our own Customs and Statutes are silent and defective. The Parliament doth, in some Statutes, expressly own
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it to be our Law (a) ; and the general Revocations of our Princes are founded upon it. In other Statutes, the Force and Authority of the Civil Law with us, is tacitly acknowledged (b) ; and Students are admitted Advocats upon Trial of their Knowledge of it.

T I T. V.

The Canon Law.

THE Canon Law is partly confirmed by papal Authority, and partly not confirmed.

1. Those Parts of it which have papal Authority, are, 1. *Decretum*. 2. *Decretales Gregorii* 9. 3. *Sextus Liber Decretalium*. 4. *Clementina*. 5. *Extravagantes Joannis* 22. 6. *Extravagantes Communes*.

[1.] *Decretum*, which is a Collection of the Decisions and Determinations of Councils, Fathers and Bishops, with Fragments of Glosses and Books of the Civil Law, was composed under Pope *Eugene* III. in Imitation of *Justinian's Pandects*, by *Gratian* a Benedictine Monk of *S. Felix*, born at *Chiufi* in *Tuscany*.

[2.] *Decretales*, are the Pope's Letters, Rescripts, or Edicts deciding Controversies in Ecclesiastick Affairs, which *Raymond* of *Pennefort*, a *Dominican* Chaplain, and Confessor to *Gregory* IX. did, by that Pope's order, in Imitation

(a) Act 80. Par. 6. *J.* V. Act 22. Par. 5. *Q. M.* Act 69, Par. 6. *J.* V. (b) Act 54. Par. 5. *J.* IV.

tion of *Justinian's Code*, reduce into a Volume of five Books.

[3.] *Boniface VIII.* caused a sixth Book of Decretals to be compil'd.

[4.] *Clement V.* collected his own Decretals, whose Collection was corrected, finished, and published under the Title of *Clementines*, from his Name, and his Successor *John XXII.*

[5.] *Extravagantes of John XXII.* are some Decretals collected by that Pope, which he (in Imitation of the Imperial Constitutions of *Frederick* and *Henry*, extant in the Body of the Civil Law, after the Books *de Feudis*) called *Extravagants of John XXII.* because, *extra Corpus Juris Canonici quasi vagantur.*

[6.] *Extravagantes communes*, are a Collection of Decretals of the said *John*, and other Popes, by an unknown Author, which are called, *Common Extravagants*, because they are not the Constitutions of one, but of several Popes.

2. The Parts of the Canon Law wanting papal Confirmation, are a seventh Book of Decretals, collected in the Year 1590, by *Peter Matthæus*, a Lawyer of *Lyons*; and the Institutes of the Canon Law published in the Year 1563, by *John Paul Lancelot*, a Lawyer in *Tuscany*.

3. The Canon Law is owned to be our common Law, by the same Statutes that establish the Authority of the Civil Law, in
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so far as our own Municipal Law hath not expressly receded from it (*a*), or it doth not clash with sound Religion.

T I T. VI.

The Feudal Law.

1. **T**HE Feudal Law, according to the most probable Opinion, got first up in *Lombardy*, upon the Suppression of the Civil Law. Where the *Lombard* Kings, wanting Money to maintain standing Forces, freely bestowed on their Souldiers, according to Quality and Merit, Cities and Lands, with Power to use and enjoy the Profits thereof, for Military Service, reserving to themselves the Superiority. Which Grants, called *Feuda*, Fees, from the Fidelity and Obedience due by the Receivers, as Vassals to the Granters, were, from small Beginnings, improved in Process of Time, and regulated by private Pactions of Parties, and some unwritten Customs, varying, in different Provinces, according to the different Genius and Circumstances of the People. These Feudal Customs were at length confusedly collected into a Volume, mostly out of the Manuscript Scrolls of *Gerardus Niger Cappagistus*, and *Obertus de Orto*, both Advocates in the Court of *Milan*, and Consuls of that City, after their Death, about the Year 1170.

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(*a*) Act 80. Par. 6. *J.* V. Act 22. Par. 5. *Q. M.*

2. This Collection hath had successively several Editions, whereof some consist of fewer, and some of more Books, variously digested and distinguished into Titles. The vulgar Edition is divided into two Books, the first whereof seems more justly to be ascribed to *Gerardus Niger Cappagistus*, the first 24 Titles of the second to *Obertus de Orto*; and the subsequent Titles therein, are a patch'd up Composition, by an uncertain Hand, of the Opinions of Lawyers at that Time. An Edition published by *James Alvorate*, a Lawyer of *Padua*, divides these Feudal Customs into three Books, whereof the third begins from the 23d Title of the vulgar Edition. *Cujacius* makes five Books of the Feudal Customs: Whereof the first three, and a Part of the fourth, comprehend only what is in the vulgar Edition, tho' otherwise distinguished by Books and Titles. The rest of the fourth Book contains extraordinary Heads or Points collected out of *Alvorate* and *Ardizon*. An Edition published by *Julius Pacius*, and another by *Dionys. Gothofrede*, are the same with the Vulgar, as to the first two Books: But have after the 58 Title of the second Book, where the vulgar Edition ends, many Titles out of *Cujacius's* Edition, and his whole fifth Book. *Ugolin* plac'd the Books of Feus after *Justinian's* Novels in the Body of the Civil Law: With which they have pass'd into Universities and Courts of Judicature. Out of these Books, a general Scheme of the Feudal

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Feudal Constitutions in *Scotland*, and other Nations hath been taken, and variously accommodated to the particular *Genius* of each Country, and the Complexion of their Affairs; there being no such Thing as a common Feudal Law.

T I T. VII.

Old Books of the Law of Scotland.

THESE are the Laws of King *Malcom II.* *Regiam Majestatem, Quoniam Attachiamenta*, and other old Pieces of our Law, which, being originally conceived in *Latine*, were, by Order of King *James VI.* translated and published in the *Scottish* Language by Sir *John Skene* of *Curriehill* Clerk Register, who also published these Laws in *Latine* with his own Notes.

T I T. VIII.

Acts of Parliament, and of Convention of Estates.

i. ACTS of Parliament are either publick, concerning the whole *Lieges*; or private, in Favour of particular Persons or Societies. Because such private Acts are made without hearing or calling of those, who may be concerned or suffer Prejudice thereby: For saving every Bodies Interest, an Act *salvo Jure cujuslibet*, which pass'd of Course, used to be subjoin'd to the Statutes of each Session of Parliament. Acts of Parliament are standing Laws, till they go into Disuse, or be repeal'd.
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But Acts of the Convention of the Estates impose only **Taxations**, and make some *interim* Regulations for answering the present Exigences of the Nation.

2. The publick Acts of the Five King *James's* and Queen *Mary*, were first printed in an old Gothick Letter, whence they had the Name of the *black Acts*. Thereafter these Acts were reprinted, omitting some in the black Letter, and continued to the End of the Year 1597, by Sir *John Skene*. Another Edition of the whole Acts from King *James I.* till the Death of King *Charles II. inclusive*, with the Acts of the Conventions 1665, 1667 and 1678, were published by Sir *Thomas Murray* of *Glendoick*, and the Acts of King *James the Seventh's* Parliament, by the Viscount of *Tarbet*, both Clerk Registers. Which Acts of King *James VII.* with those of *K. W.* and *Q. M.* *K. W.* and *Q. A.* till the 25th March 1707, when *Scotland* and *England* were united in one Kingdom of *Great Britain*, to be represented in one Parliament, were printed by *Agnes Campbell* Relict of *Andrew Anderson*.

3. Acts of Parliament generally look forward, and regulate only future Cases: But declaratory Acts, that declare what formerly was Law, look backward; and some upon weighty Considerations, are made expressly with a retrospect and retroactive Effect.

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T I T. IX.

Ancient Customs.

1. **A**N ancient Custom is a Law not written, established by long Use and Consent. So that it wants the express Sanction of the Legislative Authority, and derives its Force from the presumed Consent thereof.

2. These Customs are either general or particular. Our general Customs are those of Force all *Scotland* over : As the Rules and Degrees of Succession; the Right of Primogeniture; the Legitime of Children; Law of Death-bed; Communion of Goods betwixt Man and Wife; and the Division thereof at their Death, the Husband's Courtesy, and the Wife's Terce.

Particular or local Customs are those, peculiar to certain Places : As the Udal Right of *Orkney*, &c.

T I T. X.

Acts of Sederunt, and Decisions of the Session.

ACTS of *Sederunt*, are Statutes made by the Lords of Session, for regulating the Procedure and Form of administering Justice. These are so called from the Word *Sederunt*. with which anciently they used to begin, or because they are made by the Lords sitting in Judgment. Decisions of the Lords of Session, sometimes called *Prætiques*, are the Determinations or Resolutions upon particular Points of Right;

Right, or Form contested before them. Which, if they continue uniform for some considerable Time, have the Force of a Law.

T I T. XI.

By-Laws or Statutes of Corporations, or Bodies Politick.

A Gggregate Bodies, as Cities, Universities, Colleges, &c. have Powers from their Charters and Acts of Parliament, to make By-Laws for good Order and Discipline in the Society : Provided these be not contrary or repugnant to the Laws of the Nation. Of this Nature are the Acts of the Convention of Burrows, &c.

T I T. XII.

How the Law of Scotland is distinguished with Respect to the Objects thereof.

THE Law of Scotland, raised upon the Grounds aforesaid, is distinguished into private and publick Law.

The private Law is that, which consists of Matters respecting mainly the Interests and Differences of particular Persons among themselves.

The publick Law is that, which primarily regards the Constitution of Church and State, in their Ecclesiastical and Civil Polities, the Punishment of Criminals, and all Disturbers of

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of the publick Tranquillity. Matters of this publick Law being to be handled in the second Volume, I confine my self in this first to the private Law; save that I propound, for Connexion Sake, to add an Account of the Session, the Offices and Officers subservient to it, and of the Commission for Plantation of Churches, Valuation of Tithes, &c. with a general Scheme of the Form of Process observed in these Courts, where all Points of the private Law are agitated and determined.

The Objects of the private Law are, 1. Persons. 2. Their Estates, and how these are acquired, extinguished, and affected with Burdens. 3. How such may be transmitted and passed over from one to another. 4. The Ways of determining civil Controversies in Point of Right or Possession about them. Of all which I shall treat in Order, as they ly in the four Parts of this Volume.



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