ESSAYS AND LETTERS

In 1764, a twenty-one-year-old Thomas Jefferson wrote a provocative essay rejecting the widely accepted proposition that Christianity was the basis of the common law. To his detractors, the essay confirmed that Jefferson was an infidel, contemptuous of established judicial, legal, and religious authorities that almost without exception affirmed the Christian basis of the common law. Jefferson’s thesis, by implication, challenged the notion that America was in any legal sense a Christian nation. The essay was not published until shortly after Jefferson’s death, perhaps because of its highly controversial content. This short dissertation, which was published as an appendix to a legal compilation prepared by Jefferson, was apparently the original brief expounded in several private letters on the topic Jefferson wrote late in life, including missives to John Adams in 1814, Thomas Cooper in 1814, and Major John Cartwright in 1824.

Whether Christianity Is Part of the Common Law?

THOMAS JEFFERSON (1743-1826)

[1764?]

In Quare impedit, in C. B. 34. H. 6. fo. 38, the defendant, Bishop of Lincoln, pleads that the church of the plaintiff became void by the death of the incumbent; that the plaintiff and I. S. each pretending a right, presented two several clerks; that the church being thus rendered litigious, he was not obliged, by the ecclesiastical law, to admit either until an inquisition de jure patronatus [concerning the right of a patron] in the ecclesiastical court; that, by the same law, this inquisition was to be at the suit of either claimant, and was not ex officio [by virtue of the office] to be instituted by the Bishop, and at his proper costs; that neither party had desired such an inquisition; that six months passed; whereon it belonged to him of right to present as on a lapse, which he had done. The plaintiff demurred. A question was, How far the ecclesiastical law was to be respected in this matter by the Common law court? And Prisot c. 5. in the course of his argument, uses this expression, "à tiels leis que ils de seint eglise ont en ancien scripture, covent à nous à donner credence; car ceo common ley sur quel tous mans leis sont fondés. Et auyx, Sir, nous sumus obliges de conustré leur ley de saint eglise. Et semblablement ils sont obligés de conustré nostre ley, et, Sir, si poit apperer or à nous que levesque ad faict come un Dinary fera en tiel cas, adonq nous devons ceo adjuver bon, ou autermnt nemy," etc. It does not appear what judgment was given. Y. B. ubi supra, 3. c. Fitzh. Abr., Qu. imp. 89. Bro. Abr. Qu. imp. 12. Finch mis-states this in the following manner: "to such laws of the church as have warrant in holy scripture, our law giveth credence;" and cites the above case, and the words of Prisot in the margin. Finch's law, b r. c. 3. published 1613. Here we find "ancien scripture," converted into "holy scripture," whereas it can only mean the antient written laws of the church. It cannot mean the scriptures, 1st. Because the term

*This French passage is replicated on page 543 and, in part, on page 544. Part of the debate concerns how it should be translated. The following translation is meant to provide the overall gist, not to enter into the same debate: "To such laws as those of the holy church which are in ancient writings, it is fitting for us to give credence; as it is the common law on which all kinds of law are founded. And also, sir, we are obligated to be acquainted with their law of the holy church. And similarly they are obligated to be familiar with our law, and, Sir, if it would appear to us that the bishop had done what an ordinary person would have done in such a case, then we ought to approve it, or otherwise not."—Trans.
ancient scripture must then be understood as meaning the Old Testament in contradistinction to the New, and to the exclusion of that; which would be absurd, and contrary to the wish of those who cite this passage to prove that the scriptures, or Christianity, is a part of the common law. 2nd. Because Prisot says, "ceo (est) Common ley sur quel tous manners leis sont fondés." Now it is true that the ecclesiastical law, so far as admitted in England, derives its authority from the common law. But it would not be true that the scriptures so derive their authority. 3rd. The whole case and arguments shew, that the question was, How far the ecclesiastical law in general should be respected in a common law court? And in Brô’s Abr. of this case, Littleton says, "les juges del Common ley prendra conusans quid est lex ecclesiae vel admirali- tatet et hugus modi." 4th. Because the particular part of the ecclesiastical law then in question, viz. the right of the patron to present to his advowson, was not founded on the law of God, but subject to the modification of the law-giver; and so could not introduce any such general position as Finch pretends. Yet Wingate (in 1638) thinks proper to erect this false quotation into a maxim of the common law, expressing it in the very words of Finch, but citing Prisot, Wing. Max. 3. Next comes Sheppard (in 1675) who states it in the same words of Finch, and quotes the Y. B. Finch and Wingate. 3 Shep. Abr. tit. "Religion." In the case of the King and Taylor, Sir Matthew Hale lays it down in these words; "Christianity is parcel of the laws of England." 1 Vent. 293. 3 Keb. 607. But he quotes no authority. It was from this part of the supposed common law that he derived his authority for burning witches. So strong was this doctrine become in 1728, by additions and repetitions from one another, that in the case of the King v. Woolston, the court would not suffer it to be debated, Whether to write against Christianity was punishable in the temporal courts, at common law? saying it had been so settled in Taylor’s case, ante, 2 Stra. 834. Therefore Wood, in his Institute, lays it down, that all blasphemy and profaneness are offences by the common law, and cites Strange, ubi supra. Wood, 499. and Blackstone (about 1763) repeats, in the words of Sir Matthew Hale, that "Christianity is part of the laws of England," citing Ventn. and Stra. ubi supra. 4 Bl. 59. Lord Mansfield qualified it a little, by saying in the case of the Chamberlain of London v. Evans, 1767, that "the essential principles of revealed religion are part of the common law." But he cites no authority, and leaves us at our peril to find out what, in the opinion of the judge, and according to the measures of his foot or his faith, are those essential principles of revealed religion, obligatory on us as a part of the common law. Thus we find this string of authorities, when examined to the beginning, all hanging on the same hook; a perverted expression of Prisot’s; or on nothing. For they all quote Prisot, or one another, or nobody. Thus, Finch quotes Prisot; Wingate also; Sheppard quotes Prisot, Finch and Wingate; Hale cites nobody; the court, in Woolston’s case, cite Hale; Wood cites Woolston’s case, Blackstone that and Hale; and Lord Mansfield, like Hale, ventures it on his own authority. In the earlier ages of the law, as in the Year books for instance, we do not expect much recurrence to authorities by the judges; because, in those days, there were few or none such, made public. But in later times we take no judge’s word for what the law is, further than he is warranted by the authorities he appeals to. His decision may bind the unfortunate individual who happens to be the particular subject of it; but it cannot alter the law. Although the common law be termed Lex non scripta [an unwritten law], yet the same Hale tells us, "when I call those parts of our laws Leges non scriptae [unwritten laws], I do not mean as if all those laws were only oral, or communicated from the former ages to the latter merely, by word. For all these laws have their several monuments in writing, whereby they are transferred from one age to another, and without which they would soon lose all kind of certainty. They are for the most part extant in records of pleas, proceedings and judgments, in books of reports, and judicial decisions,
in tractates of learned men's arguments and opinions, preserved from antient times, and still extant in writing": Hale's Com. Law, 22. Authorities for what is common law, may, therefore, be as well cited as for any part of the lex scripta [written law]. And there is no better instance of the necessity of holding the judges and writers to a declaration of their authorities, than the present, where we detect them endeavoring to make law where they found none, and to submit us, at one stroke to a whole system, no particular of which, has its foundation in the common law, or has received the "estō [let it be so]" of the legislator. For we know that the common law is that system of law which was introduced by the Saxons, on their settlement in England, and altered, from time to time, by proper legislative authority, from that, to the date of the Magna Charta, which terminates the period of the common law, or lex non scripta, and commences that of the statute law, or lex scripta. This settlement took place about the middle of the fifth century; but Christianity was not introduced till the seventh century; the conversion of the first Christian King of the Heptarchy, having taken place about the year 598, and that of the last about 686. Here, then, was a space of two hundred years, during which the common law was in existence, and Christianity no part of it. If it ever, therefore, was adopted into the common law, it must have been between the introduction of Christianity and the date of the Magna Charta. But of the laws of this period, we have a tolerable collection, by Lambard and Wilkins; probably not perfect, but neither very defective; and if any one chooses to build a doctrine on any law of that period, supposed to have been lost, it is incumbent on him to prove it to have existed, and what were its contents. These were so far alterations of the common law, and became themselves a part of it; but none of these adopt Christianity as a part of the common law. If, therefore, from the settlement of the Saxons, to the introduction of Christianity among them, that system of religion could not be a part of the common law, because they were not yet Christians; and if, having their laws from that period to the close of the common law, we are able to find among them no such act of adoption; we may safely affirm (though contradicted by all the judges and writers on earth) that Christianity neither is, nor ever was, a part of the common law. Another cogent proof of this truth is drawn from the silence of certain writers on the common law. Bracton gives us a very complete and scientific treatis of the whole body of the common law. He wrote this about the close of the reign of Henry III, a very few years after the date of the Magna Charta. We may consider this book as the more valuable, as it was written about the time which divides the common and statute law; and therefore gives us the former in its ultimate state. Bracton, too, was an ecclesiastic, and would certainly not have failed to inform us of the adoption of Christianity as a part of the common law, had any such adoption ever taken place. But no word of his, which intimates anything like it, has ever been cited. Fleta and Britton, who wrote in the succeeding reign of E. I., are equally silent. So also is Glanvil, an earlier writer than any of them, to wit, temp. H. 2.; but his subject, perhaps, might not have led him to mention it. It was reserved for Finch, five hundred years after, in the time of Charles II., by a falsification of a phrase in the Year book, to open this new doctrine, and for his successors to join full-mouth in the cry, and give to the fiction the sound of fact. Justice Fortescue Aland, who possessed more Saxon learning than all the judges and writers before mentioned put together, places this subject on more limited ground. Speaking of the laws of the Saxon Kings, he says, "the ten commandments were made part of their law, and consequently were once part of the law of England; so that to break any of the ten commandments, was then esteemed a breach of the common law of England; and why it is not so now, perhaps, it may be difficult to give a good reason." Pref. to Fortescue's Rep. xvii. The good reason is found in the denial of the fact.

Houard, in his Coutumes Anglo-Normandes, i. 87, notices the falsification of the laws of Alfred, by prefixing to them, four chapters of the Jewish law, to wit, the 20th, 21st, 22nd and 23rd chapters of Exodus; to which he might have added the 13th of the Acts of
the Apostles, v. 23 to 29, and precepts from other parts of the scripture. These he calls Hors d’oeuvre of some pious copyist. This awkward monkish fabrication, makes the preface to Alfred’s genuine laws stand in the body of the work. And the very words of Alfred himself prove the fraud; for he declares in that preface, that he has collected these laws from those of Ina, of Offa, Aethelbert and his ancestors, saying nothing of any of them being taken from the scripture. It is still more certainly proved by the inconsistencies it occasions. For example, the Jewish legislator, Exodus, xxi. 12, 13, 14, (copied by the Pseudo Alfred § 13) makes murder, with the Jews, death. But Alfred himself, Ll. cxxvi. punishes it by a fine only, called a weregild, proportioned to the condition of the person killed. It is remarkable that Hume (Append. I. to his history) examining this article of the laws of Alfred, without perceiving the fraud, puzzles himself with accounting for the inconsistency it had introduced. To strike a pregnant woman, so that she die, is death by Exod. xxi. 22, 23, and pseud. Alfr. § 18. But by the Ll. Alfred ix. the offender pays a weregild for both the woman and child. To smite out an eye or a tooth, Exod. xxi. 24-27. Pseud. Alfred. § 19, 20, if of a servant by his master, is freedom to the servant; in every other case, retaliation. But by Alfred Ll. xl. a fixed indemnification is paid. Theft of an ox or a sheep, by the Jewish law, xxii. Exod. i. was repaired five fold for the ox, and four fold for the sheep; by the Pseudograph § 24, double for the ox and four fold for the sheep. But by Alfred Ll. xvi. he who stole a cow and calf, was to repay the worth of the cow, and 40s. for the calf. Goring by an ox, was the death of the ox, and the flesh not to be eaten; Exod. xxi. 28. Pseud. Alfr. § 21. By Ll. Alfr. xxiv. the wounded person had the ox. This Pseudograph makes municipal laws of the ten commandments: § 1-10, regulate concubinage; § 12, makes it death to strike, or to curse father or mother; § 14, 15, give an eye for an eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe; § 19, sells the thief to repay his theft; § 24, obliges the fornicator to marry the woman he has lain with; § 29, forbids interest on money; § 28, 35, make the laws of bailment, and very different from what Lord Holt delivers in Cogge v. Bernard, and what Sir William Jones tells us they were; and punishes witchcraft with death, § 30, which Sir Matthew Hale 1. P. C. ch. 33, declares was not a felony before the stat. 1. Jac. c. 12. It was under that statute, that he hung Rose Cullender, and Amy Duny, 16. Car. 2. (1662) on whose trial he declared, “that there were such creatures as witches, he made no doubt at all; for ist. The scriptures had affirmed as much. 2nd. The wisdom of all nations had provided laws against such persons—and such hath been the judgment of this kingdom, as appears by that act of parliament which hath provided punishments proportionable to the quality of the offence.” And we must certainly allow greater weight to this position “that it was no felony till James’s statutes,” deliberately laid down in his H. P. C., a work which he wrote to be printed and transcribed for the press in his lifetime, than to the hasty scriptum [writing], that “at common law, witchcraft was punished with death as heresy, by writ de heretico comburendo [concerning heretics who ought to be burned],” in his methodical summary of the P. c. pa. 6.; a work “not intended for the press, nor fitted for it and which he declared himself he had never read over since it was written.” Preface. Unless we understand his meaning in that to be, that witchcraft could not be punished at common law as witchcraft, but as a heresy. In either sense, however, it is a denial of this pretended law of Alfred. Now all men of reading know that these pretended laws of homicide, concubinage, theft, retaliation, compulsory marriage, usury, bailment, and others which might have been cited from this Pseudograph, were never the laws of England, not even in Alfred’s time; and of course, that it is a forgery. Yet, palpable as it must be to a lawyer, our judges have piously avoided lifting the veil under which it was shrouded. In truth, the alliance between church and state in England, has ever made their judges accomplices in the frauds of the clergy; and even bolder than they are; for instead of being contented with the sur- reptitious introduction of these four chapters of Ex-
odus, they have taken the whole leap, and declared at
once that the whole Bible and Testament, in a lump,
make a part of the common law of the land; the first
judicial declaration of which was by this Sir Matthew
Hale. And thus they incorporate into the English
code, laws made for the Jews alone, and the precepts
of the gospel, intended by their benevolent author as
obligatory only in foro conscientiae [forum (or court)
of conscience]; and they arm the whole with the co-
ercions of municipal law. They do this, too, in a case
where the question was, not at all, whether Chris-
tianity was a part of the laws of England, but simply
how far the ecclesiastical law was to be respected by
the common law courts of England, in the special
case of a right of presentment. Thus identifying
Christianity with the ecclesiastical law of England.

Common-place Book
873. In Quare imp. in C. B. 34, H. 6, fo. 38, the def.
Br. of Lincoln pleads that the church of the pl. be-
came void by the death of the incumbent, that the pl.
and J. S. each pretending a right, presented two sev-
eral clerks; that the church being thus rendered litig-
gious, he was not obliged, by the Ecclesiastical law to
admit either, until an inquisition de jure patronatus
[concerning the right of a patron], in the ecclesiastical
court: that, by the same law, this inquisition was to
be at the suit of either claimant, and was not ex-officio
[by virtue of the office] to be instituted by the
bishop, and at his proper costs; that neither party had
desired such an inquisition; that six months passed
whereon it belonged to him of right to present as on
a lapse, which he had done. The pl. demurred. A
question was, How far the Ecclesiastical law was to be
respected in this matter by the common law court?
and Prisot C. 3, in the course of his argument uses
this expression, "A tiels les que ils de seint eglise ont
en ancien scripture, covent a nous a donner credence;
car ces common ley sur quel touts manners leis sont
fondes: et auxy, Sir, nous sumus obliges de conurstre
nostre ley; et, Sir, si poit apperer ou a nous que li-
vques ad fait comme un ordinary fera en tiel cas,
adon nous devons ces adjuger bon autrement nemy,"
etc. It does not appear that judgment was given. Y. B.
ubi supra [where above]. S. C. Fitzh. abr. Qu. imp.
89. Bro. abr. Qu. imp. 12. Finch mistakes this in the
following manner: "To such laws of the church as
have warrant in Holy Scripture, our law giveth cre-
dence," and cites the above case, and the words ofPri-
sot on the margin. Finch's law, b. 1, ch. 3, published
1613. Here we find "ancien scripture" [ancient writing]
converted into "Holy Scripture," whereas it can only
mean the ancient written laws of the church. It cannot
mean the Scriptures, 1, because the "ancien scripture"

Letter from Thomas Jefferson
to Dr. Thomas Cooper

Monticello, February 10, 1814

Dear Sir,—In my letter of January 16, I promised
you a sample from my common-place book, of the
pious disposition of the English judges, to connive
at the frauds of the clergy, a disposition which has even
rendered them faithful allies in practice. When I was
a student of the law, now half a century ago, after get-
ting through Coke Littleton, whose matter cannot
be abridged, I was in the habit of abridging and
common-placing what I read meriting it, and of
sometimes mixing my own reflections on the subject.
I now enclose you the extract from these entries
which I promised. They were written at a time of life
when I was bold in the pursuit of knowledge, never
fearing to follow truth and reason to whatever results

Reprinted from The Writings of Thomas Jefferson, ed. Andrew A. Lips-
comb and Albert Ellery Bergh, Monticello Edition (Washington, D.C.: Tho-
mas Jefferson Memorial Association, 1904), 14:83-97.
must then be understood to mean the “Old Testament” or Bible, in opposition to the “New Testament,” and to the exclusion of that, which would be absurd and contrary to the wish of those who cite this passage to prove that the Scriptures, or Christianity, is a part of the common law. 2. Because Prisot says, “Ceo [est] common ley, sur quel tous manners leis sont fondés.” Now, it is true that the Ecclesiastical law, so far as admitted in England, derives its authority from the common law. But it would not be true that the Scriptures so derive their authority. 3. The whole case and arguments show that the question was how far the Ecclesiastical law in general should be respected in a common law court. And in Bro. abr. of this case, Littleton says, “Les juges del common ley prendra consunas quid est lex ecclesiae, vel admiratitatis, et trujus modi.” 4. Because the particular part of the Ecclesiastical law then in question, to wit, the right of the patron to present to his advowson, was not founded on the law of God, but subject to the modification of the lawgiver, and so could not introduce any such general position as Finch pretends. Yet Wingate [in 1658] thinks proper to erect this false quotation into a maxim of the common law, expressing it in the very words of Finch, but citing Prisot; Wing. max. 3. Next comes Sheppard [in 1675], who states it in the same words of Finch, and quotes the Year-Book, Finch and Wingate. 3 Shepp. abr., tit. Religion. In the case of the King v. Taylor, Sir Matthew Hale lays it down in these words, “Christianity is parcel of the laws of England.” 1 Ventn. 293, 3 Keb. 607. But he quotes no authority, resting it on his own, which was good in all cases in which his mind received no bias from his bigotry, his superstitions, his visions about sorceries, demons, etc. The power of these over him is exemplified in his hanging of the witches. So strong was this doctrine become in 1728, by additions and repetitions from one another, that in the case of the King v. Woolston, the court would not suffer it to be debated, whether to write against Christianity was punishable in the temporal courts at common law, saying it had been so settled in Taylor’s case, ante, 2 Stra. 834; therefore, Wood, in his Insti-

tute, lays it down that all blasphemy and profaneness are offences by the common law, and cites Strange ubi supra. Wood 409. And Blackstone [about 1763] repeats, in the words of Sir Matthew Hale, that “Christianity is part of the laws of England,” citing Ventris and Strange ubi supra. 4 Blackst. 59. Lord Mansfield qualifies it a little by saying that “the essential principles of revealed religion are part of the common law.” In the case of the Chamberlain of London v. Evans, 1767. But he cite no authority, and leaves us at our peril to find out what, in the opinion of the judge, and according to the measure of his foot or his faith, are those essential principles of revealed religion obligatory on us as a part of the common law.

Thus we find this string of authorities, when examined to the beginning, all hanging on the same hook, a perverted expression of Prisot’s, or on one another, or nobody. Thus Finch quotes Prisot; Wingate also; Sheppard quotes Prisot, Finch and Wingate; Hale cites nobody; the court in Woolston’s case cite Hale; Wood cites Woolston’s case; Blackstone that and Hale; and Lord Mansfield, like Hale, ventures it on his own authority. In the earlier ages of the law, as in the year-books, for instance, we do not expect much recurrence to authorities by the judges, because in those days there were few or none such made public. But in latter times we take no judge’s word for what the law is, further than he is warranted by the authorities he appeals to. His decision may bind the unfortunate individual who happens to be the particular subject of it; but it cannot alter the law. Though the common law may be termed “Lex non Scripta [unwritten law],” yet the same Hale tells us “when I call those parts of our laws Leges non Scriptae [unwritten laws], I do not mean as if those laws were only oral, or communicated from the former ages to the latter merely by word. For all those laws have their several monuments in writing, whereby they are transferred from one age to another, and without which they would soon lose all kind of certainty. They are for the most part extant in records of pleas, proceedings, and judgments, in books of reports and judicial decisions, in tractates of learned men’s argu-
ments and opinions, preserved from ancient times and still extant in writing." Hale's H. c. d. 22. Authorities for what is common law may therefore be as well cited, as for any part of the Lex Scripta [written law], and there is no better instance of the necessity of holding the judges and writers to a declaration of their authorities than the present; where we detect them endeavoring to make law where they found none, and to submit us at one stroke to a whole system, no particle of which has its foundation in the common law. For we know that the common law is that system of law which was introduced by the Saxons on their settlement in England, and altered from time to time by proper legislative authority from that time to the date of Magna Charta, which terminates the period of the common law, or Lex non Scripta, and commences that of the statute law, or Lex Scripta. This settlement took place about the middle of the fifth century. But Christianity was not introduced till the seventh century; the conversion of the first Christian king of the Heptarchy having taken place about the year 598, and that of the last about 686. Here, then, was a space of two hundred years, during which the common law was in existence, and Christianity no part of it. If it ever was adopted, therefore, into the common law, it must have been between the introduction of Christianity and the date of the Magna Charta. But of the laws of this period we have a tolerable collection by Lambard and Wilkins, probably not perfect, but neither very defective; and if any one chooses to build a doctrine on any law of that period, supposed to have been lost, it is incumbent on him to prove it to have existed, and what were its contents. These were so far alterations of the common law, and became themselves a part of it. But none of these adopt Christianity as a part of the common law.

If, therefore, from the settlement of the Saxons to the introduction of Christianity among them, that system of religion could not be a part of the common law, because they were not yet Christians, and if, having their laws from that period to the close of the common law, we are all able to find among them no such act of adoption, we may safely affirm (though contradicted by all the judges and writers on earth) that Christianity neither is, nor ever was a part of the common law. Another cogent proof of this truth is drawn from the silence of certain writers on the common law. Bracton gives us a very complete and scientific treatise of the whole body of the common law. He wrote this about the close of the reign of Henry III., a very few years after the date of the Magna Charta. We consider this book as the more valuable, as it was written about the time which divides the common and statute law, and therefore gives us the former in its ultimate state. Bracton, too, was an ecclesiastic, and would certainly not have failed to inform us of the adoption of Christianity as a part of the common law, had any such adoption ever taken place. But no word of his, which intimates anything like it, has ever been cited. Fleta and Britton, who wrote in the succeeding reign (of Edward I.), are equally silent. So also is Glanvil, an earlier writer than any of them, (viz.: temp. H. a.,) but his subject perhaps might not have led him to mention it. Justice Fortescue Aland, who possessed more Saxon learning than all the judges and writers before mentioned put together, places this subject on more limited ground. Speaking of the laws of the Saxon kings, he says, "the ten commandments were made part of their laws, and consequently were once part of the law of England; so that to break any of the ten commandments was then esteemed a breach of the common law, of England; and why it is not so now, perhaps it may be difficult to give a good reason." Preface to Fortescue Aland's reports, xvii. Had he proposed to state with more minuteness how much of the Scriptures had been made a part of the common law, he might have added that in the laws of Alfred, where he found the ten commandments, two or three other chapters of Exodus are copied almost verbatim. But the adoption of a part proves rather a rejection of the rest, as municipal law. We might as well say that the Newtonian system of philosophy is a part of the common law, as that the Christian religion is. The truth is that Christianity and Newtonianism being reason and verity itself, in the opinion of all but infidels and Cartesians, they are
protected under the wings of the common law from the dominion of other sects, but not erected into dominion over them. An eminent Spanish physician affirmed that the lancet had slain more men than the sword. Doctor Sangrado, on the contrary, affirmed that with plentiful bleedings, and draughts of warm water, every disease was to be cured. The common law protects both opinions, but enacts neither into law. See post, 879.

879. Howard, in his Contumes Anglo-Normandes, l. 87, notices the falsification of the laws of Alfred, by prefixing to them four chapters of the Jewish law, to wit: the 20th, 21st, 22d and 23d chapters of Exodus, to which he might have added the 15th chapter of the Acts of the Apostles, v. 23, and precepts from other parts of the Scripture. These he calls a hors d’oeuvre of some pious copyist. This awkward monkish fabrication makes the preface to Alfred’s genuine laws stand in the body of the work, and the very words of Alfred himself prove the fraud; for he declares, in that preface, that he has collected these laws from those of Ina, of Offa, Aethelbert and his ancestors, saying nothing of any of them being taken from the Scriptures. It is still more certainly proved by the inconsistencies it occasions. For example, the Jewish legislator, Exodus xxi. 12, 13, 14, (copied by the Pseudo Alfred § 13,) makes murder, with the Jews, death. But Alfred himself, Le. xxvi., punishes it by a fine only, called a Weregild, proportioned to the condition of the person killed. It is remarkable that Hume (append. i to his History) examining this article of the laws of Alfred, without perceiving the fraud, puzzles himself with accounting for the inconsistency it had introduced. To strike a pregnant woman so that she die, is death by Exodus xxi. 22, 23, and Pseud. Alfr. § 18; but by the laws of Alfred ix., pays a Weregild for both woman and child. To smite out an eye, or a tooth, Exodus xxi. 24–27, Pseud. Alfr. § 19, 20, if of a servant by his master, is freedom to the servant; in every other case retaliation. But by Alfr. Le. xl. a fixed indemnification is paid. Theft of an ox, or a sheep, by the Jewish law, Exodus xxii. 1, was repaid five-fold for the ox and four-fold for the sheep; by the Pseudo-

- graph § 24, the ox double, the sheep four-fold; but by Alfred Le. xvi., he who stole a cow and a calf was to repay the worth of the cow and forty shillings for the calf. Goring by an ox was the death of the ox, and the flesh not to be eaten. Exodus xxi. 28, Pseud. Alfr. § 21; by Alfred Le. xxiv., the wounded person had the ox. The Pseudograph makes municipal laws of the ten commandments, § 1–10, regulates concubinage, § 12, makes it death to strike or to curse father or mother, § 14, 15, gives an eye for an eye, tooth for a tooth, hand for hand, foot for foot, burning for burning, wound for wound, strife for strife, § 19; sells the thief to repay his theft, § 24; obliges the fornicator to marry the woman he has lain with, § 29; forbids interest on money, § 35; makes the laws of bailment, § 28, very different from what Lord Holt delivers in Coggs v. Bernard, ante, 92, and what Sir William Jones tells us they were; and punishes witchcraft with death, § 30, which Sir Matthew Hale, 1 H. P. C. B. 1, ch. 33, declares was not a felony before the Stat. 1 Jac. 12. It was under that statute, and not this forgery, that he hung Rose Cullendar and Amy Duny, 16 Car. 2 (1662), on whose trial he declared “that there were such creatures as witches he made no doubt at all; for first the Scripture had affirmed so much, secondly the wisdom of all nations had provided laws against such persons, and such hath been the judgment of this kingdom, as appears by that act of Parliament which hath provided punishment proportionable to the quality of the offence.” And we must certainly allow greater weight to this position that “it was no felony till James’ Statute,” laid down deliberately in his H. P. C., a work which he wrote to be printed, finished, and transcribed for the press in his lifetime, than to the hasty scripture that “at common law witchcraft was punished with death as heresy, by writ de Heretico Comburendo [concerning heretics who ought to be burned]” in his Methodical Summary of the P. C. p. 6, a work “not intended for the press, not fitted for it, and which he declared himself he had never read over since it was written,” Pref. Unless we understand his meaning in that to be that witchcraft could not be punished at common law as witchcraft, but as heresy.
In either sense, however, it is a denial of this pretended law of Alfred. Now, all men of reading know that these pretended laws of homicide, concubinage, theft, retaliation, compulsory marriage, usury, bailment, and others which might have been cited, from the Pseudograph, were never the laws of England, not even in Alfred's time; and of course that it is a forgery. Yet palpable as it must be to every lawyer, the English judges have piously avoided lifting the veil under which it was shrouded. In truth, the alliance between Church and State in England has ever made their judges accomplices in the frauds of the clergy; and even bolder than they are. For instead of being contented with these four surreptitious chapters of Exodus, they have taken the whole leap, and declared at once that the whole Bible and Testament in a lump, make a part of the common law; ante, 873: the first judicial declaration of which was by this same Sir Matthew Hale. And thus they incorporate into the English code, laws made for the Jews alone, and the precepts of the Gospel, intended by their benevolent Author as obligatory only in foro conscientiae; and they arm the whole with the coercions of municipal law.

In doing this, too, they have not even used the Connecticut caution of declaring, as is done in their blue laws, that the laws of God shall be the laws of their land, except where their own contradict them; but they swallow the yea and nay together. Finally, in answer to Fortescue Aland's question why the ten commandments should not now be a part of the common law of England? we may say they are not because they never were made so by legislative authority, the document which has imposed that doubt on him being a manifest forgery.

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Letter from Thomas Jefferson to Major John Cartwright

Monticello, June 5, 1824

Dear and Venerable Sir,—I am much indebted for your kind letter of February the 29th, and for your valuable volume on the English Constitution. I have read this with pleasure and much approbation, and think it has deduced the Constitution of the English nation from its rightful root, the Anglo-Saxon. It is really wonderful, that so many able and learned men should have failed in their attempts to define it with correctness. No wonder then, that Paine, who thought more than he read, should have credited the great authorities who have declared, that the will of Parliament is the Constitution of England. So Marbois, before the French Revolution, observed to me that the Almanac Royal was the Constitution of France. Your derivation of it from the Anglo-Saxons, seems to be made on legitimate principles. Having driven out the former inhabitants of that part of the island called England, they became aborigines as to you, and your lineal ancestors. They doubtless had a constitution; and although they have not left it in a written formula, to the precise text of which you may always appeal, yet they have left fragments of their history and laws, from which it may be inferred with considerable certainty. Whatever their history and laws show to have been practised with approbation, we may presume was permitted by their constitution; whatever was not so practiced, was not permitted. And although this constitution was violated and set at naught by Norman force, yet force cannot change right. A perpetual claim was kept up by the nation, by their perpetual demand of a restoration of their Saxon laws; which shows they were never relinquished by the will of the nation. In the pullings and haulings for these ancient rights, between the nation, and its kings of the races of Plantagenets, Tudors and

Stuarts, there was sometimes gain, and sometimes loss, until the final reconquest of their rights from the Stuarts. The destruction and expulsion of this race broke the thread of pretended inheritance, extinguished all regal usurpations, and the nation re-entered into all its rights; and although in their bill of rights they specifically reclaimed some only, yet the omission of the others was no renunciation of the right to assume their exercise also, whenever occasion should occur. The new King received no rights or powers, but those expressly granted to him. It has ever appeared to me, that the difference between the Whig and the Tory of England is, that the Whig deduces his rights from the Anglo-Saxon source, and the Tory from the Norman. And Hume, the great apostle of Toryism, says, in so many words, note AA to chapter 42, that, in the reign of the Stuarts, "it was the people who encroached upon the sovereign, not the sovereign who attempted, as is pretended, to usurp upon the people." This supposes the Norman usurpations to be rights in his successors. And again, C, 159, "the commons established a principle, which is noble in itself, and seems specious, but is belied by all history and experience, that the people are the origin of all just power." And where else will this degenerate son of science, this traitor to his fellow men, find the origin of just powers, if not in the majority of the society? Will it be in the minority? Or in an individual of that minority?

Our Revolution commenced on more favorable ground. It presented us an album on which we were free to write what we pleased. We had no occasion to search into musty records, to hunt up royal parchments, or to investigate the laws and institutions of a semi-barbarous ancestry. We appealed to those of nature, and found them engraved on our hearts. Yet we did not avail ourselves of all the advantages of our position. We had never been permitted to exercise self-government. When forced to assume it, we were novices in its science. Its principles and forms had entered little into our former education. We established, however, some, although not all its important principles. The constitutions of most of our States assert, that all power is inherent in the people; that they may exercise it by themselves, in all cases to which they think themselves competent, (as in electing their functionaries executive and legislative, and deciding by a jury of themselves, in all judiciary cases in which any fact is involved,) or they may act by representatives, freely and equally chosen; that it is their right and duty to be at all times armed; that they are entitled to freedom of person, freedom of religion, freedom of property, and freedom of the press. In the structure of our legislatures, we think experience has proved the benefit of subjecting questions to two separate bodies of deliberants; but in constituting these, natural right has been mistaken, some making one of these bodies, and some both, the representatives of property instead of persons; whereas the double deliberation might be as well obtained without any violation of true principle, either by requiring a greater age in one of the bodies, or by electing a proper number of representatives of persons, dividing them by lots into two chambers, and renewing the division at frequent intervals, in order to break up all cabals. Virginia, of which I am myself a native and resident, was not only the first of the States, but, I believe I may say, the first of the nations of the earth, which assembled its wise men peaceably together to form a fundamental constitution, to commit it to writing, and place it among their archives, where every one should be free to appeal to its text. But this act was very imperfect. The other States, as they proceeded successively to the same work, made successive improvements; and several of them, still further corrected by experience, have, by conventions, still further amended their first forms. My own State has gone on so far with its premiere esbauche [first draft or outline]; but it is now proposing to call a convention for amendment. Among other improvements, I hope they will adopt the subdivision of our counties into wards. The former may be estimated at an average of twenty-four miles square; the latter should be about six miles square each, and would answer to the hundreds of your Saxon Alfred. In each of these might be, 1st, an elementary school; 2d, a
company of militia, with its officers; 3d, a justice of the peace and constable; 4th, each ward should take care of their own poor; 5th, their own roads; 6th, their own police; 7th, elect within themselves one or more jurors to attend the courts of justice; and 8th, give in at their folk-house, their votes for all functionaries reserved to their election. Each ward would thus be a small republic within itself, and every man in the State would thus become an acting member of the common government, transacting in person a great portion of its rights and duties, subordinate indeed, yet important, and entirely within his competence. The wit of man cannot devise a more solid basis for a free, durable and well-administered republic.

With respect to our State and federal governments, I do not think their relations correctly understood by foreigners. They generally suppose the former subordinate to the latter. But this is not the case. They are co-ordinate departments of one simple and integral whole. To the State governments are reserved all legislation and administration, in affairs which concern their own citizens only, and to the federal government is given whatever concerns foreigners, or the citizens of other States; these functions alone being made federal. The one is the domestic, the other the foreign branch of the same government; neither having control over the other, but within its own department. There are one or two exceptions only to this partition of power. But, you may ask, if the two departments should claim each the same subject of power, where is the common umpire to decide ultimately between them? In cases of little importance or urgency, the prudence of both parties will keep them aloof from the questionable ground; but if it can neither be avoided nor compromised, a convention of the States must be called, to ascribe the doubtful power to that department which they may think best. You will perceive by these details, that we have not yet so far perfected our constitutions as to venture to make them unchangeable. But still, in their present state, we consider them not otherwise changeable than by the authority of the people, on a special election of representatives for that purpose expressly: they are until then the lex legum [law of laws].

But can they be made unchangeable? Can one generation bind another, and all others, in succession forever? I think not. The Creator has made the earth for the living, not the dead. Rights and powers can only belong to persons, not to things, not to mere matter, unendowed with will. The dead are not even things. The particles of matter which composed their bodies, make part now of the bodies of other animals, vegetables, or minerals, of a thousand forms. To what then are attached the rights and powers they held while in the form of men? A generation may bind itself as long as its majority continues in life; when that has disappeared, another majority is in place, holds all the rights and powers their predecessors once held, and may change their laws and institutions to suit themselves. Nothing then is unchangeable but the inherent and unalienable rights of man.

I was glad to find in your book a formal contradiction, at length, of the judiciary usurpation of legislative powers; for such the judges have usurped in their repeated decisions, that Christianity is a part of the common law. The proof of the contrary, which you have adduced, is incontrovertible; to wit, that the common law existed while the Anglo-Saxons were yet pagans, at a time when they had never yet heard the name of Christ pronounced, or knew that such a character had ever existed. But it may amuse you, to show when, and by what means, they stole this law in upon us. In a case of quare impedit [for what purpose does he hinder] in the Year-book 34, H. 6, folio 38, (anno 1458,) a question was made, how far the ecclesiastical law was to be respected in a common law court? And Prisot, Chief Justice, gives his opinion in these words: “A tiel leis qu’ils de seint eglise ont en ancien scripture, covient a nous a donner credence; car ceo common ley sur quels tous manners leis sont fondes. Et auxy, Monsieur, nous sumus obliges de consutre leur ley de seint eglise; et semblablement ils sont oblige de consutre nostre ley. Et, Monsieur, si poit apperer ou a nous que l’evesque ad fait come un ordinary fera en tiel cas, adong nous devons cee ad-
juger bon, ou auterment nemy, etc. See S. C. Fitzh. Abr. Qu. imp. 89, Bro. Abr. Qu. imp. 12. Finch in his first book, c. 3, is the first afterwards who quotes this case and mistakes it thus: "To such laws of the church as have warrant in holy scripture, our law giveth credence." And cites Prisot; mistranslating "ancien scripture," into "holy scripture." Whereas Prisot palpably says, "to such laws as those of holy church have in ancient writing, it is proper for us to give credence," to wit, to their ancient written laws. This was in 1613, a century and a half after the dictum of Prisot. Wingate, in 1658, erects this false translation into a maxim of the common law, copying the words of Finch, but citing Prisot, Wing. Max. 3. And Sheppard, title, "Religion," in 1675, copies the same mistranslation, quoting the Y. B. Finch and Wingate. Hale expresses it in these words: "Christianity is parcel of the laws of England." 1 Ventr. 293, 3 Keb. 607. But he quotes no authority. By these echoings and re-echoings from one to another, it had become so established in 1728, that in the case of the King vs. Woolston, 2 Stra. 834, the court would not suffer it to be debated, whether to write against Christianity was punishable in the temporal court at common law? Wood, therefore, 409, ventures still to vary the phrase, and say, that all blasphemy and profaneness are offences by the common law; and cites 2 Stra. Then Blackstone, in 1763, IV. 59, repeats the words of Hale, that "Christianity is part of the laws of England," citing Ventris and Strange. And finally, Lord Mansfield, with a little qualification, in Evans' case, in 1767, says that "the essential principles of revealed religion are part of the common law." Thus engulfing Bible, Testament and all into the common law, without citing any authority. And thus we find this chain of authorities hanging link by link, one upon another, and all ultimately on one and the same hook, and that a mistranslation of the words "ancien scripture," used by Prisot. Finch quotes Prisot; Wingate does the same. Sheppard quotes Prisot, Finch and Wingate. Hale cites nobody. The court in Woolston's case, cites Hale. Wood cites Woolston's case. Blackstone quotes Woolston's case and Hale. And Lord Mansfield, like Hale, ventures it on his own authority. Here I might defy the best-read lawyer to produce another scrip of authority for this judiciary forgery; and I might go on further to show, how some of the Anglo-Saxon priests interpolated into the text of Alfred's laws, the 20th, 21st, 22d, and 23d chapters of Exodus, and the 15th of the Acts of the Apostles, from the 23d to the 29th verses. But this would lead my pen and your patience too far. What a conspiracy this, between Church and State! Sing Tantara, rogues all, rogues all, Sing Tantara, rogues all!

I must still add to this long and rambling letter, my acknowledgments for your good wishes to the University we are now establishing in this State. There are some novelities in it. Of that of a professorship of the principles of government, you express your approbation. They will be founded in the rights of man. That of agriculture, I am sure, you will approve; and that also of Anglo-Saxon. As the histories and laws left us in that type and dialect, must be the text-books of the reading of the learners, they will imbibe with the language their free principles of government. The volumes you have been so kind as to send, shall be placed in the library of the University. Having at this time in England a person sent for the purpose of selecting some professors, a Mr. Gilmer of my neighborhood, I cannot but recommend him to your patronage, counsel and guardianship, against imposition, misinformation, and the deceptions of partial and false recommendations, in the selection of characters. He is a gentleman of great worth and correctness, my particular friend, well educated in various branches of science, and worthy of entire confidence.

Your age of eighty-four and mine of eighty-one years, insure us a speedy meeting. We may then commune at leisure, and more fully, on the good and evil which, in the course of our long lives, we have both witnessed; and in the meantime, I pray you to accept assurances of my high veneration and esteem for your person and character.