"Whether Christianity is a Part of the Common Law ?"

by Thomas Jefferson

As set forth in the

Reports of cases Determined in the General Court of Virginia. From 1730 to 1740; and from 1768 to 1772

[Vol.1., Virginia Law Reports Annotated]
[pp.73-75 (treatise c.1765?).]

[This law treatise is set forth here for several reasons: Its rarity among the Readers' several available libraries, public or law; For its importance in comprehending the way Errors are repeated amongst the supposed Knowledgeable (as complained of by Dr. Samuel Johnson) until as a belief being Truth among the masses of people who put their faith in such presumptuous Educated Knowledge; and also To assist in recognizing the details between the several "law systems" in effect during the many historical and law eras mentioned herein. The words, spelling, and grammatical structure, odd as they seem — and all the more difficult to easily or quickly read — are correctly represented. Read slowly. Also, Mr. Jefferson either does not understand, or rejects, the historical, archaeological, and anthropologically proven fact that the Old Testament Israelites were the Caucasians of today, none other; and that Scriptural cites mentioned did in fact not apply to any others. Nonetheless, Jefferson's argument that 'Christianity is not part of the common law' is true, as revealed in this treatise.]

Preface

"...I have added a Disquisition of my own, on the most remarkable instance of Judicial legislation, that has ever occurred in English jurisprudence, or perhaps in any other. It is that of the adoption in mass of the whole code of another nation, and its incorporation into the legitimate system, by usurpation of the Judges alone, without a particle of legislative will having ever been called on, or exercised towards its introduction or confirmation.

TH: JEFFERSON."

[The "Disquisition" mentioned by Mr. Jefferson most likely is that of the Matter presented herein; only a closer scrutiny of legal Matters and their attendant Issues extant — *i.e.*, during the A.D. 1760's — will prove if another legal Matter or Issue was intended in his Prefatory remarks. The frequent use in the main text of obscure and seasonal words, phrases, legal citations, the names of law commentators, *et al.*, and the occasional use of the French language, at the time known to may Learned and Educated men of Jefferson's times, have yet to be discerned, examined, defined, or translated here. Be watchful, however, for an occasional wry expression of Mr. Jefferson's unique kind of satire. -Ed.]

APPENDIX.

"Whether Christianity is a Part of the Common Law ?"

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 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 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, 'a tels leis que ils de sient eglise ont en ancien scripture, covient a nous a donner credence; car ceo common ley sur quel touts manners leis sont fond s. Et auxy, Sir, Nous sumus obliges de conustre lour ley de saint eglise: et semblablement ils sont obliges de conustre nostre ley, et, Sir, si poit apperer or a nous que l'evesque ad fiat come un Ordinary fera en tiel cas, adonq nous devons ceo adjuger bon, ou auterment nemy,' &c. It does not appear what judgement was given. Y.B. ubi supra. 3. c. Fitzh. Abr. Qu. imp. 89 Bro. Abr Qu. 1mp 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. 1. c. 3. published in 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 antient 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 touts manners leis sont fondes.' 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 Bro's Abr. of this case, Littleton says 'les juges del Common ley prendra conusans quid est lex ecclesiae vel admiralitatis et hujus 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 1658) things 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 Ventr. 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 tempora 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, 409. And Blackstone (about 1763) repeats, in the words of Sir Matthew Hale, that 'Christianity is part of the laws of England,' citing Ventr. 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 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 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, yet the same Hale tells us, 'when I call those parts of our laws Leges nor scriptae, 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 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 arguments and opinions, preserved from antient times, and still extant in writing.' Hale's Comm. Law. 22. Authorities for what is common law, may, therefore, be as well cited as for any part of the lex scripta. 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, that one stroke to a whole system, no particle of which has its foundations in the common law, or has received the 'esto' of the legislator. For we know that the common law is that system 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 upon 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 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 treaties 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 the Christianity as part of the common law, had any such adoption ever taken place. But no word of his, which intimates any thing 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 then 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-mouthed 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 15th 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. 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 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. xi. a fixed indemnification is paid. Theft of an ox or sheep by Jewish law, xxii. Exod. 1. was repaid 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 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 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 pay his theft; § 24, obligates the fornicator to marry the woman he had lain with; § 29, forbids interest on money; § 28, 35, make the laws of bailment, and very different from what Lord Holt delivers in Cogs 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 1st. The scriptures had affirmed so 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 til James's statutes,' deliberately laid down in his H. P. C., a work which he wrote to be printed and transcribed for the press of his lifetime, than to the hasty scriptum, that 'at common law, witchcraft was punished with death as heresy, by writ de heretico comburendo,' 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 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, had ever made their judges accomplices in the frauds of the clergy; and even bolder than they are; for instead of being contented with the surreptitious introduction of these four 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 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 conscientiæ, and they arm the whole with the coercions of municipal law. They do this, too, in a case where the question was, not at all, whether Christianity was a part of the law 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.

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