

the Authority of the Civil Law in Scotland, I shall in the next place consider what is objected against it. The Viscount of Stair (Inst. lib. 1. tit. 1. §. 16.) alleges, that the Civil Law (the of great Weight with us for its Equity and Expediency in Cases where a former Custom is wanting) hath no legal Authority. Because Scotland was declared subject only to the King's Laws, and not to the Laws of other Countries Act. 40. Par. 3. J. 1. Act. 79. Par. 6. J. 4. which are ratified, and all jurisdiction not authorized by King and parliament discharged Act. 131. Par. 8. J. 6.

But these Statutes do not in the least enervate the Authority of the Civil Law with us. For they were not calculated or intended to shake off our due respect to the Civil Law of the old Romans which was voluntarily assumed into our Constitution as a Subsidiary Law to our own, and not imposed upon us by Foreign Authority. For the parliament made such Acts only to obviate and disapprove the vain Pretensions and Usurpations of the Emperor Pope and King of Denmark. Mikenzie Observ. on Act 40. Par. 3. J. 5. Act. 79. Par. 6. J. 4. In those Days when

Laws of Churchmen obtruded the Papal Canons and Bulls as Laws upon the people; when Notaries in Scotland were made by Authority of the Emperor Act. 31. Par. 5. J. 3. & 3. When the King of Denmark would have the Isles of Orkney and Shetland to be governed by his Laws. The Ground of the King of Denmark's Claims was this. Donald Bann Brother to King Malcolm Canmore had given the Isles of Scotland to the King of Norway for his Assistance to support him in his usurped Right to the Crown of Scotland against his brother's Son. But after many bloody Battles this Alienation Magnus the fourth King of Norway renounced all Right to these Isles in a Treaty of Peace with Alexander the third of Scotland in the year 1266 for Payment of 100 Marks Sterling yearly by the King of Scotland to the King of Norway which was called the Annual of Norway. At length this Annual was discharged by Christian the first King of Norway Denmark and Sweden An. 1466. In the Contract of Marriage between our H. James the third and Margret only Daughter to Christian, Rene de Vorh. Signif. voce Annual. Craig Feud lib. 1. tit. 15. §. 11. So that the Sovereignty of our Nation is not in the least diminished by adopting the Laws of another, and suffering the Subjects to follow and make Use of such Laws. Our Legislators by approving the Roman Laws have made them their own, as the Romans did the Laws of Rhodes in Maritime Affairs, and all Europe have done concerning Feudal Law composed by some Lombard Doctors. And what Appearance is there, that the Roman Emperors submitted to that Yoke, because they adopted some of their Laws: or that all Christendom was subject to the Princes of Lombardy, by authorizing their Customs? The voluntary Deference shew'd the Roman Laws in Scotland, is not an Effect of our Dependence, but of our Reason, which leads us to make Choice of such Laws as we could not reject without straying at the same time from Equity and right Reason.

I have treated elsewhere concerning the Use and Authority of the Civil Law in France and in England, vid. Appendix to my third Volume, page 3. 4. 5. 27.

2^d Sir George Mikenzie (Inst. lib. 1. tit. 8. §. 8.) insinuates that the Canon Law hath no popular Authority here since the Reformation as being computed by private persons at the Desire of the Pope. But this I cannot simply agree to, because the Canon Law is now to be our common Law by the same Statutes that establish the Authority of the Civil Law, in so far as our own Municipal Law hath not expressly receded from it Act. 20. Par. 6. J. 5. Act. 22. Par. 6. 2. M. or it doth not clash with sound Religion. The since the Reformation the Pope had no Authority in Scotland, yet our Ecclesiastical Rights being settled by the Canon Law before the Reformation, and there being many things

in that Law founded on material Justice and Equity, we are still obliged to recur to it in Ecclesiastical Matters, as we do to the Roman Law in secular Affairs. For in things touching Conscience, Marriages, Testaments, and Benefices, or Rights, we follow the Canon Law, and prefer it to the Civil Law, except where it clashes with sound Religion, or our civil or Municipal Law. Not as if the Pope were now to be obey'd in Scotland since the Reformation, being our Kings and Parliaments even in some of Popery disowned his having any Legislative power in Scotland, and declared us only subject to the Kings Laws Act. 40. Par. 3. J. 1. Act. 79. Par. 6. J. 4. but because we willingly assumed the Canon Law for its Equity and Expediency into our Constitution (as we did the Civil Law) without either being imposed on us by any Foreign Pontifical or Imperial power, or Authority. Therefore Craig (Feud. lib. 1. tit. 3. §. 5.) that juris pontificia magna apud nos manet Auctoritas adeo ut quatuor a pure Civili Subject, his pontificum preferantur. And my Lord Stair (Inst. lib. 1. tit. 1. §. 14. adds, that the Canon Law may be more fitly retained than rejected.

3. The Feudal Law made its first Remove from Italy where it originally got up and flourished, into Germany where, particularly, it received many Alterations Amendments and Embellishments. Then it passed into France. It is difficult to determine precisely when Feuds or Tenures were first brought in England. Some as the Lord Coke (Inst. 76. b.) the Judges of Ireland (the Case of Feudal Tenures upon defective Titles &c. Mr. Pender. 21. of Hon. 510. 511. 513. 520.) Valuer-miel (Baron's Hist. of the Eng. Gov. 161) and others (Balterne de antiq. Britan. l. 1. c. 6. cap. 8. Temple introd. to the Hist. of Eng. 171. 172. Mirror cap. 1. Sect. 3. p. 11. 12.) have thought that they were common among the Saxons, and planted in England long before the Conquest. Others, as the Lord Hale's Hist. of the Comm. Law 107. 223. 224. before the Conquest. Others, as the Lord Stair's Hist. of the Comm. Law 107. 223. 224. Sir Henry Spelman (Gloss. ad mag. Chart. Fol. 874. ad verb. Feodum posthum. Works) are of Opinion that Feuds were first established in England by the Conqueror. Martin Wright (Introduct. to the Law of Tenures Chap. 2.) makes appear that the Fees or Tenures first were established or became a principal Branch of the National Policy of England in the Time of King William, yet that even in the Saxon Times some Lands might have been let under various Acknowledgments or Returns of Service. But the Feudal Customs were in Scotland before the Normans came into England Craig Feud lib. 1. tit. 8. §. 2. & 3. Aboriginibus. But the Saxons when Rulers of our Island, having Quasior, a travelling in Saxony, fetched home to us the feudal Constitution after it had been smoothed and in a great Measure reduced to the refined Equity of the Civil and Canon Laws. We borrowed also from France several Improvements thereof, particularly the Capitalities of Superiority, and the Use of some Technical Words. Craig (Feud lib. 1. tit. 10.) reckons the feudal Law as contained in Aboriginibus, to be the proper Law of Scotland. But this is not to be imagined. For out of the Books of the Feus a general Scheme of the Feudal Constitution of Scotland and other Nations hath been taken, and variously accommodated to the particular Genius of each Country, and the Complexity of their Affairs, there being no such Thing as a common feudal Law. Stair lib. 1. tit. 1. §. 16. circa fin. I may presume to say that no one particular System of Feuds does exactly tally with another. For the Feudal Policy did not at once prevail in the several Parts of Europe by a conquering Power, or in a legislative uniform Manner, but it obtaining as a meer Policy, and as such gradually spreading it self. H. Grob. Orog. Hist. Goth. by Craig Feud lib. 1. tit. 7. §. 1. p. 1. was variously received every Nation so modelling it as to preserve its principal Aim, and at the same Time to make it conform as far as possible with the Notions of Government and Conditions of Property established in each Country, antecedent to its Reception of such Policy.