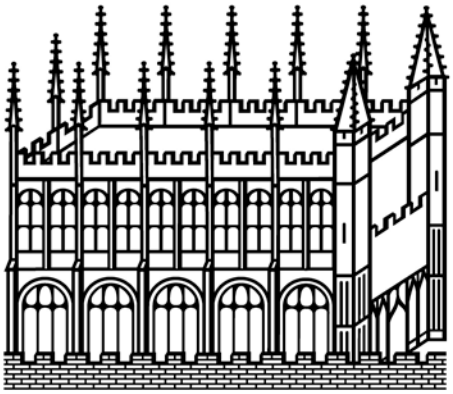
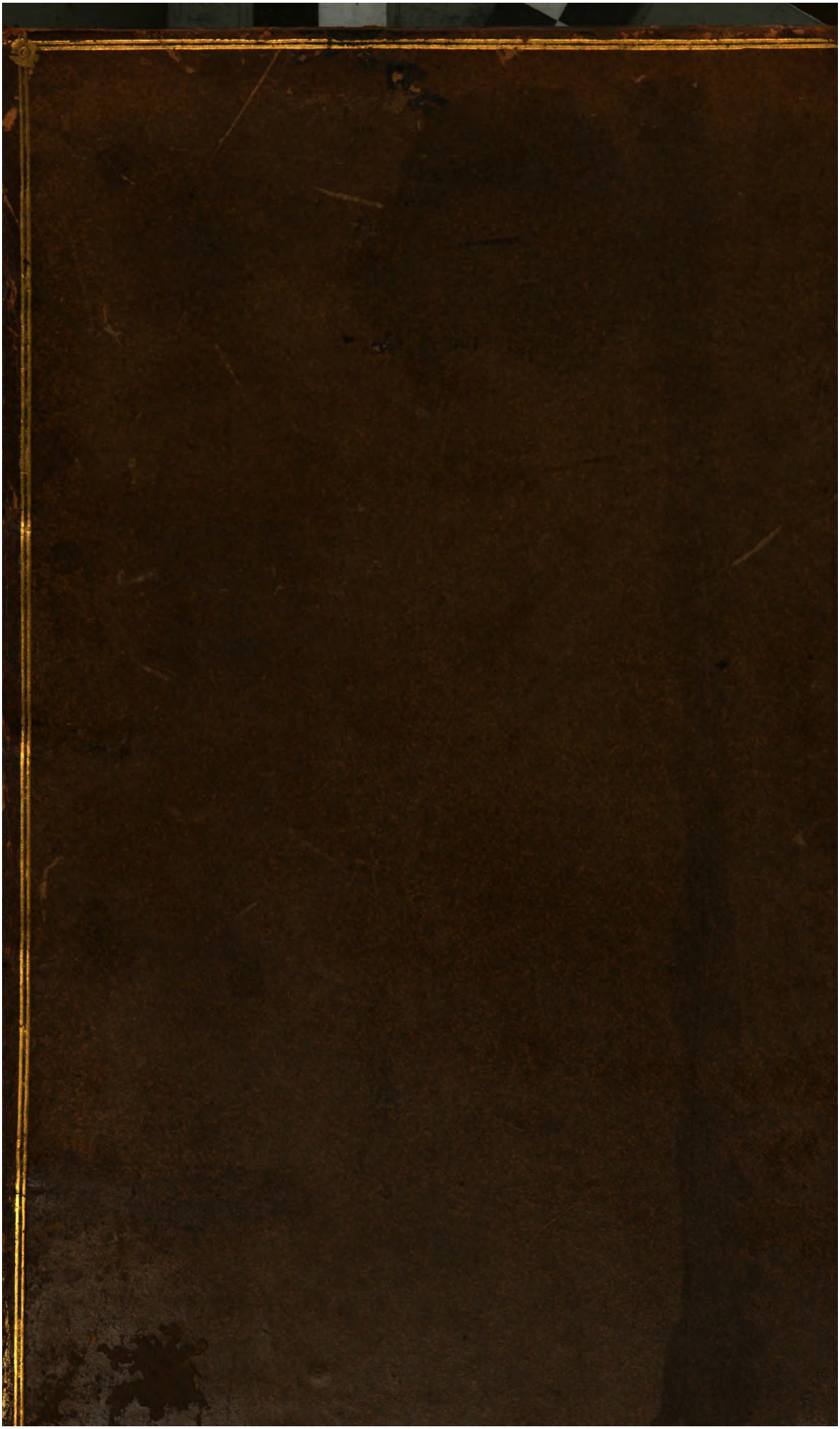
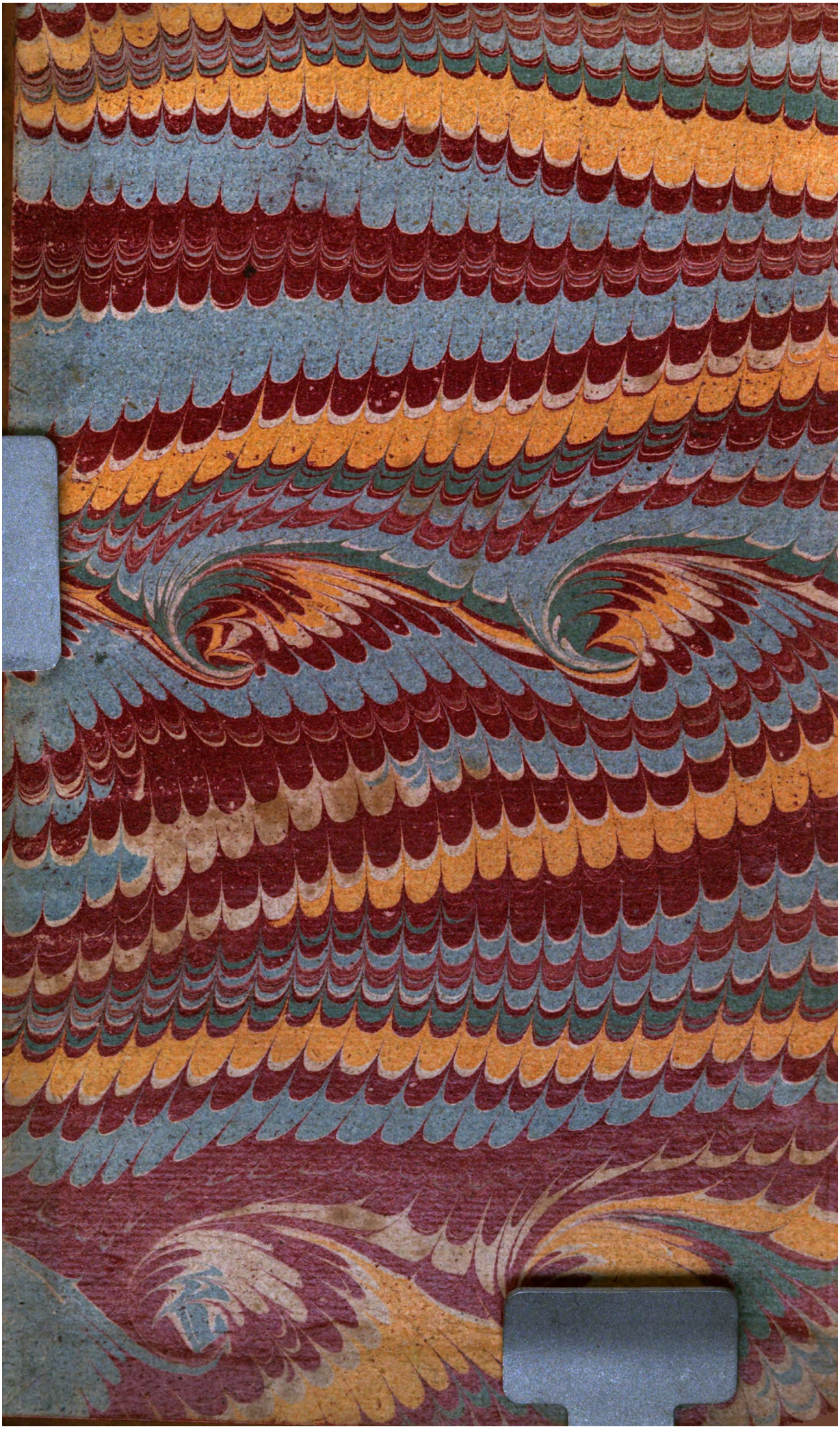
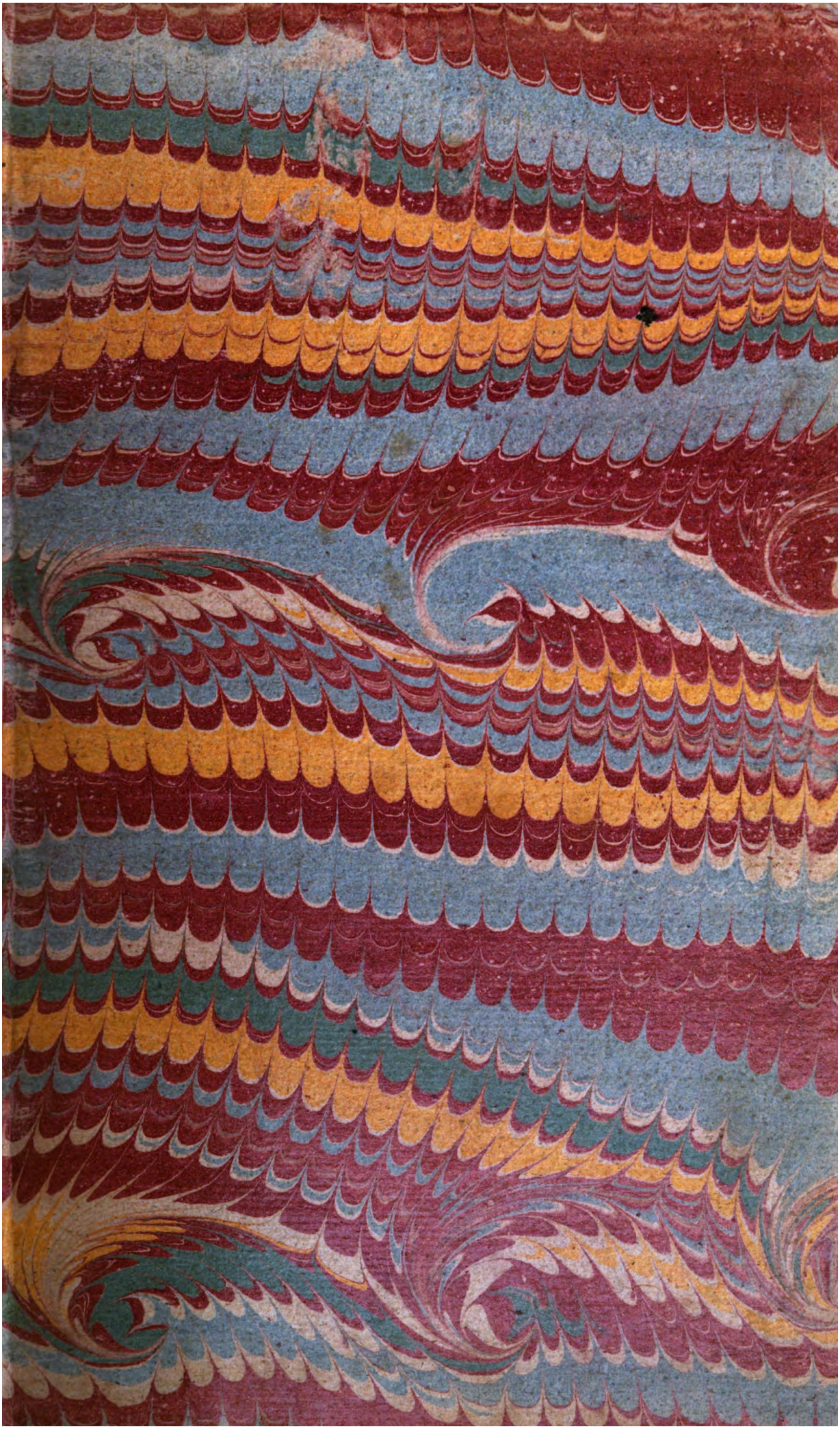








For the Bodlejan Library

Wm Blackstone.

AN

ESSAY

ON

Collateral Conſanguinity, &c.

Entered

AN

ESSAY

ON

COLLATERAL CONSANGUINITY,

It's Limits, Extent, and Duration;

More particularly

As it is regarded by the STATUTES of

ALL SOULS COLLEGE

IN THE

UNIVERSITY of OXFORD.

Μηδὲ προσέχειν Μυθοις, καὶ Γενεαλογιαις ἈΠΕΡΑΝΤΟΙΣ, αἵτινες Ζητησεις παρεχουσι.

πρὸς ΤΙΜΟΘ. Α. α. δ.

LONDON,
Printed; and sold by W. OWEN near *Temple-Bar*,
and R. CLEMENTS, in OXFORD.
M DCC L.

TO

THE MOST REVEREND FATHER IN GOD,

THOMAS,

LORD ARCHBISHOP OF CANTERBURY,

VISITOR,

THE REVEREND STEPHEN NIBLETT, D. D.

WARDEN,

AND THE FELLOWS

OF

ALL SOULS COLLEGE,

THE FOLLOWING ESSAY

IS,

WITH ALL DUTY TO HIS GRACE,

AND RESPECT TO THE SOCIETY,

MOST HUMBLY INSCRIBED.

TO THE

READER.

IT *was the Misfortune of the Society, upon whoſe Account theſe Papers were originally drawn up, that, about ſeven and twenty Years ſince, a Claim was revived upon them; which having lain dormant a conſiderable Time, they with Reaſon concluded was then become utterly extinct.*

When they came to conſider this Claim, they ſaw clearly the abſolute Neceſſity *there was, for ſetting* ſome *Bounds to that Conſanguinity, to which (while it laſted) it was their Duty to pay a proper Regard: They imagined, that ſince it ſome time or other* muſt *have an End, it had probably expired in the Space of three*

three Centuries; and, as they were informed that collateral Kindred was ſeldom, if ever, extended beyond ten *Degrees at the utmoſt, they ſuppoſed that this was the fartheſt Period, to which either Law or Reaſon would permit them to extend it in the preſent Inſtance.*

THEY *farther conſidered, that this was by no means a Matter of Indifference; that if they were* not bound *by their Statutes to* admit *the Claimant, the Nature of his Claim and the Privileges he inſiſted on were ſuch, that they were abſolutely* bound *to* oppoſe *him; and that they were no more at Liberty to accept of a* pretended, *than they were to refuſe a* genuine FOUNDER'S *Kinſman.*

UPON *the matureſt Deliberation therefore, they ventured to reject the Claimant, whoſe Alliance to their* FOUNDER *(if any) was in a remoter Degree than the* tenth. *They ventured to reject him, though a vigorous Oppoſition was naturally to be expected from the Weight of his Family and Friends; and though by the ſame Reſolution they conſequentially excluded the Deſcendants of that very Perſon, who was afterwards to ſit in Judgment on their Conduct.*

UPON *Principles of the ſame Kind their Succeſſors have ever ſince acted; thoroughly convinced*

vinced (and that not lightly, but on Grounds they have never heard anſwered) that all *collateral Conſanguinity muſt* ſome where or other *have a Limit; and induſtrious to the utmoſt of their Power to diſcover,* what *Limit was intended by their* FOUNDER *in this particular Caſe.*

But as human Reaſon is ever fallible and imperfect, as well in Societies as in private Men, the Succeſs hath not at any time anſwered their Endeavours. It was determined, in the firſt Inſtance, *that they had erred in rejecting the* then *Claimant. And their Succeſſors have, by ſome Fatality, fallen into as great Errors, whenever* they *have endeavoured to ſet a Limit to this Claim: It having been conſtantly determined, that the different Boundaries, which they have tried to eſtabliſh at different Times, have* not *been the proper ones; though* what *the proper Boundaries are, has yet been never adjudged.*

In the mean time, it has given them no ſmall Concern, that many Gentlemen of Senſe and Judgment, but unacquainted with the real *State of the Caſe, have miſ-interpreted the frequent Diſappointments which the College have hitherto met with; and been ready to conclude from thence, that there muſt have been ſomething*

very weak (*if not* worſe) *in their Conduct upon this Occaſion.* Unfortunate *they have certainly been, (that, among the Variety of Boundaries they have tried, they ſhould never be able to hit upon the right) but not* blind, *it is hoped, to the Force of Truth, nor perverſely* obſtinate *in a known Error; ſince the main Point which they have all along aſſerted, the Neceſſity of* ſome *Boundary, has never been decided againſt them; or, if decided at all, has rather been decided in their Favour. Yet hence unworthy Notions have been progagated; diſingenuous Aſperſions have been* publickly *thrown out; and printed Invectives been* privately *diſperſed; tending greatly to reflect on a Society, which has always been ſolicitous to maintain it's Reputation, though not at the Expence of it's Duty.*

Upon theſe Accounts it is, that the Author of the following Papers has been induced to conſent to their Publication; in order to demonſtrate to the Unprejudiced, that the Behaviour of the College in this Affair has been far from deſerving Reproach: Since he hopes that, upon a fair Examination, it will appear to Men of Candour and Underſtanding, (for Ignorance, which is ever obſtinate, he undertakes not to convince) that the Notions of

the

the Society are neither abſurd nor unwarranted; that the general Doctrine they inſiſt on is clear beyond all Contradiction; and that even in thoſe particular Caſes, wherein it has been determined they have erred, they have at leaſt erred upon plauſible Grounds, have been miſguided by Authorities too great for them *to diſpute, and been miſtaken upon Reaſons too cogent for* them *to anſwer.*

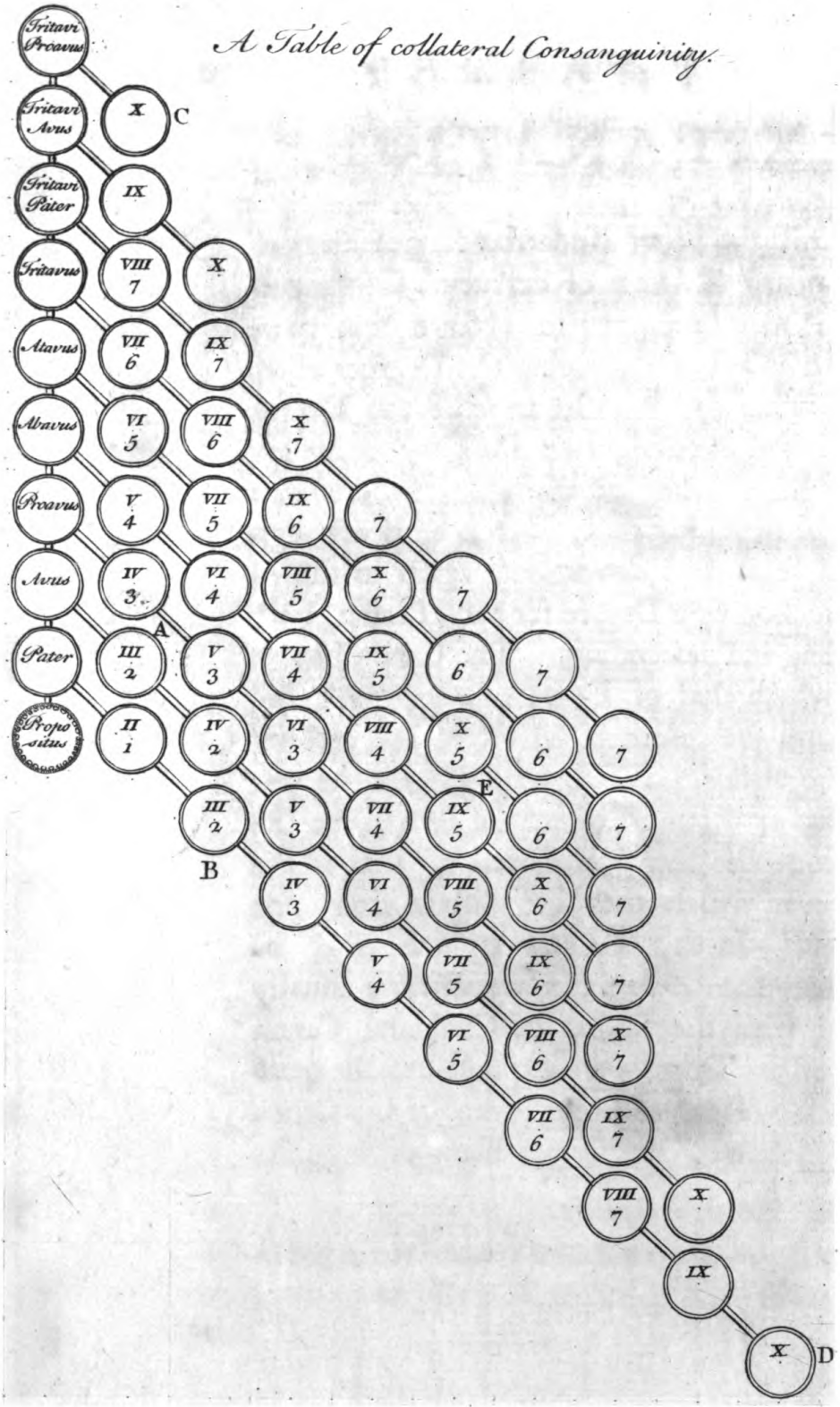
The principal, if not the only, Arguments which are urged in Support of the Infinitude of Kindred, are conſidered in the Courſe of this Eſſay. Other than theſe the Writer does not recollect to have heard; unleſs indeed a round Aſſertion, "That no Limits have ever been "ſet to Conſanguinity in any Law whatſo-"ever." The Truth of this Aſſertion, as well as the Force of thoſe Arguments, muſt be left to the Opinion of the Reader, after his Peruſal of theſe Papers; which, as nothing offenſive is intended, it is hoped will offend nobody; being wholly calculated to ſhew, that the College may ſtill be right as to that Part of the Queſtion, which has yet received no final Deciſion from Authority. To this End it is that they are ſubmitted, with all due Deference, to competent and impartial Judgments; there remaining only to add that (as they

come entirely from a private Hand) the Society, whoſe Conduct they propoſe to vindicate, is by no means anſwerable for any Miſtakes which may have ariſen, through the Uncommonneſs of the Subject, or the Inexperience of the Compiler.

ERRATUM.

Pag. 46. Not. lin. 4. for *Denominators* read *Denominator is.*

A Table of collateral Consanguinity.



EXPLANATION.

FOR the better Underſtanding of the annexed TABLE of collateral Conſanguinity, it may be proper to obſerve that there are two Ways of reckoning the Degrees of it. The Civilians [1], in order to ſettle the Degree of Kindred between two Perſons, count *upwards* from either of them to the common Stock or Anceſtor from whom both are deſcended, and then *downwards* again to the other, reckoning a Degree for each Perſon, both aſcending and deſcending. The Canon Law [2], with which that of ENGLAND agrees [3], begins from the common Anceſtor, and reckons only *downwards*; and in what Degree the two Perſons, or the moſt remote of them, are diſtant from the common Anceſtor, that is the Degree in which they are diſtant from one another. In this TABLE (which is no other than the *Arbor Conſanguinitatis* uſually printed with the Bodies of Civil and Canon Law) all the Degrees are expreſſed to the *tenth* of the Civilians, and the *ſeventh* of the Canoniſts, incluſive; the former being diſtinguiſh-

[1] FF. 38. 10. 10. § 3. [2] DECRETAL. *Lib.* 4. *tit.* 14. *c.* 3 & 9. JOAN. ANDREÆ *Declaratio Arbor. Conſang.* § 15 & 17. [3] Co. LITT. 23. *b.*

ed by the numeral Letters, the latter by the common Figures.

If, for Inſtance, it be enquired in what Degree E is related to the *Propoſitus* by the Civil Computation, we muſt count from the *Propoſitus* upwards to the *Abavus*, four; then downwards from the *Abavus* to E, the Perſon enquired after, five more; in the whole, nine; and that is the Degree in which he is related to the *Propoſitus* by the Civil Law.

According to the Canoniſts, we muſt begin counting downwards, from the *Abavus* to the *Propoſitus*, four; then again, from the *Abavus* to E, five; which being the greater Number of the two, is therefore the Degree in which E and the *Propoſitus* are of Kin to each other.

AN

ESSAY

ON

Collateral Conſanguinity, &c.

THE COLLEGE OF THE SOULS OF ALL FAITHFUL PEOPLE DECEASED OF OXFORD was founded in the year of our Lord 1438, 16 HENR. VI. by that learned and renowned Prelate, Archbiſhop CHICHELE; who, in the Statutes which he publiſhed in his Life-time for the better Government of the ſame, has given a certain Degree of Preference in the Election of Fellows to his KINSMEN; and has alſo indulged them with certain peculiar Privileges, to which none are to be admitted, except thoſe who are really and truly of his Blood: And to the Obſervance of every Part of theſe Statutes the Warden and Fellows are bound by a ſolemn Oath at their Admiſſion.

IT is therefore to them a Matter of very ſerious Concern to know, what Perſons are, or are not, comprehended under ſo general a Name as that of Kindred: For, as on the one hand they are bound *poſitively*, to pay Reſpect to the Blood of their FOUNDER wherever they meet with it; ſo on the other hand they are bound *negatively*, not to impart the Advantages of Kinſmen to Strangers. Therefore it ſhall be the Buſineſs of the enſuing Pages to enquire, WHO THESE KINSMEN ARE; or, How far that Relation extends, which entitles the Perſons related to the Privileges of Kinſmen.

THE Rule, which muſt govern this Enquiry, is undoubtedly the Statute of the FOUNDER; and, if that be at all dubious, or applicable to more Senſes than one, the genuine Meaning muſt be diſcovered by the ordinary Rules of Interpretation. Now theſe will be much the ſame, whether we are to conſider the FOUNDER's Statutes as his Will, according to the Doctrine of ſome; or as a Body of Laws for the Government and Direction of the Society he had inſtituted, which ſeems to be the better Opinion. For, though all Laws interpret Bequeſts and Legacies in the moſt beneficial Manner for the Perſons intended to

receive them, yet, in order to find out *Who* the Perſons intended are, a leſs liberal Conſtruction is uſed; and of courſe the ſame Rules of Interpretation muſt prevail, whether we look upon the FOUNDER in a teſtamentary, or a legiſlative Capacity.

THERE are two Lights, in which the FOUNDER may be thought to have conſidered this Relation of Kindred; either as ſubſiſting and extended *in infinitum*, or as bounded at ſome certain Period and Degree. In the following Tract it will be attempted to ſhew, that he muſt be ſuppoſed to have conſidered it as limited and circumſcribed within ſome particular Boundary; and *what* that Boundary was, may alſo be, incidentally, the Subject of this Enquiry.

IN order to proceed with the greater Regularity and Certainty, it will not, I imagine, be improper to govern our Interpretation by the Rules, which have been laid down by Writers of Eminence, and indiſputable Authority, and who cannot be ſuſpected of any Biaſs or Partiality to either Side of the Queſtion. Such are SUAREZ and PUFFENDORF; who have reduced [a] all the Methods of interpreting Laws

[a] SUAREZ *de Legibus. Lib.* 6. *cap.* 1.—PUFFENDORF *de Offic. Hom. et Civ. Lib.* 1. *cap.* 17.

to three, by conſidering, firſt, the very Words of the Law itſelf, " *Verba Legis* ;" ſecondly, the Occaſion of making it, " *Ratio Legis* ;" and thirdly, the Intention of the Maker, or " *Mens Legiſlatoris.*" And hence it is manifeſt, that the Heads of our Enquiry muſt be theſe, Whether from the *Letter* of the Statute, the *Occaſion* of making it, or the probable *Intentions* of the FOUNDER, it appears, that the Kindred by him ſpoken of may continue to ſubſiſt *in infinitum.*

I.

IT will therefore be firſt neceſſary to aſcertain the Words of the Statute, and then to conſider their Force. Now the Name, which moſt uſually occurs for the Perſons intended by the FOUNDER is that of *Conſanguinei* [b]: He alſo deſcribes them [c] in this manner, " *Illi* " *qui ſunt, vel erunt de Conſanguinitate no-* " *ſtrâ & Genere* ;" and again [d], " *Hi qui de* " *noſtro Sanguine fuerint.*" So that the Words, upon which the preſent Queſtion ariſes, are theſe three, CONSANGUINITAS, GENUS, and SANGUIS.

[b] STATUT. *de totali numero, &c. propè fin.—de modo & formâ & tempore eligendi, &c. propè fin.—de communi annuâ Veſtium, &c. ad init.*

[c] STATUT. *de modo & formâ, &c. propè init.*

[d] *Ibid.*

THE

THE ſtrict Signification of CONSANGUINITAS, by the Civil Law, is only that Relation which ſubſiſts between Brethren born of the ſame Father [e]; more diſtant Kinſmen being comprized under the Terms *Agnatio* and *Cognatio*. But this Senſe of the Word being apparently too confined, we muſt take it, in the more enlarged Senſe of the Canon and our municipal Laws, to ſignify all collateral Relations, and what *they* are ſhall be preſently aſcertained. GENUS, in its proper Signification, comprehends only a Man's Lineage, or direct Deſcendants; "*Genus* [f] *eſt uniuscujuſque Generationis Principium, ut Avus eſt Principium multis procreatis.*" But here alſo we muſt extend the Word beyond the *proper* Senſe of it, if we would make it carry any Meaning at all. SANGUIS ſignifies [g] properly "*Cognatio naturalis,*" and is by much the moſt extenſive Word made uſe of, it importing the ſame that CONSANGUINITAS does in the Canon and Common Law.

ALLOWING therefore every one of theſe Words to be uſed in the largeſt Senſe it is capable of, the Perſons, intended by the FOUN-

[e] FF. 38. 16. 1 & 2.—CALVIN. *Lex. voc.* CONSANGUINEI & CONSANGUINITAS. [f] CALVIN. *Lex. voc.* GENUS.
[g] *Ibid. voc.* SANGUIS.

DER

DER to enjoy the Privileges he appoints, will be HIS COLLATERAL RELATIONS; that is, ſuch as are the lineal Deſcendants from ſome one of his lineal Anceſtors; according to that uſual Definition of the Canoniſts, *Conſanguinitas eſt Vinculum Perſonarum ab eodem Stipite deſcendentium.* A Definition, which in the courſe of this Argument we ſhall frequently have Occaſion to refer to; and which therefore ſhould be thoroughly conſidered, in order to retain an adequate Idea of what Conſanguinity is, in the Senſe wherein the FOUNDER uſes it, and wherein it will conſtantly be uſed in the Remainder of this Eſſay.

LET us next obſerve the Force of the Term, *Conſanguinitas*, in this it's moſt comprehenſive Senſe, and ſee whether or no the Relation which it implies is neceſſarily without End, and without Boundary.

THERE are two Ways of conſidering the Force of any Expreſſion; either according to it's natural, or civil, Propriety [h]; either in it's popular, or technical, Signification [i]. If then, in the firſt place, we conſider Conſanguinity as a popular Expreſſion, (which, according to PUFFENDORF [k], is to be under-

[h] SUAREZ *ubi ſupr.*
[i] PUFFEND. *ubi ſupr.* § 2 & 3.
[k] *Ibid.* § 2.

ſtoo

ſtood "*in famoſo Significatu, quem illi impo-*
"*ſuit non tàm Proprietas, quàm popularis*
"*Uſus*") the common Notions of Mankind will never teach us to look upon collateral Kindred as a Thing ſubſiſting for ever. On the contrary, the Affection, the Remembrance, the very Name of Couſins ceaſes after a few Deſcents: Even the ſeveral Families, that have of late inſiſted on a Relation to the FOUNDER, will hardly in common Diſcourſe acknowledge ſuch a Relation between themſelves; though they have generally a much nearer *communis Stipes*: Nay, the very Name of *Cater*, or (as it is more properly wrote) *Quater* Couſins, is grown into a Proverb; to expreſs, by way of Irony, the laſt and moſt trivial Degree of Intimacy and Regard. When we ſpeak of *our Relations*, we only mean ſuch as are within a few Degrees of us; nor do we pretend to argue, that becauſe all Kinſmen are deſcended from one common Anceſtor, therefore all who are deſcended from one common Anceſtor are Kinſmen.

BUT if Conſanguinity is not here to be conſidered as a popular Expreſſion, but rather as a legal Term; PUFFENDORF will farther[1] inform us, that "*Vocabula Artium expli-*
"*canda ſunt ſecundùm Definitiones Pruden-*

[1] *Ibid.* § 3.

"*tum.*"

" *tum.*" The Opinions of the Lawyers are therefore to be conſulted ; and I truſt that in the courſe of this Eſſay it will clearly appear, that no Law whatſoever has extended Conſanguinity *in infinitum*, when it conſiders it in the ſame Light wherein it ſtands in the FOUNDER's Statutes.

TAKING this then at preſent to be the Caſe; if in common Speech the Conſanguinity here mentioned be never conſidered as diffuſing itſelf infinitely, if in it's legal Acceptation it ſhould appear to be never extended without Limit, we need go no farther to find out the Meaning of a Statute, which thoſe whom it moſt nearly concerns are ſworn [m] to interpret " *ſecundùm planum, literalem, et gram-*" *maticalem Senſum.*" But leſt the Favourers of this Interpretation ſhould ſeem to ſtick to the Letter, through a Fear that a farther Examination ſhould make againſt them, let us proceed to put it to the Teſt, according to the two remaining Methods of aſcertaining the Meaning of any Law: And, firſt, the Occaſion of it.

II.

Now the Occaſion of the FOUNDER's making this particular Statute was, undoubt-

[m] *Juramentum Officij Cuſtodis & Sociorum.*

edly

edly, his Affection and Regard for his *real* Kindred: And theſe Motives we muſt ſuppoſe to be greater or leſs, in proportion to the Nearneſs to, or Diſtance from him. If therefore we enlarge the Circle of his Conſanguinity, nay, ſet no Bounds to it's Circumference, the Advantages intended his *real* Kinſmen will dwindle into nothing at all. For, the fewer there are that are capable of partaking of a Privilege, the Privilege is undoubtedly the greater to thoſe few that do partake of it; an excluſive Right to a Fellowſhip is certainly an Advantage, if confined within a ſtated Degree of Diſtance; but if the Limit be thrown down, and a Door opened to every, even the remoteſt, Degree, the Privilege leſſens in proportion as the Number that enjoy it encreaſes.

WHAT then becomes of the FOUNDER's Affection to his *near* Relations? Did he mean them a Benefit, and, at the ſame time, by extending it to render it of none Effect? Did he mean to prefer his *diſtant* Relations (if indeed they are intitled to that Name) to ſuch as are confeſſedly his *near* ones? This even the remote Retainers to his Family, who call themſelves now-a-days his Kinſmen, will not pretend. And yet this prepoſterous Preference is the Conſequence of an infinite, nay even of a

remotely finite, Extenſion of Conſanguinity: The greater Diſtance they are from him, the more likely will they be, on account of their ſuperior Numbers, to monopolize his Bounty, and exclude his real Relations (if any ſuch there are) from partaking a Share of his Benevolence. A ſtrange kind of inverſe Proportion! And yet this would have been liable to happen, even at the Foundation of his College: His own Nephews might then have been excluded by ſome herald-made Couſin, in the twentieth or other more remote Degree.

THIS *might* have been the Conſequence, even though it were not true, that unbounded Conſanguinity muſt neceſſarily end in its Univerſality. But that this is really the Caſe ſhall be preſently ſhewn, ſince ſome have affected to doubt it; and then it muſt be owned, that the ſtrange Conſequences above ſpoken of will, inſtead of probable, become unavoidable.

THUS we ſee that even the FOUNDER'S Affection to his Kindred (paradoxical as ſome may think it) will limit this Relation within ſome certain Degree. Yet this was only a *private* Inducement of his; an Inducement for excepting ſome particular Perſons from the general Laws he had eſtabliſhed. Let us now go a Step farther, and conſider his more *public*

and

and avowed Motives, for making thoſe Laws whereof the preſent Clauſe is a Part, and for founding that Society for whoſe Uſe thoſe Laws were compiled: The Glory of God, the Good of Mankind, and the Encreaſe of Religion and Learning. And it is to be feared, that theſe Ends will be but indifferently anſwered by the infinite Extenſion of Kindred.

I SPEAK not this, with a View to caſt any perſonal Reflections; the Cauſe I have undertaken diſdains them: There have been, are, and undoubtedly may be, Gentlemen as well qualified for a Fellowſhip in Morals, Diſpoſition, and Learning, *with* Pedigrees as *without* them; but the Misfortune is, that, according to the Doctrine which has hitherto prevailed, they are not *obliged* to be very eminent in either. Excellence, it ſeems, is not required in them, whatever it may be in other Candidates; but the Weight of a Pedigree is ſufficient to overbalance ſuperior Merit. Now we know that Emulation is the ſtrongeſt Incentive to Deſert; and where a Check is manifeſtly given to that, where comparative Merit is entirely put out of the Queſtion, poſitive (it is to be feared, from the general Degeneracy of Mankind) cannot be of long Continuance.

IT is upon this Account only, that I preſume to doubt, whether the great Ends of the FOUNDER will be anſwered by the infinite Duration of Kindred: And no more than this a certain noble Writer [n] muſt be underſtood to mean, when he charges the Excluſion of learned Men from theſe Societies, as the Conſequence of admitting the Claim of FOUNDER's-Kinſmen.

THIS then is the Amount of allowing the Infinitude of that Claim; the Deſtruction of the great Ends for which the Society was founded; and alſo the Deſtruction of thoſe particular Ends for which the Kindred are excepted from the general Laws of the Foundation. But from the contrary Interpretation no ſuch Inconveniences will follow. A decent and reaſonable Regard will be paid to the FOUNDER's Blood, ſo far as his Affection may be ſuppoſed to reach, and no farther: There will be Room ſufficient to admit all ſuch, as are within a moderate Degree of Propinquity; but this will not happen ſo frequently, as to deſtroy the Conſideration of comparative Merit; for when, from the Encreaſe of Kindred, this Inconvenience begins a little

[n] Lord CLARENDON. See, in his Tracts, the Dialogue of Youth and Old Age.

to

to be felt, the Relation itſelf will gradually fail, and of courſe the evil Conſequences will be no more.

THIS being the Caſe, one would think it impoſſible to entertain ſo diſhonourable an Opinion of the FOUNDER, as to ſuppoſe him capable of a Meaning which abſolutely contradicts itſelf: This would indeed be *Interpretatio viperina*, as the Doctors call it where the Comment deſtroys the Text; and ſurely there is no Reaſon to depart from the Letter of the Statute, in favour of *ſuch* an Interpretation.

III.

WE are next to conſider the FOUNDER's Intention, or what SUAREZ calls [o] the *Mens Legiſlatoris*; and on this our Pſeudo-Kinſmen have laid a great Streſs, alledging (with no great Compliment to their ſuppoſed Relation) that this is to be obſerved, however unreaſonable it may ſeem; and that it is to be conſidered, not what the FOUNDER *might*, or *ſhould* have meant, but what he *did* actually mean. Now how we can better collect the FOUNDER's Meaning, than from the Words of his own Laws, and the Occaſion of his making them, I confeſs I cannot ſee; but

[o] *Ubi ſupr.*

however

however I truſt it will appear, from every other Method of collecting it, that he did not, could not intend that his Kinſmen ſhould extend their Claim *in infinitum*.

I. ONE of the beſt and moſt general Rules, for finding out the Intention of a Perſon who uſes a dubious Expreſſion, is this: That [p] where one Signification of the Word induces an Injuſtice or Abſurdity, another Signification is to be taken. And this is the Rule, even where the unjuſt or abſurd Signification is the primary and proper one; it will hold therefore much more ſtrongly here, where the Caſe is otherwiſe. And that the Extending of Conſanguinity *in infinitum* muſt neceſſarily produce very wild and abſurd Conſequences, may be beyond Contradiction demonſtrated.

As all collateral Conſanguinity conſiſts in being derived from one common Parent, if this Conſanguinity knows no Bounds, all Mankind are without doubt Kinſmen, becauſe derived from the ſame original Anceſtor. This is certainly a juſt Conſequence, how oddly ſoever it may ſound; and the Ridiculouſneſs of it (if any) is not to be attributed to ſuch as draw the Concluſion, but to thoſe who

[p] SUAR. *ubi ſupr.*—PUFFEND. *ubi ſupr.* § 6.

maintain

maintain the Premiſes, from which this Concluſion regularly follows.

LET us endeavour to illuſtrate this Matter a little. The common Stock of Conſanguinity [q] of the FOUNDER and his Nephew is the FOUNDER's Father; the common Stock of the FOUNDER and his Couſin-german is the FOUNDER's Grandfather; of him and his ſecond Couſin is his Great-Grandfather; and ſo on: All theſe are confeſſedly his Kinſmen, and yet all derived from different common Stocks. But unleſs there be ſome Period to ſtop at, by the ſame Rule that the common Stock may be aſſumed three Generations above either of the related Parties, it may be aſſumed three hundred; we may aſcend to NOAH, or to ADAM himſelf, and make him the *Stipes* of univerſal Conſanguinity.

IF we conſider it in another Light, we may obſerve that all Conſanguinity is reciprocal; my Nephew or Couſin is as much related to me, as I am to him, and ſo *vice verſâ*. It will follow therefore that the FOUNDER's Uncle [r] or Father's Brother, A, is as much his Kinſman as his Nephew or Brother's Son, B; and the Deſcendants of each of them are

[q] See the Table of collateral Conſanguinity prefixed.
[r] See the ſame.

equally his Relations: In like manner the Brother, C, of his eighth lineal Anceſtor (or eightieth, for it is all one) bears the ſame Relation to him, as the lineal Deſcendant, D, of his own Brother at the ſame Diſtance, and the Deſcendants of each of them are equally his Relations: For A and C bear juſt the ſame Relation to the FOUNDER, as he himſelf bears to B and D. If therefore we may be allowed to *deſcend* infinitely, we muſt alſo by Parity of Reaſon be allowed to *aſcend*; and, by aſcending higher and higher, muſt at laſt reach our common Parent; and, by adopting all that have ſprung from his Loins as FOUNDER's Kinſmen, take in the whole Race of Mankind.

THUS the infinite Extenſion of Conſanguinity neceſſarily induces its Univerſality, if we give Credit to the MOSAIC Account of either the Creation, or the Deluge; of either the Origin, or Preſervation of the human Species. Nor will it be expected, that every Man ſhould prove his particular Deſcent by Evidences peculiar to his own Family; ſince the Whole includes all it's Parts, and (as the Logicians ſpeak) what is predicated of the Species muſt be true of every Individual. Such Evidences may be neceſſary, where it is poſſible that the Perſon, whom TITIUS aſſerts to be his

his and the FOUNDER's common Anceſtor, may not be ſo; but where it is impoſſible to be otherwiſe, as in the Caſe of a Deſcent from NOAH, ſuch Proofs are idle and ſuperfluous. In ſuch a Caſe one Text of Scripture [f] is of more avail than thouſands of Heralds' Viſitation-Books; No College, I believe, will diſpute that both TITIUS and the FOUNDER are deſcended from that Patriarch, though every intermediate Anceſtor cannot be particularly named; unleſs perhaps the College of Arms, which may look upon Kindred as conſiſting not in the Deſcent, but the Deduction of it; not ſo much in the Blood, as in the Pedigree.

THE Univerſality of Kindred being once eſtabliſhed, the abſurd Conſequences of ſuch a Doctrine, in the preſent Caſe, will flow in almoſt as faſt as the Kinſmen. A Preference will be given by the FOUNDER, and no Preference at the ſame time: Particular Exceptions will be made, (as with regard to Perſons born out of the Province of CANTERBURY) and yet thoſe Exceptions exclude nobody; for Kinſmen are eligible "*ubicunque fuerint oriundi*": A year of Probation will be ordained, and no one to undergo it; for Kinſmen are exempted from that Trial:

[f] GENES. ix. 19.

Proviſions will be made in caſe of their Deficiency, and yet they can never fail, but at the End of the World.

SUCH are a few of the Conſequences of the infinite Extenſion of Conſanguinity, and it's inſeparable Companion, the Univerſality of it. Is it poſſible therefore to ſuppoſe, that a Perſon, ſo illuſtrious for his Wiſdom and Learning as the FOUNDER is acknowledged to have been, could ever think of, or intend ſuch an Extenſion; in contradiction not only to Reaſon, and to himſelf, but (as will be next ſhewn) to the general Senſe of his Contemporaries, and the Maxims both of Civil, Canon, and Common Law? For,

II. A SECOND Rule for determining the dubious Senſe of a Legiſlator, is by Compariſon [t] with other Laws: If they are repugnant to one Interpretation, and agree with the other, the latter is undoubtedly to be choſen. And, in order to bring the Caſe before us within this Rule, it will (as was before [u] promiſed) be attempted to ſhew, "That, whenever other Laws have conſidered Conſanguinity in the ſame Light in which it is conſidered by the FOUNDER's Statutes,

[t] SUAR. *ubi ſupr.* [u] *Pag.* 8.

"they

" they have never extended it *in infinitum.*" It will therefore be firſt neceſſary to ſtate clearly, in what Light the FOUNDER's Statutes do conſider it.

Now the Object of the Statutes is Conſanguinity *in general*, and not *Proximity* of Blood; the College is not concerned to enquire who is *next* of Kin to the FOUNDER, but who is of Kin *at all*; the moſt diſtant, as well as the neareſt, Relation has an equal Right to the Advantages there given. Before therefore it can be determined whether a Man be a Kinſman, it is neceſſary to know how far Conſanguinity extends. But this is not ſo neceſſarily the Caſe, when Proximity only is the Object of our Enquiry. There the Queſtion is whether A, or B, is the *neareſt*, how diſtant ſoever they both may be; for the Rule then is, that *Remotus excludit Remotiorem.* And this may be determined, without knowing preciſely what are the fartheſt Limits of Conſanguinity, or indeed without ſetting any Bounds to it at all. If a Queſtion ariſes, whether KENT or CORNWALL be the neareſt to OXFORD, we may eaſily decide it, without defining exactly where the Neighbourhood of OXFORD ceaſes: But if the Queſtion is, whether KENT be in the Neighbourhood of OXFORD or not, this cannot be

regularly decided, without pointing out preciſely how far this Vicinity extends.

ACCORDINGLY we ſhall find, that all Laws, when Conſanguinity in general is the Object of their Contemplation, have avoided extending it *in infinitum*; and the expreſs Boundary is declared by moſt of them: But when Proximity only comes to be conſidered, ſuch a Boundary being then a Matter of Indifference, it ſeems to have been adopted by ſome Legiſlators, and rejected by others. And that for this plain Reaſon; that the ſame Abſurdities will not follow in one Caſe, as in the other: For, though it is clear that, if no Limits be ſet to Conſanguinity, the whole Race of Mankind are of Kin to TITIUS; yet it will not hold farther, that all Mankind are his *next* of Kin. So alſo *lineal* Conſanguinity is allowed by all Laws to laſt *in infinitum*; becauſe the infinite Duration of that does not neceſſarily infer it's Univerſality, as has been ſhewn to be the caſe among *Collaterals*.

IN order therefore to make good the Poſition I have laid down, "That when Con-
" ſanguinity in general is conſidered by other
" Laws, without regard to Proximity, it is
" never extended *in infinitum*," I muſt beg leave

leave to review the ſeveral Lights in which other Laws have conſidered it.

1. And firſt, with regard to Succeſſions, or the Diſpoſal of Inheritances, wherein the Next of Kin is uſually preferred; this might, and indeed ought to be entirely laid out of the Caſe, for the Reaſons above given, as being always a Queſtion of Proximity. But this being the ſtrongeſt Hold of the Gentlemen who favour the Infinitude of Kindred, and the Common Law ſeeming to give ſome Colour to their Notions in this Point, it may be Matter of Curioſity to look a little into it; premiſing beforehand, that it has no Relation at all to the preſent Argument.

It would lead us into a very large Field of Diſpute, if we were to enquire into and weigh all the Arguments on both ſides upon the Queſtion, whether, by the Civil Law, Succeſſions among Collaterals were protended *in infinitum*. The Words of the Law [w] are, that they ſhall ſucceed "*etſi decimo Gradu* "*ſint*:" And the moſt cautious of the Commentators have confined themſelves to that, or the like Expreſſion; well knowing, that whether the Limits of Conſanguinity were hereby

[w] Inst. III. 5. 5.

defined,

defined, or whether it was only *Numerus certus pro incerto*, is a Queſtion more of Curioſity than Uſe; ſince it can hardly ever happen that a Man's next Heir ſhould be at a remoter Diſtance than ten Degrees. But among thoſe who have declared their Minds more openly, we ſhall find, that the Generality of the antient Lawyers are for confining Succeſſions to the tenth Degree, and many of the Moderns for extending them without Limit. The FOUNDER, in all probability, thought with the Antients; that being the received Opinion of his own Age, and thoſe more immediately before and after him; and Lord COKE will inform [x] us, that "*Contemporanea Expoſitio in* "*Lege eſt fortiſſima.*"

THAT this was the Doctrine of the Antients, is acknowledged by VAN LEUWEN, who, being of a contrary Opinion himſelf, calls [y] it indeed the "*Error*," but yet the "*communis Error*" of the Practiſers before him; and may abundantly appear from the following expreſs Authorities, beſides a Multitude of others which might be brought to the ſame Purpoſe.

AZO, who flouriſhed before the FOUNDER, and ſpeaking of the miſtaken Notions of ſome

[x] 4. Co. 4. *Inſt.* 138. [y] *Gloſs. in* INST. III. 5. 5.

old

old Canoniſts (who thought that the Civilians reckoned as far as the fourteenth Degree, becauſe ſeven canonical [z] Degrees will ſometimes make fourteen legal ones) proceeds [a] thus, " *Ultrà decimum autem Gradum nunquam pro-*
" *cedimus; licèt enim Decretiſtæ dicant nos*
" *computare uſque ad decimum quartum Gra-*
" *dum, quod falſum eſt tamen: Imò, non com-*
" *putamus ultrà decimum, ſcilicet ad Com-*
" *moditatem; nec ultrà decimum aliquid mihi*
" *vendicare, jure Cognationis, poſſum: Com-*
" *putare tamen potes mille, ſi velles; perſonas*
" *enumerando.*"

NICOLAUS DE UBALDIS (who wrote about the year 1470, and may therefore be well enough reckoned the FOUNDER's Contemporary) in his [b] Treatiſe of Succeſſions ſays, " *Reſtat videre nunc uſque ad quem Gra-*
" *dum vocentur ad Succeſſionem. Dic quòd, ſi*
" *loquimur in Lineâ deſcendenti vel aſcendenti,*
" *uſquè quo Vita Hominum perduci poteſt vo-*
" *cantur: Si de tranſverſali, tunc vocantur*
" *uſque ad decimum Gradum.*" And afterward [c], ſpeaking of the Caſes wherein the Inheritance would eſcheat to the *Fiſcus*, he is expreſs, that " *Si Defunctus reliquit unum*

[z] See the Table of Conſanguinity. [a] *Summ. in Lib.* 3. INST. *de Grad. Cognat.* § 8. [b] *De Succeſs. ab Inteſtat. part.* 3. § 12. [c] *Ibid. part.* 5. § 1.

" *ex*

" *ex tranſverſalibus, fortè ultrà decimum*
" *Gradum, certè Fiſcus ſuccederet.*

COVARRUVIAS, who flouriſhed in 1530, has this [d] Paſſage; " *Quæ quidem (ſc. Conſan-*
" *guineorum) Succeſſio uſque ad decimum Gra-*
" *dum tendit, nec ulteriùs progreditur.*"

PETRUS LORIOTUS, SALINENSIS, who wrote about the year 1541, among other Rules for Succeſſion lays down [e] the following; " *Poſtremò ſciendum eſt, tranſverſos,*
" *cujuſcunque Qualitatis fuerint, non ultrà*
" *decimum Gradum vocari.*"

GAILL, who wrote his Treatiſe in 1577, ſpeaking [f] of the Succeſſion *in feudalibus*, premiſes, " *Agnatum de Jure communi in Bonis*
" *allodialibus ultrà decimum Gradum non ſuc-*
" *cedere, ſed Fiſcum vocari, non ambigitur.*" And herewith agrees CRAG, who only doubts [g] whether the Limit of Cognation, with Regard to the Succeſſion to Inheritances, was the ſeventh, or tenth Degree.

I AM unwilling to multiply Quotations any farther; but the Teſtimony of LYNDEWODE

[d] *De Succeſs. ab Inteſt.* § 11. [e] *Comm. in tit. de Grad. Affin. fol.* 30. [f] *Obſerv.* 2. 150.
[g] *Jus Feud. Lib.* 2. *tit.* 15.

muſt by no means be omitted; whoſe Authority, great as it is at all times, is much ſtronger in the preſent Caſe than in any other; as he was the FOUNDER'S more immediate Contemporary, his Chaplain and Official, and according to general Tradition the Compiler, or at leaſt Reviſer, of his Statutes. And he, in his Comment upon one of Archbiſhop STRATFORD'S Conſtitutions [h], explaining "*Qui dicuntur Conſanguinei*," refers back to a former Note, which [i] is as follows. "*In "Succeſſione ab Inteſtato prima Cauſa eſt "Liberorum; ſecunda Aſcendentium, cum "quibuſdam Collateralibus, ſi extent; tertia "Tranſverſalium. Primæ duæ in infinitum "protenduntur, tertia uſque ad decimum Gra- "dum protenditur, ſive ſint Agnati ſive Cog- "nati. Iſtis autem deficientibus, ſi extet Uxor "Defuncti, ipſa ſuccedet; poſt eam Fiſcus*[k].

[h] *Prov. Conſtit. Lib.* 3. *tit.* 13. *c. ita quorundam. v. conſanguineis.* [i] *Ibid. v. decedentium.*

[k] For the better Underſtanding what LYNDEWODE, and the Authors before quoted, have here ſaid, it may be proper to ſubjoin what the general Rule of Succeſſions by the Civil Law was: In the firſt place the Children or lineal Deſcendants were preferred: If the Deceaſed had none ſuch, then the Father, or Mother, or lineal Aſcendants were called in, and with them the Brethren or Siſters of the whole Blood to the Inteſtate, and alſo the Children of a deceaſed Brother, but no farther: Theſe are what LYNDEWODE means by "*quibuſdam Collateralibus, ſi extent.*" On Failure of lineal Aſcendants, the neareſt Collaterals ſucceeded: On their Deficiency, the Huſband or Wife came in: And, on the total Failure of all theſe, the Public was then the Heir, and the Inheritance eſcheated to the Exchequer. See *Nov.* 118. *c.* 1, 2, & 3. *Nov.* 127. *c.* 1. FF. 38. 15. 1.

So ſtands, or at leaſt in the FOUNDER's Days ſo was thought to ſtand, the Civil Law with regard to Succeſſions.

THE Canon Law, conſidered as ſuch, has very little to do with Inheritances; it only conſiders them incidentally, and in ſuch Caſes always refers [1] to the Civil Law. But it will be acknowleged by any one, the leaſt converſant therein, that the Canoniſts were of Opinion that the Civilians did not extend Succeſſions *in infinitum*. They ſeem indeed to have many of them [m] imagined, that as the ſeventh Degree, according to their Computation, was the Boundary of Conſanguinity in the Canon Law, ſo it was alſo the *Nè plus ultrà* of Succeſſions in the Civil. A Miſtake, which might naturally ariſe from that Narrowneſs of thinking, which too often accompanies thoſe Perſons who confine their Studies to one Branch of Science only. However, it at leaſt proves one Thing, (which was before hinted at) that in the Courſe of Nature it hath never, or very rarely, happened, that Kinſmen in very diſtant Degrees have been called to the Inheritance of an Inteſtate; ſince if ſuch Inſtances were at

[1] DECRETUM, *part.* 2. *caus.* 35. *qu.* 2 & 3. *c.* 1 & 2.— & *qu.* 5. *cap.* 2. § 1. [m] *Vide, inter alia,* AZON. *Summ. in Lib.* 3. *Inſt. de Grad. Cognat.* § 8.—CRAG. *Jus Feud. Lib.* 2. *tit.* 15.—*(ſuprà-citat.)*—DECRETUM. *part.* 2. *caus.* 35. *qu.* 5. *cap.* 2. *(infrà-citat.)*

all

all frequent, it could never be long a Doubt whether the ſeventh canonical Degree, or the tenth of the Civilians, was the legal Boundary of Succeſſions.

THE municipal Laws of ENGLAND, it muſt be frankly owned, ſet no Boundaries to this Succeſſion: The Land deſcends to the next Heir, of the Blood of the firſt Purchaſer, at any Diſtance whatſoever. Yet, though the Laws allow the next Heir, however remote, to take the Inheritance, even in this Caſe they do not ſeem to extend Conſanguinity *in infinitum*; for the Heir cannot claim the Eſtate, *tanquam Conſanguineus*, beyond a particular Degree.

FOR, by the old Law, a Man who could claim within that particular Degree had the Advantage of a peculiar Writ, called a Writ of *Coſinage*, which a more remote Heir was excluded from; ſince no one could have this Writ, if his common Anceſtor (by a Deſcent from whom he claimed to be Heir to *J. S.*) was removed higher than the *Treſael* or Great-Grandfather's Father; that is, unleſs the common Anceſtor was within four Degrees of the Claimant. This appears from FITZHERBERT [n]; "*En Breſe de Coſinage Home poit*

[n] *Grand Abridgment. tit.* Coſinage *pl.* 15.

" *count par reſort jeſque al Frere le Be-*
" *ſail & ceſt al 4 degree* ;" and in another [o] place he ſays the ſame. BRITTON alſo [p] confirms this Rule ; " *Car tielx Brefs tenent* " *lieu entre Prives du Saunk, clamauntz par* " *une Deſcente, amountaunt jeſques a Treſael,* " *ſi le Temps le ſoeffre.*" What may therefore be inferred from hence is, That if the Reaſon why Inheritances deſcend to a remote Heir, is *not* on the Score of Conſanguinity, it will not follow, that becauſe Inheritances deſcend *in infinitum*, Conſanguinity muſt endure for ever. On the contrary it will rather follow, that the Law ſuppoſes no ſuch perpetual Duration ; ſince, though a Man may claim as Heir at any Diſtance, he is not ſuffered to call himſelf *Coſin and Heir*, but within the fourth Degree.

INDEED at firſt Sight it may juſtly ſeem Matter of Wonder, from whence this *theoretical* Rule of our Laws (for, morally ſpeaking, it cannot go far in *Practice*) had it's Original ; ſince the NORMAN Laws, to which ours bear ſo remarkable a Conformity, that it has been much diſputed [q] which of them is derived from the other, are in this Reſpect very different. Succeſſions are not extended

[o] *Ibid. tit.* Aiel. *pl.* 6. [p] *Cap.* 89.
[q] See HALE's Hiſtory of the Common Law.

by them beyond the ſeventh Degree. "*Sca-* "*voir debuons*, ſays [r] the GRAND COUSTUMI- "ER, *que le Lignage ſentent juſques au ſepti-* "*eſme Degree. Notandum eſt, quod Linea* "*Conſanguinitatis uſque ad Gradum ſeptimum* "*ſe extendit.*" The Gloſs indeed confines this Rule, as is very reaſonable, to the collateral Line only. "*Ceſta entendre a la Ligne* "*collateral, & non pas la Ligne droicte, car* "*il nya point de Fin*;" and again, "*L'Heri-* "*tage doibt deſcendre a celuy, qui eſt le plus* "*prochain en Lignage a celuy qui le tint, apres* "*ſa mort, pourtant que il ſoit du Lignage de-* "*dens le ſeptieſme Degree de celuy dont l' Heri-* "*tage deſcend.*" But this Difference will be tolerably well accounted for, when we conſider that both the NORMAN and the ENGLISH Laws are plainly Offsets from the Feudal; in which at one time (as we learn [f] from CRAG) Succeſſions extended only to the ſeventh Degree, though afterwards they were allowed *in infinitum.*

HAVING mentioned the Feudal Law, it may farther be obſerved, that, according to the Rules of that Law [t], the *Feudum novum*, or

[r] GRAND COUSTUMIER *de* NORMENDIE. *ch.* 25. *de Eſcheance.*
[f] *Jus Feud. Lib.* 1. *tit.* 4. § 9. [t] See WRIGHT's Introduction to the Law of Tenures, pag. 182 to 186. and CRAG, STRYPE, HANNETON, and ZAZIUS, there cited.

one

one newly purchaſed, could only deſcend to the Children and lineal Deſcendants of the Purchaſer. For, if he had no lineal Deſcendants, it could not aſcend to his Father, or any of his lineal Anceſtors, as the Law with Us ſtill is: Nor could it go to any of his collateral Relations, but would rather eſcheat to the Lord; becauſe whoever would ſucceed to a Feud, muſt have entitled himſelf to the Succeſſion in a regular Courſe of Deſcent from the firſt Feudatory or Purchaſer. "And "this (as the learned Author [u] referred to "has obſerved) was no doubt the Ground of "what the Lord COKE calls [w] that old and "true Maxime in our Law, that none ſhall in-"herit any Lands as Heir, but only the Blood "of the firſt Purchaſer." And hence it is certain that this Maxim, when it was firſt adopted by our Law, by *Blood* meant lineal Deſcendants only; for Conſanguinity in general it could never mean, becauſe not only the Collaterals, but all the lineal Anceſtors of the Purchaſer were excluded from Inheriting.

WHAT therefore has been ſo much inſiſted on, the *infinite* hereditary Right of Succeſſion, appears to have been originally *confined* to the Deſcendants of the firſt Purcha-

[u] *Ibid.* 183. [w] Co. LITT. 12. *a.*

ſer,

ſer, and that Deſcent was neceſſary to be ſtrictly proved. Afterwards indeed a more looſe Kind of Evidence was admitted; "for "it [x] becoming in many Caſes impoſſible, "by Length of Time and a long Courſe of "Deſcents, to deduce a Title from the *firſt* "Feudatory, Proof of being Heir to the *laſt* "was neceſſarily allowed, as the beſt Proof "that could be expected of Title from the "firſt." And this is what Mr. Juſtice WRIGHT calls [y] ſubſtituting a *reaſonable* in the ſtead of an *impoſſible* Proof; for the Perſon, who would now entitle himſelf to a Fee as Heir by Deſcent, is not obliged to offer any direct Proof of his being of the Blood of the firſt Purchaſer, but is only to prove himſelf Heir of the whole Blood to the Perſon laſt ſeized; and when that is done, the Law preſumes the other. So that the *Stipes*, from whom the Heir is to deduce his Pedigree, is not at preſent the firſt Purchaſer; but as often as a Deſcent happens, ſo often is the *Stipes* altered; for now *Seiſina facit Stipitem*, which is, and we know has been, the Maxim of the Common Law ever ſince FLETA's Time [z], and perhaps was ſo long before it.

[x] WRIGHT's Introd. 184, 185.
[y] *Ibid.* 185, 186.
[z] *Lib.* 6. *cap.* 2. § 2.

If then we rightly obſerve the Courſe of Deſcents according to this Law, we ſhall find that it is really not *collateral*, but *lineal* Conſanguinity, which is attended to *in infinitum*. For the Intendment of the Law is, that One of the lineal Deſcendants of the firſt Purchaſer conſtantly ſucceeds to the Inheritance; that is to ſay, that lineal Deſcendant in particular, who is alſo the next Heir of the Perſon who was laſt ſeized. And there is no Diſpute, but that lineal Conſanguinity may reaſonably [a] enough be extended without End or Boundary.

Those Gentlemen therefore, who urge the Common Law Rules of Deſcent as an Authority for the unlimited Extenſion of the Founder's Kindred, would do well to conſider how little Analogy there is between the two Caſes, either in the Thing to be proved, or the Rules of Proof. For, firſt; the Object of the Common Law is (as hath been ſaid) *Proximity* merely; not indeed an *abſolute* Proximity, but a Proximity *ſub modo*: ſuch a one as, conſiſtently with the other Regulations of the Law, (*viz.* the Preference of Males to Females, of the elder Branch to the younger, of the whole Blood to the half,

[a] See pag. 20.

of

of the *Agnati* to the *Cognati*) is ſufficient to mark out, not who is related in general, as in the Caſe of FOUNDER's Kinſmen, but who is the *next Heir*. Secondly; In every Queſtion of Deſcent at the Common Law, as the Perſon entitled to ſucceed is only *One* (for where many Siſters inherit as Coparceners, they all [b] make but *one* Heir) and that uſually the Next of Kin, which prevents the Confuſion that would reſult from a Variety of other Titles; ſo is the Perſon, from whom he is to derive his Claim of being allied to the firſt Purchaſer, only *One*, and that the Perſon laſt ſeized: Whereas the Claim of Conſanguinity to the FOUNDER is open at once, not to *One* only, but to the *whole* Race of Kindred, to the moſt diſtant as well as the neareſt Relations; and their Alliance is to be deduced, not from any *one* of his Anceſtors in particular, but from *all*, or *any* of his remote Progenitors. Laſtly; the Diſtance of Time, from the FOUNDER's Days, muſt have already occaſioned to many Families the ſame Impoſſibility of direct Proof, as was at the Common Law, when the Heir was obliged to prove himſelf of the Blood of the firſt Purchaſer. But no *reaſonable* Proof has, as yet, been thought expedient to be ſubſtituted, in lieu of the *im-*

[b] LITTLET. *Ten.* § 241.

poſſible; and when, or whether it will ever be ſo ſubſtituted, or what is ſuch reaſonable Proof as might be admitted in this Caſe, is not my Part to determine. I can only remark, that the Common Law Rules of Proof are as well entitled to our Obſervance here, as the Common Law Rules of Deſcent; and if, in Imitation of thoſe, Proof of being of Kin to any Perſon who was *formerly* admitted (or who was *laſt* admitted) to a Fellowſhip as the FOUNDER's Kinſman, ſhould ever be allowed as Proof of being of Kin to the FOUNDER, ſuch a Method of Proceeding would, I doubt not, very ſoon demonſtrate the Truth of the Poſitions laid down in this Treatiſe; for (without having Reſort to our common Parent) ſcarce a Candidate would be found in the Kingdom, who might not be thus *proved* to be ſome Way or other related to the FOUNDER.

IT appears then, on the whole, that the Caſe, wherein the Common Law ſeems to favour the Infinitude of Kindred, is by no means parallel with the preſent: I ſhall next attempt to ſhew, that in parallel Caſes a Limit is ſet to Conſanguinity by the Common and all other Laws, that were ever regarded in ENGLAND; having digreſſed thus far out of the Way, merely to follow thoſe Gentlemen who lay

lay ſo much Streſs on a Matter foreign to the preſent Purpoſe.

2. ANOTHER, and a more appoſite, Light in which Conſanguinity has been conſidered by divers Laws, is with regard to a Cuſtom, called among the NORMANS Tenure by *Parage*; and which was alſo engrafted into the Laws of ENGLAND, though the Name ſeems never to have been adopted. Tenure by *Parage* was where ſeveral Perſons, deſcended from the ſame Anceſtor, held equal Portions of an Inheritance; as for inſtance, an Eſtate in Co-parcenary, which is ſhared among ſeveral Siſters and their Deſcendants: In this and the like Caſes, the younger Branches were bound not to do any Service to the elder, by reaſon of the Privity of their Blood. Now here the Object, which the Law contemplates, is not Proximity, but Conſanguinity in general; it is not the *neareſt* Relation only that is quit of Services, but *all:* If therefore this Conſanguinity were never to have ceaſed, none of the Deſcendants of the younger Branches could ever have been bound to do Service to the elder. But the Law was otherwiſe: Till the ſixth Degree the younger were excuſed from any Service; but *at* that Degree they were bound to do Fealty, and *after* that Homage,

mage, to the elder Branch. So [c] the GRAND COUSTUMIER; "*Teneure par Parage eſt quand* "*cil qui tient, & cil de qui il tient, doibuent* "*par raiſon de Lignage eſtre Pers, es parties* "*de l' Heritage qui deſcent de leurs Anceſteurs.* "*En ceſte maniere tient le puiſne de l' ainſne,* "*juſques a ce q'l vienne au ſixte degre du Lig-* "*nage. Mais dillec en avant ſont tenus les* "*puinez faire Feaultie a l' ainſne, et eu ſep-* "*tieſme degre; & dillec en avant ſera tenu* "*par Homage ce qui devant eſtoit tenu par* "*Parage. Per Paragium autem fit Teneura,* "*eò quod Tenens & ille de quo tenetur Pares* "*eſſe debeant, ratione Parentagij, in portio-* "*nibus Hereditatis ab Anteceſſoribus deſcen-* "*dentis; & hoc modo tenent Poſtnati de Ante-* "*natis ſuis, quouſque ad ſextum Gradum per-* "*venerint in Lineâ Conſanguinitatis conſtitu-* "*tum. In illo autem Gradu tenentur Fideli-* "*tatem facere Antenato; in ſeptimo autem* "*Gradu Homagium; & exinde quod per Pa-* "*ragium tenebatur priùs, per Homagium ulte-* "*riùs tenebitur.*" And the Reaſon, which the Gloſs gives for this Diſtinction, is, that at the ſixth Degree they have one Degree of Kindred left, but at the ſeventh they are "*hors de Conſanguinitate.*"

[c] *Ch.* 30. *De Teneure par Parage.*

THIS

THIS was alſo Part of our Common Law, when theſe Sort of Tenures were in Uſe; with this nominal Difference, that with Us the Conſanguinity ceaſed after the *third* Degree; which, by the different Ways of Computation, might be much the ſame as the ſixth among the NORMANS. Thus [d] GLANVIL; "*De omnibus Terris non fieri debet Homagium;* "*quiâ non de Dotibus, nec de Maritagijs libe-* "*ris, nec de Feodo Juniorum Sororum de Pri-* "*mogenitâ tenentium, infrà tertium Hære-* "*dem utrobique.*" And in another [e] Place; "*Nullum autem Homagium, vel etiam Fideli-* "*tatem aliquam tenentur Mariti poſtnatarum* "*Filiarum Marito primogenitæ Filiæ facere* "*in Vitâ ſuâ, nec earum Hæredes primi vel* "*ſecundi; tertii verò Hæredes, ex poſtnatis* "*Filiabus exeuntes, ſecundùm Jus hujus Regni* "*Homagium tenentur facere de ſuo Tenemento* "*Hæredi Filiæ primogenitæ, & rationabile* "*Relevium.*"

3. SOMEWHAT ſimilar to this is the Caſe of a Gift in Frank-Marriage; when a Perſon gives Lands to his Daughter or Couſin, and her Huſband, to hold in Frank-Marriage; which diſcharges the Donees and their

[d] *Lib. 9. cap. 2.* [e] *Lib. 7. cap. 3.*

Iſſue

Iſſue from all Rents and Services to the Donor and his Iſſue, except Fealty, till the fourth Degree be paſt [f] on both Sides. So that in theſe Inſtances, where Proximity is not the Thing attended to, the Law has ſet a Boundary to Kindred.

4. A BOUNDARY has alſo been thought proper, by the antient Law, to be eſtabliſhed, with regard to the Writ of Right *de rationabili Parte*; which lies always (according to [g] the REGISTER) between Privies in Blood, and not between Strangers. It is properly then [h] ſuable, when two or more Perſons claim by Deſcent from the ſame Anceſtor, (as in Gavelkind or Co-parcenary) and one of them enters upon, and occupies the Whole: For in ſuch caſe the Parties deforced have their Remedy by this Writ. And ſince it lies only between Privies in Blood, the Parties are [i] excluded from waging Battail, *&c*, the uſual Method of determining all Controverſies at the antient Law. Now had the Privity of Blood been extended in this Caſe *in infinitum*, had the common Anceſtor been allowed to be aſſumed at any Degree of Diſtance, this Writ

[f] LITTLET. *Ten.* § 19. [g] *Fol.* 3. *b.*
[h] REGIST. *ibid.*—F. N. B. 9.
[i] F. N. B. *ibid.*—VET. NAT. BR. 4. *f.* 79. *e.*—FINCH. Law. b. 4. ch. 18.—BRITTON. *cap.* 73.

would

would have been open to all Men; the Connection of Conſanguinity would have been univerſal; there would be no Strangers to be excluded from the Writ; and every one would be intitled to Exemption from the Trial by Battail. But the Law has prudently interpoſed a Boundary here, and determined [k] that this Writ is not ſuable after the third Degree be paſt; "*Ne giſt entre Parents queux clamont par Deſ-*" *cent, apres que il paſſa le tierce Degre:*" And of Courſe that the Exemption from the Trial by Battail ſhall extend no further; the which, according to FITZHERBERT [l], FINCH [m], BRITTON [n], and the OLD NATURA BREVIUM [o], "*ne ſe joindra pas entre Parents, a-*" *vaunt ceo que ils ſoient paſſes le tierce degre* " *de Parents, la ils count per un Deſcent.*"

5. ANOTHER Inſtance, in which our Law has regarded Conſanguinity, is in the Caſe of an Appeal of Death; which, when a Man is killed, his Heir Male is entitled to bring (even after an Acquittal on an Indictment) if he believes the Appellee to be really guilty. And though this be a Caſe merely of Proximity, yet even here the antient Law, as we learn [p]

[k] VET. NAT. BR. 6. *g.*—FINCH. *ibid.*—BRITTON. *cap.* 79.
[l] *Gr. Abridgm. tit.* Droyt. *pl.* 31. [m] *Ubi ſupr.* & b. 1. ch. 3. max. 29. [n] *Ubi ſupr.*
[o] *Ubi ſupr.* & 79. *f.* [p] MYRROUR DES JUSTICES. *cap.* 2. § 7.

from

from the MYRROUR, ſet a Boundary to the Kindred, *viz.* the fourth Degree. "*Les* "*Appeles de Homicide fueront reſtraine, par* "*le Roy* HENRY *le premiere, jeſque al quatre* "*procheins Degrees de Sanck.*"

UNDER this Article, of Appeals, may be mentioned an antient Cuſtom, which is ſaid by the Judges [q] in the FOUNDER's Time, to have obtained in their Days: That when a Man was hanged on an Appeal of Death, the Wife of the Perſon killed, and *all* his Kindred, "*tout Sank*," drew the Felon to Execution. It will not, I imagine, be contended, that the Kindred were admitted to *this* Office *in infinitum.*

6. THERE is another Light, in which the Laws of ENGLAND have conſidered Conſanguinity, which I ſhould chuſe to paſs over, as I apprehend but little can be gathered from it; but I would not be conſcious of omitting any Inſtance, in which I can recollect that Kindred has been treated of in our Laws. What I mean is with Regard to the Proof of Villenage, when the Lord brought his Writ *de Nativo habendo*, in order to recover the Poſſeſſion of him whom he claimed to be his Villein. For in ſuch Caſe, if the Demandant claimed him as his Villein by Deſcent, it

[q] YEARBOOK, *Mich.* 11. HENR. 4. *pl.* 24.

was

was incumbent upon him to prove it by his Kinſmen; ("*per Conſanguineos de eodem Sti-* "*pite, unde ipſe exierat, exeuntes,*" ſays [r] GLANVIL; which, by the way, conveys the true Idea of Conſanguinity) that is, he was [s] obliged to produce ſome of the Defendant's Kinſmen, who ſhould confeſs in Court, that they were Villeins to the Demandant. Now here it muſt be owned that the preciſe Degree, where this Conſanguinity ended, is no where (that I know of) ſet down in the Books; but, on the other hand, I do not find it any where aſſerted that it was extended without Boundary; which is, in Strictneſs, ſufficient for my Purpoſe, as the Poſition I have advanced is merely negative. Though from the whole of what GLANVIL ſays upon this Occaſion, I think it might fairly be inferred, that there were ſome poſitive Limits ſet to the Kindred in this Caſe; notwithſtanding, at this Diſtance of Time, we are at a Loſs to know what thoſe Limits exactly were: But I am rather deſirous to eſtabliſh the Truth I contend for, upon clear and undeniable Evidence, than upon ſuch as is in any Shape liable to Cavil and Exceptions.

[r] *Lib.* 5. *cap.* 4. [s] GLANVIL. *ibid.*—REGIST. 87. *a.*—CO. LITT. 187. *b.*—OLD TENUR. 127.—OLD NAT. BREV. 30.—F. N. B. 78. *b.*

NOT indeed that it is of much Importance, whether it were infinitely extended, or no; for, if ſome of his Relations appeared to be bond Men, and others of them free, it was then [t] to be enquired by a Jury, whether the bond or free Men were his *Next* of Kin; and according to the State of his *neareſt* Kinſmen, his own Liberty was to be determined. Since therefore, in caſe of a Multiplicity of Kindred, which will always follow from admitting diſtant ones, the Point was here reduced to a Queſtion of mere Proximity, it ſignifies nothing to our preſent Purpoſe (as has been more than once obſerved) whether they were, or were not, admitted without any Boundary.

7. LET us therefore proceed to another Method, and that a very univerſal one, of conſidering Kindred; I mean, with regard to the Prohibitions of Marriage. With us at preſent, by the Statute [u] of HENRY the eighth, theſe Prohibitions extend no farther than the LEVITICAL Degrees; (the utmoſt of which is the third [w], according to the Civil Computation) but in the FOUNDER's time they

[t] GLANVIL. *ibid.* [u] 32 HENR. 8. *cap.* 38.
[w] See the Caſe of BUTLER *v.* GASTRELL, *Trin.* 8. GEO. 1. Rep. of Caſes in Equ. 158.

were

were regulated throughout all Chriſtendom by the Canon Law. And it is in that Law that Conſanguinity has been treated of moſt at large, and with the greateſt Accuracy; other Laws only regarding it incidentally, and generally with a Reference to the Canon. As therefore the Kindred, which is the Object of the Canon Law, is of the ſame Nature with that which is the Object of the College-Statutes, (the Queſtion in both being, Who are Kinſmen, not Who is the next Kinſman) the Determinations of *this* Law ought to have ſome Weight in the preſent Caſe: For though, upon Reaſons of Religion and State, it is made no longer binding here in ENGLAND; yet, in Points which are not pontificial, we may ſtill have Reſpect for it's Authority, eſpecially where it is founded upon ſtrong and ſubſtantial Grounds.

Now nothing can be more evident, than that, by the Canon Law, Conſanguinity extended no farther [x] than the ſeventh Degree. Nor will this, I apprehend, be diſputed; and therefore we may ſpare ourſelves a Multitude of Quotations, by referring ſuch as may happen to doubt it, to the Title below-cited. It may not however be amiſs to obſerve the Rea-

[x] DECRETUM. *part. 2. caus. 35. qu. 3. per tot.*]

ſons which one Canon [y] gives for prohibiting Matrimony within ſeven Degrees: "*Nam in "ſeptem Gradibus, ſi canonicè & uſualiter "numerentur, omnia Propinquitatis Nomina "continentur. Ultrà quos nec Conſanguinitas "invenitur, nec Nomina Graduum reperiun-"tur, nec Succeſſio poteſt ampliùs prorogari, "nec memoritèr ab aliquo Generatio recor-"dari.*"

IF this be not ſpeaking plainly, it is hard to ſay what is: And though afterwards [z] the Prohibition of Marriage was taken off, and confined to four Degrees only; yet, as a learned Author [a] has juſtly obſerved, the Extent and Boundaries of Conſanguinity, which are here fixed and determined, have ſuffered no Change or Removal.

THAT theſe Boundaries were received in ENGLAND, at leaſt by the Clergy, would need no other Proof, than that they were Part of the Canon Law, for which our popiſh Anceſtors had the utmoſt Regard and Reverence. But it ſo happens, that this very Conſtitution is adopted and enforced by a national Synod here at home; namely, by the Coun-

[y] *Ibid. qu.* 5. *cap.* 2. [z] DECRETAL. *lib.* 4. *tit.* 14. *cap.* 8. [a] JOAN. ANDREÆ *Declaratio Arboris Conſang.* § 18.

cil

cil of LONDON, which was held *A. D.* 1102. 3 HENR. I. the twenty fifth Canon [b] of which runs thus; "*Ne Cognati uſque ad ſeptimam Generationem ad Conjugium copulentur, vel copulati ſimùl permaneant.*"

LET us next examine into the Reaſon of this Determination of the Canon Law, and we ſhall find it equally applicable to the Caſe before us. I do not contend for the greater *natural* Propriety of ſtopping at the ſeventh, rather than at the ſixth or eighth Degree: Superſtition perhaps might have a Share in pitching upon the Number, Seven; and perhaps not. It is at leaſt *as* proper as any other Number; and there was, it is plain, a Neceſſity of ſtopping ſomewhere (as Marriage with any of one's Kindred was forbidden [c] generally) or elſe, as in the College Caſe, the Kindred would be univerſal.

FOR the Blood of the common Anceſtor, wherein conſiſts the Relation, is by a Multitude of Deſcents fluiced into ſo many different Channels, and mixed with ſo many other Bloods, that it can be no longer diſtinguiſhed. Every Man has two Anceſtors in the firſt aſ-

[b] WILKINS *Concil. M. B. tom.* 1. p. 383.
[c] DECRETUM. *part.* 2. *caus.* 35. *qu.* 3. *cap.* 2.

cending

cending Degree, four in the ſecond, and, by the ſame Rule of Progreſſion, an hundred and twenty eight in the ſeventh, in the tenth a thouſand and twenty four, and in the twentieth above a million [d]; and has, conſequently, as many Bloods in him as he has Anceſtors. But how very minute a Portion has he

[d] This will ſeem ſurprizing to thoſe who are unacquainted with the encreaſing Power of progreſſive Numbers; but is palpably evident from the following Table of a geometrical Progreſſion, in which the firſt Term is 2, and the Denominator alſo 2; or, to ſpeak more intelligibly, It is evident, for that each of us has two Anceſtors in the firſt Degree, and the Number of them is doubled at every Remove, becauſe each Anceſtor of ours has alſo two immediate Anceſtors of his own.

Number of Degrees in the direct aſcending Line.	*Number of Anceſtors in each Degree.*
1	2
2	4
3	8
4	16
5	32
6	64
7	128
8	256
9	512
10	1024
11	2048
12	4096
13	8192
14	16384
15	32768
16	65536
17	131072
18	262144
19	524288
20	1048576

A ſhorter Method of finding the Number of Anceſtors at any even Degree is by ſquaring the Number of Anceſtors at half that Number of Degrees. Thus 16 is the Square of 4; 256 the Square of 16; ~~16384~~ 65536 of 256; and the Number of Anceſtors at 40 Degrees would be the Square of 1048576.

of

of the Blood of a remote Anceſtor! A Perſon, for inſtance, one of whoſe Anceſtors in the fifteenth Degree is the FOUNDER's Father, has 32767 other Anceſtors in the ſame Degree: That Share of his Blood therefore, which he derives from the FOUNDER's Father, is only one 32768th Part of his whole Maſs; and how much this boaſted Proportion may amount to, I leave to the Curious to determine. A Proportion it is, which the Canon Law does not ſo far regard, as to adjudge it an inceſtuous Mixture, though it again be blended with Blood derived from the ſame Fountain; a Proportion, which one would think ſhould hardly entitle the Poſſeſſor of it to any ſpecial Share of Affection, from the reſt of the Deſcendants of the ſame Anceſtor.

BUT we may purſue this Way of Reaſoning ſtill farther. Half of this Number of Anceſtors are male and half female: Now, ſuppoſing each Couple to leave at leaſt two Children, and every one of them two more, and ſo on; (a very moderate Suppoſition; for, without it, the human Species inſtead of encreaſing would be daily diminiſhing) we ſhall find, I ſay, upon this Suppoſition, that all of us have now ſubſiſting near two hundred and ſeventy millions of Couſins in the fifteenth

Degree; deriving (one half of them) their Kindred by different Titles, but all at the ſame Diſtance from the ſeveral common Anceſtors as ourſelves are; over and above thoſe, that are one or two Deſcents nearer to, or farther from them, and who may amount to as many more [e]. And if this Calculation, which

[e] This will ſwell more conſiderably than the former Calculation; for here, though the firſt Term is but 1, the Denominator is 4; that is, there is *one* Kinſman (a Brother) in the firſt Degree, who makes, together with the *Propoſitus*, the two Deſcendants of the firſt Couple of Anceſtors; and the Number of Kinſmen in every other Degree muſt be the *quadruple* of thoſe in that more immediately preceding it; becauſe each Couple of Anceſtors having two Deſcendants, who encreaſe in a duplicate *Ratio*, the *Ratio* in which all the Deſcendants encreaſe muſt be double to that in which the Couples of Anceſtors encreaſe; but we have ſeen that the Anceſtors (and of courſe the Couples) increaſe in a duplicate *Ratio*; therefore the Deſcendants muſt encreaſe in a double duplicate, *i. e.* in a quadruple *Ratio*.

Number of Degrees in the collateral Line.	*Number of Kindred in each Degree.*
1	1
2	4
3	16
4	64
5	256
6	1024
7	4096
8	16384
9	65536
10	262144
11	1048576
12	4194304
13	16777216
14	67108864
15	268435456
16	1073741824
17	4294967296
18	17179869184
19	68719476736
20	274877906944

This

which any one that pleaſes may ſoon examine, ſhould appear incompatible with the Number of Inhabitants on the Earth; it is becauſe, by Intermarriages among theſe ſeveral Deſcendants, a hundred or a thouſand different Relations may be conſolidated in one Perſon, or, he may be related to us a hundred or a thouſand different Ways. A ſtrange Labyrinth of Confuſion! from which nothing can extricate us, but the confining this diffuſive Ocean within ſome certain Limits; for, by the ſame Rule as before, if the Inhabitants of our Iſland be twenty millions, it is poſſible they may be all related to each other (and, of courſe, to the FOUNDER) within the thirteenth Degree.

IT is to prevent this amazing Extenſion, which common Arithmetic will demonſtrate muſt in a few Deſcents be tantamount to Univerſality, without recurring to our former Arguments; it is to prevent the Name of Rela-

This Calculation may alſo be formed by a more compendious Proceſs, *viz.* by ſquaring the Couples, or Half the Number, of Anceſtors at any given Degree; which will furniſh us with the Number of Kinſmen we have in the ſame Degree, at equal Diſtance with ourſelves from the common Stock. And if we will be at the Trouble to recollect the State of the ſeveral Families within our own Knowledge, and obſerve how far they agree with this Account; *i. e.* whether, on an Average, every Man has not one Brother or Siſter, four firſt Couſins, ſixteen ſecond Couſins, and ſo on; we ſhall find that the preſent Calculation is very far from being *over*-charged.

tions from being uſed, when the Thing is entirely loſt; when the Blood of the common Anceſtor is mingled, confuſed, and blended with a million of other Bloods; it is upon theſe Accounts that the Canon Law has fixed this Boundary. And this is avowed by the moſt ſenſible and learned of the Doctors; ſuch as not only tell us the Law, but the Reaſon of it; and whoſe Authority I quote, not for the ſake of their Names only, but for the unanſwerable Reaſons they give for confining Conſanguinity within *ſome* Limits.

AND firſt let us hear ESTIUS, who defines [f] collateral Conſanguinity to be "*Vinculum eorum, qui ab Uno aliquo deſcendunt per Sanguinis Propagationem, ſic ut Virtus Stipitis in Genito vel Genitis perſeveret:*" He goes on, "*Ideò diximus*, ſic ut Virtus Stipitis, *&c, quià, dùm longius ſit Intervallum unius ab altero, Virtus Stipitis, movens ad ea quæ ſunt Individui, tandem evaneſcit; & Nomen Conſanguinitatis, ſimul cum Affectione quæ peculiaris inter Conſanguineos eſſe ſolet, extinguitur.*"

To this purpoſe alſo ſpeaks COVARRUVIAS, who obſerves [g] that unleſs the *communis Stipes*

[f] *In Sententias, lib.* 4. *part.* 2. *diſt.* 40. § 1.
[g] *Tom.* 1. *part.* 2. *cap.* 6. § 6.

be

be confined to be *propinquus*, " *omnes Homines* " *Conſanguinei forent, cùm ab* ADAMO *omnes* " *deſcendimur.*" The only Queſtion therefore is, when the *Stipes* ceaſes to be *propinquus*, and begins to be *remotus*. The Canon Law, we have ſeen, adjudges that the *ſeventh* lineal Anceſtor is the moſt remote *Stipes*, that collateral Conſanguinity can be derived from: And AZO, like many other Civilians, when ſpeaking of Conſanguinity in general, ſubſcribes to this Determination. Let COVARRUVIAS and him mutually explain each other: The former ſays [h], " *Conſanguinitas* " *eſt Vinculum Perſonarum ab eodem Stipite* " propinquo *deſcendentium*;" the latter gives [i] us the Bounds of this Propinquity, " *Conſan-* " *guinitas eſt Vinculum Perſonarum ab eodem* " *Stipite deſcendentium* intrà ſeptimam Gene- " rationem." If therefore the *communis Stipes* be not within the ſeventh Generation to each Party, the *Virtus Stipitis* and every Tie of Affection are, by both Canoniſts and Civilians, concluded to be worn out, and no Deſcendants from that *Stipes* can be Kinſmen to each other.

THIS gradual Failure of Kindred is elegantly [k] expreſſed by St. AUGUSTIN; and

[h] *Ibid.* § 14.

[i] *Summ. in Lib.* III. INST. *de Grad. Cognat.*

[k] *De Civit. Lib.* 15. *cap.* 16.

ſurely in ſearching for the pious FOUNDER's Intentions, the Sentiments of an antient LATIN Father [1] may not be improperly mentioned. " *Fuit autem antiquis Patribus reli-*
" *gioſæ Curæ, ne ipſa Propinquitas, ſe paula-*
" *tim Propaginum Ordinibus dirimens, lon-*
" *giùs abiret, & Propinquitas* eſſe deſiſteret,
" *eam nondum longè poſitam rurſùs Matrimo-*
" *nij Vinculo colligare, & quodammodò revo-*
" *care fugientem.*"

IT appears then, from what has been here urged, that with regard to Conſanguinity, as it reſpects Marriage, the Canon Law has eſtabliſhed a notorious Boundary; and that not wantonly, but upon very good Reaſon, no leſs than the abſolute Neceſſity of ſuch a Limit: It appears, that the ſame Reaſons are equally forcible when applied to Conſanguinity in general, and the Caſe of FOUNDER's-Kinſmen in particular; and we know that our own Law will [m] teach us, that " *ubi eadem*
" *eſt Ratio, idem debet eſſe Jus.*"

8. ANOTHER Method of conſidering Conſanguinity by the Laws, is in the Caſe of refuſing a Judge, or challenging a Juror upon

[1] The College Chapel is dedicated by the FOUNDER to the four LATIN Fathers.

[m] CO. LITT. 191.

that

that account. And this being alſo a Queſtion, wherein the whole Extent of Conſanguinity comes under Conſideration, it has accordingly received a Boundary here.

THE Canon and Civil Laws allow the Parties to refuſe a Judge for Conſanguinity, as being a probable Suſpicion of Partiality. The latter indeed (which ſeems to permit [n] a Man to refuſe a Judge, if he himſelf is of opinion he has any Cauſe, without aſſigning what that Cauſe is) is therefore in general very ſilent about what ſort of Conſanguinity is, or is not, a good Ground for Recuſation. The *Lex* CORNELIA *de Injurijs* does indeed confine [o] it in one Caſe to the ſixth Degree, and this has been thought [p] to be a good Meaſure for all other Caſes; though BALDUS ſeems [q] rather for confining it to the fourth, while others [r] would extend it to the tenth.

BUT the Canon Lawyers, who require a ſufficient Cauſe to be both alledged and proved, are more explicit: " *Si Cauſa alicui fuerit de-*
" *legata*, ſays the Law [s], *qui Conſanguineus ſit*
" *illius qui Literas impetravit, hujuſmodi De-*

[n] COD. 3. 1. 14. & *Gloſs. ibid.*
[o] FF. 47. 10. 5.
[p] *Vid.* MARANTÆ *Spec. aur. part.* 6. *cap.* 1. *num.* 62.
[q] *In leg.* 13. COD. *lib.* 2. *tit.* 7.
[r] MARANT. *ibid.*
[s] DECRETAL. 2. 28. 36. & *Gloſs. ibid.*

" *legatus*

" *legatus non immeritò poteſt recuſari.*" The Gloſs proceeds, " *Sed uſque ad quem Gradum* " *intelligimus iſtam Conſanguinitatem? Vide-* " *tur quòd uſque ad ſeptimum:*" and BALDUS approves [t] of this Gloſs, but adds, " *& hoc* " *in tranſverſalibus; ſed in aſcendentibus in* " *infinitum.*"

BY the Common Law of ENGLAND, as it now [u] ſtands, a Judge cannot be challenged for Conſanguinity, or any other Cauſe; though formerly, according to BRACTON [w] and FLETA [x], he might have been. But Challenges to a Jury, who are Judges of Fact, ſeem to anſwer the *Recuſatio Judicis* of the ROMAN Laws. Now Conſanguinity, or Coſinage, is good Cauſe of Challenge to any of the Jurors; nay, to the whole Array, if the Sheriff who impanels them be of Kin to either Party: But this Exception of Conſanguinity does not hold *in infinitum*; as appears from numberleſs Authorities; and, firſt, from a Caſe [y] in the YEAR BOOKS, where a Juror was allowed to be challenged for being related to one Party, within the Degrees of Marriage; that is, ſays the Book, within the *ninth* Degree.

[t] *In loc.* [u] Co. LITT. 294. *a.* [w] *Lib.* 5. *De Exceptionibus. cap.* 15. [x] *Lib.* 6. *cap.* 7.
[y] *Paſch.* 41. ED. 3. *pl.* 3.

ONE

ONE would be tempted to imagine a Miſtake in the Reporter here, and that, inſtead of the *ninth*, it ſhould have been the *fourth* Degree; ſince no Law, that I know of, did ever extend the Prohibitions of Marriage to the *ninth*; and, at the time when this Caſe happened, the *fourth* was the utmoſt Degree prohibited in any Part of EUROPE. Accordingly we find that FITZHERBERT, in reporting this very Caſe in his *Abridgment*, is expreſs [z] that the Juror was in the *fourth* Degree related to the Plaintiff, and thereupon was ſet aſide; but that it was ſaid at the ſame time, that if they had been of Kin in the *fifth* Degree, ſo that they might have intermarried, the Juror ſhould have been ſworn: "*Fuit dit que ſils uſſent eſtre de Linage en le* "*quinte degree, iſſint que il puit eſtre maries,* "*que il uſt eſte jurr'.*"

HOWEVER this may be, the Miſtake (if any) appears to have been of very long ſtanding; the Caſe, as it is now reported, has ſerved for a leading one to ſubſequent Determinations; and the Number, *Nine*, whether originally fixed upon by Deſign or Accident, has been eſtabliſhed as the Boundary of that

[z] *Tit.* Challenge. *pl.* 99.

Conſanguinity, which is Cauſe of Challenge. This we may learn from BROOK's *Abridgment* [a]; "*Et nota, per Curiam, quòd Coſinage* "*al* ix *degree eſt bon principal Challenge,* "*quod nota.*" The Margin refers to the YEARBOOK, which is [b] as follows; "CHOKE "*dit, ſi le Juror ſoit al* ix *degree Coſin al* "*Party, ſi il poit monſtrer coment Coſin, eſt* "*bon Challenge, quod omnes conceſſerunt.*" And accordingly, in the Caſe [c] of VERNON and MANNERS, an Array was quaſhed, becauſe the Sheriff was Couſin to the Defendant in the ninth Degree; the common Anceſtor being nine Generations above the Sheriff, and ſeven above the Defendant. On the other hand, it appears from another Caſe in the Book [d] of ASSISES, that a Challenge to one in a *very remote* Degree was diſ-allowed; ſo that it is plain that the Coſinage, which is Cauſe of Challenge, does not extend *in infinitum.*

THIS Matter may be farther illuſtrated from what is ſaid by GLANVIL; who, ſpeaking of the Inſtitution of the *grand Aſſiſe,* by King HENRY the ſecond, in lieu of the barbarous and gothic Cuſtom of *Duelling,* lays down

[a] *Tit.* Challenge. *pl.* 180.
[b] *Mich.* 21. ED. 4. *pl.* 37.
[c] PLOWD. 425.—DIER. 319.
[d] *Lib.* 40. *pl.* 20.

this

this [e] general Rule for Challenges or Exceptions to the Jury; "*Excipi autem poſſunt Ju-*
"*ratores eiſdem modis, quibus & Teſtes in*
"*Curiâ Chriſtianitatis juſtè repelluntur.*" If therefore Jurors were to be challenged, in the ſame manner as Witneſſes were ſet aſide in the Eccleſiaſtical Courts; and Witneſſes were there ſet aſide (for Conſanguinity) only to a certain Degree; it will follow, that Jurors could not be challenged beyond a certain Degree, for any Coſinage or Alliance of Blood. And that the Civil and Canon Laws, which are properly the Rule in our [f] Eccleſiaſtical Courts, did not extend that Exception *in infinitum*, will appear from the next Article.

In the mean time we may obſerve, from Finch, the Reaſon why Coſinage is a good Challenge; which is the ſame that muſt be aſſigned for the peculiar Advantages given by the Founder to his Kinſmen. "Coſinage, ſays he [g], "in the Sheriff is a good principal
"Challenge to the Array; and in a Juror to
"the Poll; although it be to the ninth Degree,
"and that one cannot be Heir to the other of
"the Land in Variance.—The Reaſon whereof
"is, for the Affection, which the Law in-
"tendeth that one doth carry to the other."

[e] *Lib.* 2. *c.* 12.
[f] Hale's Hiſtory of the Law. ch. 2.
[g] Law. b. 4. ch. 36.

If therefore the Affection may be ſuppoſed to be diſſipated at a certain Period in the one Caſe, *it* is hard to ſay why it ſhould not alſo ceaſe at a like Period in the other.

9. CONSANGUINITY is again conſidered in another Light, by the Civil [h] and Canon [i] Laws; namely, by ordaining that Kinſmen ſhould not be received to give Evidence for, or compelled to give Evidence againſt, each other. But here alſo the Kindred is circumſcribed within Boundaries; for it extends, in the utmoſt [k] Latitude of Conſtruction, only to the *ſeventh* Degree. In FRANCE, as we learn [l] from DOMAT, this Exception is at preſent extended to the Children of ſecond Couſins; which are in the *ſeventh* Degree by the Civil, and the *fourth* by the Canonical Computation. The municipal Laws of ENGLAND are Strangers to any ſuch Exceptions, ſave only as to Huſband and Wife; whoſe Love or Averſion being ſuppoſed extremely violent, they are for the moſt part [m] excluded from giving Teſtimony, either for or againſt each other.

[h] FF. *Lib.* 22. *tit.* 5. *l.* 4 & 5.—COD. 4. 20. 5.
[i] DECRETUM. *part.* 2. *caus.* 3. *qu.* 5. *c.* 1 & 10.—*caus.* 4. *qu.* 2 & 3. *c.* 3. § 4.
[k] *Gloſs in* FF. 22. 5. 4.—CORVIN. *in* COD. 4. 20. 5.—MARANTÆ *Spec. aur. part.* 6. *c.* 1. *n.* 2. [l] Part. 2. b. 3. tit. 6. § 3. c. 8. [m] Co. LITT. 6. *b.*

10. NOT

10. Not that Kindred is totally diſregarded by the Common Law, with regard to Actions, and other judicial Proceedings; ſince a Man may maintain a Suit for his Kinſman, without incurring the Penalties of the Statutes againſt Maintenance. [n] But as this ſeems to be confined to the *prochein Amy*, or *Next* of Kin, it is of little Importance to the preſent Caſe, whether there are, or are not, any further Limits ſet to it: A Caſe in the Civil Law, which bears ſome Analogy to this, being much more to the Purpoſe. A Lawyer, who was promoted to be *Advocatus Fiſci*, (or, as we ſhould call it, King's Counſel) was not [o] permitted to plead in common Cauſes; with an Exception however to the private Cauſes of Himſelf, his Wife, his lineal Anceſtors and Deſcendants, and alſo his collateral Couſins; but with regard to theſe laſt, the Exception is not *in infinitum*, but only to the *fourth* Degree.

11. The next Light, in which the Laws have conſidered Conſanguinity, is with Regard to the Diſtribution of the *perſonal* Eſtate of an Inteſtate. Now the Duration of Kindred, and Manner of contemplating it, by

[n] Co. 2 Inſt. 564. [o] Cod. 2. 7. 13.

the Civil Law, being much the ſame here, as in the Caſe of Succeſſion to *real* Eſtates, we need only refer to what has been before ſaid upon that Subject. And as to the Law of ENGLAND, which is in this particular *the Statute of Diſtribution* [p], it directs that the perſonal Eſtate of an Inteſtate ſhall, upon Failure of Wife and Iſſue, be divided among the *Next* of Kin to the Inteſtate in equal Degree, and their Repreſentatives; but no Repreſentatives are admitted among Collaterals, after Brothers' and Siſters' Children. Now this being alſo a Caſe wherein Proximity is attended to, I ſhall not take the Pains to inquire how far, in Theory, the Kindred may be here ſuppoſed to extend: Nor indeed ſhould I take any farther Notice of it, if it were not for an Argument of Lord Chief Juſtice North's, in a Caſe [q] which aroſe upon the Conſtruction of this Statute; the Whole of which contains a great deal of ſound Reaſoning upon Conſanguinity in general, and Part of which is very much to the preſent Queſtion.

THE Doubt was this; *What* Brothers and Siſters ſhould be allowed to be repreſented; whether the Brothers and Siſters *of the next*

[p] 22 & 23 CAR. 2. *cap.* 10.

[q] CARTER and CRAWLEY. 33 CAR. 2. B. R. RAYM. 496.

Colla-

Collaterals, or thoſe *of the Inteſtate only*; or, whether the Children of an Inteſtate's deceaſed Aunt ſhould come in for her Share among his other Aunts, as the Children of a deceaſed Siſter would have done among his other Siſters. The Chief Juſtice delivers his Opinion, that the Brothers and Siſters *of the Inteſtate only* were intended, which is now the eſtabliſhed Law: And therein he accounts why Repreſentation is allowed *in infinitum*, *lineally*, but only to a particular Degree, *collaterally*; the general Reaſon of which is applicable to all Caſes of Conſanguinity, which muſt be allowed to laſt for ever in the *right* Line, though not in the *tranſverſe*.

"It is, ſays he[r], an Obligation upon "every Man to provide for thoſe deſcended "from his Loins; and, as the Adminiſtra- "tor is to diſcharge all other Debts, ſo this "Debt to Nature ſhould likewiſe exact a Diſ- "tribution, to all that deſcend from him in "the lineal Degrees, be they never ſo remote: "And, becauſe thoſe which are more remote "from him, have not ſo much of his Blood, "therefore the Meaſure ſhould be according "to the *Stocks*; more, or leſs, as they ſtand "in Relation to him: Upon this Reaſon Re-

[r] *Ibid.* 500.

" preſentations are admitted to *all* Degrees in " the *lineal* Deſcent. There is no ſuch Obli- " gation to the remote Kindred in the *collate-* " *ral* Line; therefore they are not regarded, " but in reſpect of *Proximity*, as they are " *Next* of Kin." And again [r]; " Remoter " Degrees have no Regard, but for their *Prox-* " *imity*; becauſe there are none nearer." He concludes [t] thus, the Application of which is extremely eaſy; " I conceive this Act was " intended for a plain Rule; and I think it " much better to interpret it in the moſt plain " and obvious Senſe, (which will eſtabliſh the " Succeſſion of perſonal Eſtates according to " Reaſon and Symmetry) than to ſtrain to find " out another Senſe for the Sake of *remote* " Kindred, that are of *no* Regard; which " will produce apparent Abſurdities, and ſub- " ject perſonal Eſtates to fanciful and intricate " Diſputes."

12. THE laſt Light, in which I can re- collect that Conſanguinity has been conſidered, is in a Caſe the moſt ſimilar of any to that be- fore us, though not abſolutely the ſame; the Caſe of a general Legacy to ALL of one's Kindred. Here, if Kinſmen were admiſſi- ble *in infinitum*, the Legacy would be (accord-

[r] *Ibid.* 505. [t] *Ibid.* 506.

ing

ing to what has been before urged) to all Mankind: But the Laws have avoided this Abſurdity, by confining it among certain Particulars only.

AND firſt, with regard to the Civil Law, let us hear PAULUS DE CASTRO, a very eminent Lawyer, and the FOUNDER's Contemporary; who determines [u] upon the very Point. "*Teſtator, qui erat Preſbyter, in ſuo Teſta-*
"*mento inſeruit talem Clauſulam; Item lego*
"*cuilibet de Conſanguineis meis decem Fl. Au-*
"*ri. Quæritur, qui ad Legatum erunt ad-*
"*mittendi?*" After many learned Arguments, he anſwers, "*Quòd omnes uſque ad*
"*ſeptimum Gradum.*" MANTICA indeed differs from him as to the Degree; to which he [w] prefers the *tenth*, on the Authority of BALDUS; but agrees with him that there muſt be *ſome* Limitation. "*Debet intelligi*
"*uſque ad decimum Gradum, quià eò uſque*
"*protenditur & defertur Succeſſio; & ideò*
"*qui vult admitti tanquam ex Progenie ad Fi-*
"*deicommiſſum, debet probare ſe in aliquo Gra-*
"*du qui non ſit ultrà decimum.*" So that if we are to look upon the FOUNDER's Proviſion, as a Legacy to ALL of his Kindred, as

[u] *Conſil.* 1. 384.

[w] *De Conject. ult. Volunt. Lib.* 8. *tit.* 12. *num.* 46.

has

has been the Opinion of ſome; we find that, according to PAULUS DE CASTRO, none are entitled to that Legacy beyond the *ſeventh* Degree, or, according to BALDUS and MANTICA, the *tenth*; but all agree that they are not to be admitted *in infinitum*.

THE ſame Point has alſo been frequently determined in the Court of Chancery with Us; and it has been ſettled that ſuch Legacies ſhall not extend to the Kindred *in infinitum*. The Limits indeed, eſtabliſhed by that Court, are not any particular Degrees, but the Statute of Diſtribution in general; which, the Lord Chancellor ſaid [x], "He thought the beſt "Meaſure for ſetting Bounds to ſuch general "Words." The ſame has been determined in divers [y] Caſes; and this in order to prevent that Confuſion and Abſurdity which muſt neceſſarily enſue, if *no Bounds are ſet to ſuch general Words*. For, "it was ſaid [z] by the "Maſter of the Rolls, and admitted by Mr. "VERNON, and others, to be ſettled; that "where One deviſes the reſt of his perſonal "Eſtate to his Relations, without ſaying what "Relations, it ſhall go among all ſuch Rela-

[x] In the Caſe of ROACH and HAMMOND. *Paſch.* 1715. PREC. CHANC. 401. [y] CARR and BEDFORD. 30 CAR. 2. 2 CH. REP. 8vo. 146.—GRIFFITH and JONES, *ibid.* 394.—THOMAS and HOLE. CAS. *temp.* TALBOT. 251.

[z] 1 P. WMS. 327.

"tions

" tions, as are capable of taking within the " Statute of Diſtribution: Elſe it would be " uncertain, for the Relation may be infi- " nite." The Amount of all which is no more than this, that ſuch Bequeſts are totally void for their Uncertainty; and the Legacy is diſtributed as if, *quoad hoc*, the Teſtator had died inteſtate.

If therefore the FOUNDER's Statute is to be interpreted as his Will would have been in our preſent Courts of Equity, it muſt be entirely diſregarded; and his Fellowſhips diſtributed, as if, *quoad hoc*, he had made no Statute; for that is the Method in Chancery of diſpoſing of ſuch general Legacies: Or, at leaſt, no Perſons can claim a Fellowſhip by Conſanguinity to him, but ſuch as would be entitled to his perſonal Eſtate, in caſe he were now to have died inteſtate. The Conſequence of which is, that no Perſon can lay Claim, who has a Father, Uncle, or other Anceſtor living, related to the Founder; nay, no one can (or ever could) lay Claim, than whom there is *a nearer* Relation living in any Part of the World. But this would be a moſt unreaſonable Excluſion! It may therefore be juſtly doubted (as was hinted at the beginning of this Eſſay) whether the FOUNDER's Statute ought to be interpreted by *our* Rules for in-

terpreting of Wills. What however may be properly collected from hence, is; That our Courts were evidently ſenſible of the Inconveniences, that would be introduced by infinitely extending ſuch general Legacies; and have therefore applied a Remedy that was ſufficiently adapted to the Caſe before them, by vacating the Whole for it's Uncertainty, and diſtributing the Legacy in a Courſe of Adminiſtration, which is uſually the moſt equal Diſpoſition of any: But how far *ſuch* a Remedy can be, with Juſtice, applied to the Caſe of FOUNDER's Kinſmen, I ſhall not undertake to determine, but leave to be conſidered by proper Judges.

THESE are the ſeveral Lights, ſo far as can be at preſent recollected, in which Conſanguinity has been conſidered by the Civil, Canon, and Common Laws: And it is hoped, that upon a fair and candid Examination of the Authorities here cited, the Truth of the Propoſition ſet out with will clearly appear: "That where "Conſanguinity in general, and not Proximi-"ty, is the Object of any of thoſe Laws, it "is never extended *in infinitum.*" Farther than this it is impoſſible to go, in maintaining a negative Propoſition; unleſs by calling upon and challenging the warmeſt Adverſaries to this

Truth,

Truth, to produce a ſingle Inſtance, where Conſanguinity is profeſſedly extended without any Boundary; except in ſuch Caſes only, where Proximity is the Thing attended to. The Boundary indeed is not always the ſame: The third, the fourth, the ſixth, the ſeventh, the ninth, and tenth Degrees have been ſeverally eſtabliſhed as Limits for particular Purpoſes; but it is never extended without *any* Limit. And the Variety of Bounds that we find in different Laws, as different Exigencies required, is ſo far from being an Argument againſt eſtabliſhing *any*, that it is a very ſtrong one in favour of it; ſince it is thereby manifeſt, that all Legiſlators have, at all times, agreed in the *Neceſſity* of the *Thing*, though they differed in the *Manner* of accompliſhing it.

Nor will it be to any Purpoſe to object, that part of the Citations here made, from the Common Law, are with regard to Cuſtoms either quite, or almoſt, antiquated at this Day; ſince they were in full Force and Vigour at the Time when the College Statutes were compiled. Beſides, we are to look into the general Reaſon of Laws, in order to apply them to the Caſe before us; ſince a Caſe exactly parallel is no where to be met with: And the Reaſon of our antient Laws is at leaſt

as good as that of our more modern ones; nay, the Reaſon of the Laws now in Uſe is not always to be found, without having Recourſe to thoſe, which Cuſtom or Statutes have aboliſhed. In ſhort, it is at any time idle to object to antient and eſtabliſhed Determinations, unleſs it can be ſhewn that modern Reſolutions have been otherwiſe; much more in the preſent Inſtance, where we are looking not ſo much into the Practice of any one Law in particular, as the Principles of all Laws in general.

On the Whole, it may with Reaſon be aſſerted, that Lord Chancellor Clarendon did not haſtily, and *currente calamo* only, decide as he has done (though not in his judicial Capacity) on the very Point in Queſtion; however the Practice may have been in the learned Society he ſpeaks of, either ſince or before the Publication of his Hiſtory. Speaking of Lord Say and Sele, he ſays[a], "He had "been a Fellow of New College in Oxford: "to which he claimed a Right, by the Alli- "ance he pretended to have from William "of Wickham, the Founder; which he "made good by a far-fetched Pedigree through "ſo many hundred Years, half the Time "whereof extinguiſhes all Relation of Kin- "dred."

[a] Hiſt. of the Rebellion. Book 6. near the end.

III.

III. THE laſt Rule, that can be made Uſe of for interpreting the Intentions of the FOUNDER, is by [b] conſidering his Character, Profeſſion, and Learning, the Age in which he lived, and other Circumſtances of the ſame Nature; according to that Saying [c] of CICERO, "*Quâ in Sententiâ Scriptor fuerit, ex cæteris* "*ejus Scriptis, Factis, Dictis, Animo, at-* "*que Vitâ ſumi oportebit.*"

AND here we are not ſo much to conſider the many ſhining Qualities, which diſtinguiſhed this great and venerable Prelate as a Stateſman, and a Primate; as a Patron of all kinds of Learning, and the two illuſtrious Seats of it; as a ſteady and zealous Defender of the Rights of the Church of ENGLAND, the Prerogative of the King, and the Liberties of the People, againſt papal Encroachments, when ROME was in the Zenith of her Power: Theſe ſtrong and notorious Lines of his *public* Character are not at preſent the Object of our Contemplation. Let us here conſider him in a more *private* View; as an Eccleſiaſtic; as a Doctor of Civil and Canon Law, and remarkably eminent in the Knowledge of both; the *Lumen Legis*, as he is [d] ſtiled by

[b] PUFFEND. *ubi ſupr.* § 6 & 7. [c] *De Inv.* H. 40.
[d] *Provinc. ad init.*

LYNDEWODE: Let us recollect the Age in which he lived, wherein the Canon Law was in the higheſt Vogue and moſt univerſal Eſteem: Let us obſerve what a Regard he profeſſes to have both for that and the Civil Law; declaring [e] them to be "*pro Regimine politico* "*perquàm utiles & neceſſariæ*;" the Favour he ſhews to his Juriſts, and particularly his [f] Canoniſts; and how ſollicitous he ſeems [g] to be that the Knowledge of theſe Laws ſhould flouriſh in his Society: Let us, laſtly, conſider the permanent Benefit he has conferred on the College; by exempting them, as much as in him lay, from the Juriſdiction of the Common Law, (for which the Clergy had in his Time no great Reverence) and appointing his Succeſſor their Viſitor, who was ſure to determine all Differences by the Rules of the Canoniſts: Let us duly reflect upon all theſe Conſiderations, and we ſhall find it reaſonable to imagine, that the Conſanguinity, intended by the FOUNDER, is of the ſame Nature with that treated of in the Canon Law.

IT is therefore ſubmitted, with the utmoſt Deference, to the Judgment of ſuch, whoſe

[e] STATUT. *de totali numero, &c. ad init.*
[f g] STATUT. *paſſim.*

undoubted

undoubted Province it is to fix a Boundary to this Relationſhip, whether the Canonical Limit, of the SEVENTH Degree, does not ſeem to be better entitled to be the Limit here, than any other whatſoever. For that it *muſt* be bounded *ſomewhere* is, I hope, no longer a Doubt, after what has been here urged; eſpecially when we conſider farther, that the ſame Inference may be fairly drawn from the Sentence of the moſt reverend Prelate, by whom the firſt Appeal againſt the College-Election was decided: He determining [h] that the then Appellant was of the FOUNDER's Blood, and ejecting the Perſons choſen by the College, as being "*merè extraneos*, & "*dicto* FUNDATORI *in nullo Conſanguinitatis Gradu conjunctos.*" And the ſame is alſo virtually implied in every ſubſequent Sentence, wherein Judgment of *Ouſter* has been given. The Argument therefore will ſtand thus: If there are no Limits to Conſanguinity, all Men muſt be related to the FOUNDER in ſome Degree or other; but it is expreſsly determined that ſome Men are in no Degree related; the Conſequence of which is, that Conſanguinity muſt have *ſome* Limits. *What* theſe Limits are, is therefore the only Queſtion remaining; and that they may in

[h] *Decretum reverendiſs. in* CHRISTO *Patr.* GUIL. WAKE. 5 *Jun.* 1723.

ſome

ſome Way or other be finally aſcertained is, the Whole, I apprehend, that the Society deſire, and have been for theſe many Years endeavouring at. There ſeem at preſent to be tolerably good Reaſons for confining it within the SEVENTH Degree; but if *any other* Degree ſhall, upon better Reaſon, be determined to be more proper, Acquieſcence under lawful Authority is undoubtedly the Duty of inferior Judgments.

HAVING drawn out this Argument to ſo great a Length, it is now high Time to relieve the Readers from ſo dry, and, to moſt of them, unintereſting a Subject: But it may be expected, that I ſhould take Notice of an Objection or two, that have been raiſed to the Doctrine here contended for, from the Words of the Statute before us; and upon which ſome Streſs has been laid, as if they neceſſarily implied the perpetual Duration of Conſanguinity.

THE firſt is, That the FOUNDER ordains a Preference to be given to his Kinſmen "*in* "OMNI *Electione futuris temporibus faciendâ*;" and hence it is argued, that the FOUNDER thought there muſt, or might, be Kinſmen ſubſiſting at ALL future Elections.

To

To this it may be anſwered; firſt, that however *general* the Words may be, taken nakedly and by themſelves, yet they are afterwards reſtrained by the *Particularity* of others, with which they muſt be connected. The Preference is appointed to be given to the Kinſmen, only "*ſi qui tales ſint*;" which Words as much imply a Poſſibility of their *Failing* as the other do a Poſſibility of their *Subſiſting*. The whole Clauſe [1] of the Statute runs thus:——"*Volumus, quòd in omni Elec-*
"*tione Scholarium prædictorum futuris Tempo-*
"*ribus in dictum Collegium faciendâ, princi-*
"*paliter & ante omnes alios Illi qui ſunt vel erunt*
"*de Conſanguinitate noſtrâ & Genere, ſi qui*
"*Tales ſint, ubicunque fuerint oriundi, dùm*
"*tamen ſint reperti habiles & idonei ſecundùm*
"*Conditiones ſuperiùs & inferiùs recitatas,*
"*ſine aliquo Probationis Tempore in veros dicti*
"*Collegij Socios ab initio eligantur, & etiam*
"*admittantur.*" We ſee, that if the former Part of the Clauſe ſhould ſeem to ſuppoſe that they might laſt for ever, the latter as plainly ſuppoſes the contrary: From hence therefore we cannot infer the *Neceſſity* of a perpetual Duration.

[1] STATUT. *de modo & formâ & tempore eligend.*

BUT further, we cannot even infer the *Poſſibility* of it; for the Words, "*in omni E-*"*lectione futuris temporibus facienda*," are Words which operate upon all the remaining Parts of the Statute, as well as upon this proviſionary Clauſe; and in theſe there are, undoubtedly, *perpetual* Directions given, or ſuch as may be in Uſe for ever. It was therefore neceſſary, at the Head of this Branch of the Statute, to make uſe of ſuch comprehenſive Words as might reach the Whole of it; and yet, they are not to be applied, in their utmoſt Latitude, to every Part. Some Parts, as the Year of Probation for inſtance, are intended to be obſerved for ever; but no Parts can be longer obſerved, let the Expreſſion be as general as it will, than while their Objects continue to exiſt. It no more follows, that becauſe in ALL Elections *Kinſmen* are ordered to be preferred, therefore *Kinſmen* may laſt for ever; than it would, ſuppoſing *Nephews* were ordered to be preferred, that *Nephews* alſo may endure throughout all Ages. When Words, that ſignify Perpetuity, are applied to ſuch Things as are, in themſelves, of a tranſitory Nature, common Senſe will teach us to underſtand that *Perpetuity*, as meaning no more than the *utmoſt Duration*, of which the Thing it is applied to is capable.

A PARALLEL Inſtance may perhaps more fully explain this Matter. In the Canons of 1603, it is [k] enjoined, that "before ALL "Sermons, Lectures, and Homilies, Preach-"ers and Miniſters ſhall moove the People to "joyne in Prayer (*inter alia*) for our Sove-"raigne Lord King JAMES, our gracious "Queen ANNE, and the noble Prince HEN-"RY." But will any one thence conclude that Archbiſhop BANCROFT, and the other Makers of that Canon, imagined, that King JAMES, &c, would live as long as Sermons were preached, or Lectures read? Or would even a Jeſuit argue from thence, that the Church of ENGLAND enjoined Prayers for the Dead? Certainly not. The Word, ALL, will be underſtood with this Reſtriction as to them, "ſo long as they continue to be the Subjects "of Prayer;" and be taken in it's moſt extenſive Senſe only with regard to thoſe Things that are of a permanent Nature; "the holy "catholike Church, the Miniſters of God's "Word, &c."

I HAVE been the more minute in examining this Argument from the Words of the Statute, becauſe from the Air of Triumph with which

[k] Canon lv.

it is generally urged, it is looked upon, I imagine, as unanſwerable. However, I ſubmit it that this is a full Anſwer. But even ſuppoſing it be not ſo, ſuppoſing that, in their primary and moſt obvious Senſe, the Words imply a perpetual Duration of Kindred; would that alone be ſufficient to ſilence all Objections, and ſolve the otherwiſe unſurmountable Difficulties of ſuch a Conſtruction? I may venture to ſay, it would not. There is no Rule more certain, or more univerſally uſeful than this, which has been before mentioned;" *Ubi*[l] "*Verba nullum aut abſurdum Senſum poſt ſe* "*eſſent tractura, a receptiori Senſu pauliſper* "*erit deflectendum.*"

BUT again, we are told that, in another[m] Statute, the FOUNDER orders that "*Cuſtos* "*& Socij univerſi dicti Collegij, infrà Reg-* "*num* ANGLIÆ *exiſtentes, tàm noſtri Con-* "*ſanguinei quàm Alij, qui pro Tempore fue-* "*rint, ergà Feſtum Nativitatis Domini in* "*perpetuum, habeant Veſtes de unâ & eâdem* "*Sectâ; &c.*" and hence theſe ingenious Gentlemen draw the ſame Concluſion, in favour of the Perpetuity of FOUNDER's Kinſmen.

[l] PUFFEND. *ubi ſupr.* § 6.

[m] STATUT. *de communi annuâ Veſtium, &c.*

To

To this Argument, if we may venture to call it ſo, the ſame Anſwer will ſerve as to the foregoing; with this additional Remark, That, according to their own Way of reaſoning, the *Alij* muſt endure for ever in the College as well as the *Conſanguinei*; whereas we have ſhewn that if Conſanguinity be infinite, and of courſe univerſal, there can be no *Alij* ſubſiſting. In like manner as, by the other Argument, the Election of *Scholars* muſt confeſſedly continue for ever; whereas if Conſanguinity be extended to a great Diſtance, and much more if it be unlimited, there can be no ſuch Thing as *Scholars* to be elected; but that ſalutary Proviſion, of a Year of Probation, muſt entirely fall to the Ground. And thus much for this Piece of verbal Criticiſm.

On the Whole, it is ſubmitted to calm and impartial Judgments, whether the College, in the Reluctance they have expreſſed to admit Perſons to the Privilege of Kinſmen in Degrees far remoter than any that are above conſidered, have (as is malevolently ſuggeſted by ſome) acted a Part unbecoming the Character of Gentlemen, of Scholars, or of Clergymen; of Perſons who are bound, by the ſtrongeſt

Ties of Religion and Gratitude, to pay a proper Regard to the Blood of their munificent FOUNDER; but yet who are at the ſame time under equal Obligations, NOT to pay that Regard, unleſs where it is really due; who think it their Duty to diſtinguiſh and ſeparate true Claimants from the falſe; and who owe that Reſpect to their FOUNDER's Memory, as to endeavour to vindicate his Meaning from groſs Abſurdities, and palpable Contradictions.

IF what is contained in the foregoing Pages be really the Truth, as the Writer has the greateſt Reaſon to believe it is, the Conſequence muſt be left to the equitable Determination of HIM, in whoſe Patronage and Protection the College is at preſent happy. If, on the other hand, there be any Miſrepreſentations of Fact, any wrong Citations from Authorities, or any falſe Reaſoning either from thoſe Facts or Authorities, of none of which the Author is at preſent conſcious, he hopes at leaſt that it deſerves from ſuch as think differently, and may receive an Anſwer.

THE END.

THE

CONTENTS.

3. Frank-

CONTENTS.