Section the first.
On the STUDY of the LAW.[A]

Mr Vice-Chancellor, and gentlemen of the university,

THE general expectation of so numerous and respectable an audience, the novelty, and (I may add) the importance of the duty required from this chair, must unavoidably be productive of great diffidence and apprehensions in him who has the honour to be placed in it. He must be sensible how much will depend upon his conduct in the infancy of a study, which is now first adopted by public academical authority; which has generally been reputed (however unjustly) of a dry and unfruitful nature; and of which the theoretical, elementary parts have hitherto received a very moderate share of cultivation. He cannot but reflect that, if either his plan of instruction be crude and injudicious, or the execution of it lame and superficial, it will cast a damp upon the farther progress of this most useful and most rational branch of learning; and may defeat for a time the public-spirited design of our wise and munificent benefactor. And this he must more especially dread, when he feels by experience how unequal his abilities are (unassisted by preceding examples) to complete, in the manner he could wish, so extensive and arduous a task; since he freely confesses, that his former more private attempts have fallen very short of his own ideas of perfection. And yet the candour he has already experienced, and this last transcendent mark of regard, his present nomination by the free and unanimous suffrage of a great and learned university, (an honour to be ever remembered with the deepest and most affectionate gratitude) these testimonies of your public judgment must entirely supersede his own, and forbid him to believe himself totally insufficient for the labour at least of this employment. One thing he will venture to hope for, and it certainly shall be his constant aim, by diligence and

attention to atone for his other defects; esteeming, that the best return, which he can possibly make for your favourable opinion of his capacity, will be his unwearied endeavours in some little degree to deserve it.

[A] Read in Oxford at the opening of the Vinerian lectures; 25 Oct. 1758.

THE science thus committed to his charge, to be cultivated, methodized, and explained in a course of academical lectures, is that of the laws and constitution of our own country: a species of knowlege, in which the gentlemen of England have been more remarkably deficient than those of all Europe besides. In most of the nations on the continent, where the civil or imperial law under different modifications is closely interwoven with the municipal laws of the land, no gentleman, or at least no scholar, thinks his education is completed, till he has attended a course or two of lectures, both upon the institutes of Justinian and the local constitutions of his native soil, under the very eminent professors that abound in their several universities. And in the northern parts of our own island, where also the municipal laws are frequently connected with the civil, it is difficult to meet with a person of liberal education, who is destitute of a competent knowlege in that science, which is to be the guardian of his natural rights and the rule of his civil conduct.

NOR have the imperial laws been totally neglected even in the English nation. A general acquaintance with their decisions has ever been deservedly considered as no small accomplishment of a gentleman; and a fashion has prevailed, especially of late, to transport the growing hopes of this island to foreign universities, in Switzerland, Germany, and Holland; which, though infinitely inferior to our own in every other consideration, have been looked upon as better nurseries of the civil, or (which is nearly the same) of their own municipal law. In the mean time it has been the peculiar lot of our admirable system of laws, to be neglected, and even unknown, by all but one practical profession; though built upon the soundest foundations, and approved by the experience of ages.

FAR be it from me to derogate from the study of the civil law, considered (apart from any binding authority) as a collection of written reason. No man is more thoroughly persuaded of the general excellence of it's rules, and the

usual equity of it's decisions; nor is better convinced of it's use as well as ornament to the scholar, the divine, the statesman, and even the common lawyer. But we must not carry our veneration so far as to sacrifice our Alfred and Edward to the manes of Theodosius and Justinian: we must not prefer the edict of the praetor, or the rescript of the Roman emperor, to our own immemorial customs, or the sanctions of an English parliament; unless we can also prefer the despotic monarchy of Rome and Byzantium, for whose meridians the former were calculated, to the free constitution of Britain, which the latter are adapted to perpetuate.

WITHOUT detracting therefore from the real merit which abounds in the imperial law, I hope I may have leave to assert, that if an Englishman must be ignorant of either the one or the other, he had better be a stranger to the Roman than the English institutions. For I think it an undeniable position, that a competent knowlege of the laws of that society, in which we live, is the proper accomplishment of every gentleman and scholar; an highly useful, I had almost said essential, part of liberal and polite education. And in this I am warranted by the example of antient Rome; where, as Cicero informs us[a], the very boys were obliged to learn the twelve tables by heart, as a *carmen necessarium* or indispensable lesson, to imprint on their tender minds an early knowlege of the laws and constitutions of their country.

[a] *De Legg.* 2. 23.

BUT as the long and universal neglect of this study, with us in England, seems in some degree to call in question the truth of this evident position, it shall therefore be the business of this introductory discourse, in the first place to demonstrate the utility of some general acquaintance with the municipal law of the land, by pointing out its particular uses in all considerable situations of life. Some conjectures will then be offered with regard to the causes of neglecting this useful study: to which will be subjoined a few reflexions on the peculiar propriety of reviving it in our own universities.

AND, first, to demonstrate the utility of some acquaintance with the laws of the land, let us only reflect a moment on the singular frame and polity of that land, which is governed by this system of laws. A land, perhaps the only one in the universe, in which political or civil liberty is the very end and scope of

the constitution[b]. This liberty, rightly understood, consists in the power of doing whatever the laws permit[c]; which is only to be effected by a general conformity of all orders and degrees to those equitable rules of action, by which the meanest individual is protected from the insults and oppression of the greatest. As therefore every subject is interested in the preservation of the laws, it is incumbent upon every man to be acquainted with those at least, with which he is immediately concerned; lest he incur the censure, as well as inconvenience, of living in society without knowing the obligations which it lays him under. And thus much may suffice for persons of inferior condition, who have neither time nor capacity to enlarge their views beyond that contracted sphere in which they are appointed to move. But those, on whom nature and fortune have bestowed more abilities and greater leisure, cannot be so easily excused. These advantages are given them, not for the benefit of themselves only, but also of the public: and yet they cannot, in any scene of life, discharge properly their duty either to the public or themselves, without some degree of knowlege in the laws. To evince this the more clearly, it may not be amiss to descend to a few particulars.

[b] Montesq. *Esp. L. l.* 11. *c.* 5.

[c] *Facultas ejus, quod cuique facere libet, nisi quid vi, aut jure prohibetur. Inst.* 1. 3. 1.

Let us therefore begin with our gentlemen of independent estates and fortune, the most useful as well as considerable body of men in the nation; whom even to suppose ignorant in this branch of learning is treated by Mr Locke[d] as a strange absurdity. It is their landed property, with it's long and voluminous train of descents and conveyances, settlements, entails, and incumbrances, that forms the most intricate and most extensive object of legal knowlege. The thorough comprehension of these, in all their minute distinctions, is perhaps too laborious a task for any but a lawyer by profession: yet still the understanding of a few leading principles, relating to estates and conveyancing, may form some check and guard upon a gentleman's inferior agents, and preserve him at least from very gross and notorious imposition.

[d] Education. §. 187.

AGAIN, the policy of all laws has made some forms necessary in the wording of last wills and testaments, and more with regard to their attestation. An ignorance in these must always be of dangerous consequence, to such as by choice or necessity compile their own testaments without any technical assistance. Those who have attended the courts of justice are the best witnesses of the confusion and distresses that are hereby occasioned in families; and of the difficulties that arise in discerning the true meaning of the testator, or sometimes in discovering any meaning at all: so that in the end his estate may often be vested quite contrary to these his enigmatical intentions, because perhaps he has omitted one or two formal words, which are necessary to ascertain the sense with indisputable legal precision, or has executed his will in the presence of fewer witnesses than the law requires.

BUT to proceed from private concerns to those of a more public consideration. All gentlemen of fortune are, in consequence of their property, liable to be called upon to establish the rights, to estimate the injuries, to weigh the accusations, and sometimes to dispose of the lives of their fellow-subjects, by serving upon juries. In this situation they are frequently to decide, and that upon their oaths, questions of nice importance, in the solution of which some legal skill is requisite; especially where the law and the fact, as it often happens, are intimately blended together. And the general incapacity, even of our best juries, to do this with any tolerable propriety has greatly debased their authority; and has unavoidably thrown more power into the hands of the judges, to direct, control, and even reverse their verdicts, than perhaps the constitution intended.

BUT it is not as a juror only that the English gentleman is called upon to determine questions of right, and distribute justice to his fellow-subjects: it is principally with this order of men that the commission of the peace is filled. And here a very ample field is opened for a gentleman to exert his talents, by maintaining good order in his neighbourhood; by punishing the dissolute and idle; by protecting the peaceable and industrious; and, above all, by healing petty differences and preventing vexatious prosecutions. But, in order to attain these desirable ends, it is necessary that the magistrate should understand his business; and have not only the will, but the power also, (under which must be included the knowlege) of administring legal and

effectual justice. Else, when he has mistaken his authority, through passion, through ignorance, or absurdity, he will be the object of contempt from his inferiors, and of censure from those to whom he is accountable for his conduct.

YET farther; most gentlemen of considerable property, at some period or other in their lives, are ambitious of representing their country in parliament: and those, who are ambitious of receiving so high a trust, would also do well to remember it's nature and importance. They are not thus honourably distinguished from the rest of their fellow-subjects, merely that they may privilege their persons, their estates, or their domestics; that they may list under party banners; may grant or with-hold supplies; may vote with or vote against a popular or unpopular administration; but upon considerations far more interesting and important. They are the guardians of the English constitution; the makers, repealers, and interpreters of the English laws; delegated to watch, to check, and to avert every dangerous innovation, to propose, to adopt, and to cherish any solid and well-weighed improvement; bound by every tie of nature, of honour, and of religion, to transmit that constitution and those laws to their posterity, amended if possible, at least without any derogation. And how unbecoming must it appear in a member of the legislature to vote for a new law, who is utterly ignorant of the old! what kind of interpretation can he be enabled to give, who is a stranger to the text upon which he comments!

INDEED it is really amazing, that there should be no other state of life, no other occupation, art, or science, in which some method of instruction is not looked upon as requisite, except only the science of legislation, the noblest and most difficult of any. Apprenticeships are held necessary to almost every art, commercial or mechanical: a long course of reading and study must form the divine, the physician, and the practical professor of the laws: but every man of superior fortune thinks himself *born* a legislator. Yet Tully was of a different opinion: "It is necessary, says he[e], for a senator to be thoroughly acquainted with the constitution; and this, he declares, is a knowlege of the most extensive nature; a matter of science, of diligence, of reflexion; without which no senator can possibly be fit for his office."

[e] *De Legg.* 3. 18. *Est senatori necessarium nosse rempublicam; idque late patet:—genus hoc omne scientiae, diligentiae, memoriae est; sine quo paratus esse senator nullo pacto potest.*

THE mischiefs that have arisen to the public from inconsiderate alterations in our laws, are too obvious to be called in question; and how far they have been owing to the defective education of our senators, is a point well worthy the public attention. The common law of England has fared like other venerable edifices of antiquity, which rash and unexperienced workmen have ventured to new-dress and refine, with all the rage of modern improvement. Hence frequently it's symmetry has been destroyed, it's proportions distorted, and it's majestic simplicity exchanged for specious embellishments and fantastic novelties. For, to say the truth, almost all the perplexed questions, almost all the niceties, intricacies, and delays (which have sometimes disgraced the English, as well as other, courts of justice) owe their original not to the common law itself, but to innovations that have been made in it by acts of parliament; "overladen (as sir Edward Coke expresses it[f]) with provisoes and additions, and many times on a sudden penned or corrected by men of none or very little judgment in law." This great and well-experienced judge declares, that in all his time he never knew two questions made upon rights merely depending upon the common law; and warmly laments the confusion introduced by ill-judging and unlearned legislators. "But if, he subjoins, acts of parliament were after the old fashion penned, by such only as perfectly knew what the common law was before the making of any act of parliament concerning that matter, as also how far forth former statutes had provided remedy for former mischiefs, and defects discovered by experience; then should very few questions in law arise, and the learned should not so often and so much perplex their heads to make atonement and peace, by construction of law, between insensible and disagreeing words, sentences, and provisoes, as they now do." And if this inconvenience was so heavily felt in the reign of queen Elizabeth, you may judge how the evil is increased in later times, when the statute book is swelled to ten times a larger bulk; unless it should be found, that the penners of our modern statutes have proportionably better informed themselves in the knowlege of the common law.

[f] 2 Rep. Pref.

WHAT is said of our gentlemen in general, and the propriety of their application to the study of the laws of their country, will hold equally strong or still stronger with regard to the nobility of this realm, except only in the article of serving upon juries. But, instead of this, they have several peculiar provinces of far greater consequence and concern; being not only by birth hereditary counsellors of the crown, and judges upon their honour of the lives of their brother-peers, but also arbiters of the property of all their fellow-subjects, and that in the last resort. In this their judicial capacity they are bound to decide the nicest and most critical points of the law; to examine and correct such errors as have escaped the most experienced sages of the profession, the lord keeper and the judges of the courts at Westminster. Their sentence is final, decisive, irrevocable: no appeal, no correction, not even a review can be had: and to their determination, whatever it be, the inferior courts of justice must conform; otherwise the rule of property would no longer be uniform and steady.

SHOULD a judge in the most subordinate jurisdiction be deficient in the knowlege of the law, it would reflect infinite contempt upon himself and disgrace upon those who employ him. And yet the consequence of his ignorance is comparatively very trifling and small: his judgment may be examined, and his errors rectified, by other courts. But how much more serious and affecting is the case of a superior judge, if without any skill in the laws he will boldly venture to decide a question, upon which the welfare and subsistence of whole families may depend! where the chance of his judging right, or wrong, is barely equal; and where, if he chances to judge wrong, he does an injury of the most alarming nature, an injury without possibility of redress!

YET, vast as this trust is, it can no where be so properly reposed as in the noble hands where our excellent constitution has placed it: and therefore placed it, because, from the independence of their fortune and the dignity of their station, they are presumed to employ that leisure which is the consequence of both, in attaining a more extensive knowlege of the laws than persons of inferior rank: and because the founders of our polity relied upon

that delicacy of sentiment, so peculiar to noble birth; which, as on the one hand it will prevent either interest or affection from interfering in questions of right, so on the other it will bind a peer in honour, an obligation which the law esteems equal to another's oath, to be master of those points upon which it is his birthright to decide.

THE Roman pandects will furnish us with a piece of history not unapplicable to our present purpose. Servius Sulpicius, a gentleman of the patrician order, and a celebrated orator, had occasion to take the opinion of Quintus Mutius Scaevola, the oracle of the Roman law; but for want of some knowlege in that science, could not so much as understand even the technical terms, which his friend was obliged to make use of. Upon which Mutius Scaevola could not forbear to upbraid him with this memorable reproof[g], "that it was a shame for a patrician, a nobleman, and an orator of causes, to be ignorant of that law in which he was so peculiarly concerned." This reproach made so deep an impression on Sulpicius, that he immediately applied himself to the study of the law; wherein he arrived to that proficiency, that he left behind him about a hundred and fourscore volumes of his own compiling upon the subject; and became, in the opinion of Cicero[h], a much more complete lawyer than even Mutius Scaevola himself.

[g] *Ff.* 1. 2. 2. §. 43. *Turpe esse patricio, & nobili, & causas oranti, jus in quo versaretur ignorare.*

[h] *Brut.* 41.

I WOULD not be thought to recommend to our English nobility and gentry to become as great lawyers as Sulpicius; though he, together with this character, sustained likewise that of an excellent orator, a firm patriot, and a wise indefatigable senator; but the inference which arises from the story is this, that ignorance of the laws of the land hath ever been esteemed dishonourable, in those who are entrusted by their country to maintain, to administer, and to amend them.

BUT surely there is little occasion to enforce this argument any farther to persons of rank and distinction, if we of this place may be allowed to form a general judgment from those who are under our inspection: happy, that while

we lay down the rule, we can also produce the example. You will therefore permit your professor to indulge both a public and private satisfaction, by bearing this open testimony; that in the infancy of these studies among us, they were favoured with the most diligent attendance, and pursued with the most unwearied application, by those of the noblest birth and most ample patrimony: some of whom are still the ornaments of this seat of learning; and others at a greater distance continue doing honour to it's institutions, by comparing our polity and laws with those of other kingdoms abroad, or exerting their senatorial abilities in the councils of the nation at home.

NOR will some degree of legal knowlege be found in the least superfluous to persons of inferior rank; especially those of the learned professions. The clergy in particular, besides the common obligations they are under in proportion to their rank and fortune, have also abundant reason, considered merely as clergymen, to be acquainted with many branches of the law, which are almost peculiar and appropriated to themselves alone. Such are the laws relating to advowsons, institutions, and inductions; to simony, and simoniacal contracts; to uniformity, residence, and pluralities; to tithes and other ecclesiastical dues; to marriages (more especially of late) and to a variety of other subjects, which are consigned to the care of their order by the provisions of particular statutes. To understand these aright, to discern what is warranted or enjoined, and what is forbidden by law, demands a sort of legal apprehension; which is no otherwise to be acquired than by use and a familiar acquaintance with legal writers.

FOR the gentlemen of the faculty of physic, I must frankly own that I see no special reason, why they in particular should apply themselves to the study of the law; unless in common with other gentlemen, and to complete the character of general and extensive knowlege; a character which their profession, beyond others, has remarkably deserved. They will give me leave however to suggest, and that not ludicrously, that it might frequently be of use to families upon sudden emergencies, if the physician were acquainted with the doctrine of last wills and testaments, at least so far as relates to the formal part of their execution.

BUT those gentlemen who intend to profess the civil and ecclesiastical laws in the spiritual and maritime courts of this kingdom, are of all men (next to common lawyers) the most indispensably obliged to apply themselves seriously to the study of our municipal laws. For the civil and canon laws, considered with respect to any intrinsic obligation, have no force or authority in this kingdom; they are no more binding in England than our laws are binding at Rome. But as far as these foreign laws, on account of some peculiar propriety, have in some particular cases, and in some particular courts, been introduced and allowed by our laws, so far they oblige, and no farther; their authority being wholly founded upon that permission and adoption. In which we are not singular in our notions; for even in Holland, where the imperial law is much cultivated and it's decisions pretty generally followed, we are informed by Van Leeuwen[i], that, "it receives it's force from custom and the consent of the people, either tacitly or expressly given: for otherwise, he adds, we should no more be bound by this law, than by that of the Almains, the Franks, the Saxons, the Goths, the Vandals, and other of the antient nations." Wherefore, in all points in which the different systems depart from each other, the law of the land takes place of the law of Rome, whether antient or modern, imperial or pontificial. And in those of our English courts wherein a reception has been allowed to the civil and canon laws, if either they exceed the bounds of that reception, by extending themselves to other matters, than are permitted to them; or if such courts proceed according to the decisions of those laws, in cases wherein it is controlled by the law of the land, the common law in either instance both may, and frequently does, prohibit and annul their proceedings[k]: and it will not be a sufficient excuse for them to tell the king's courts at Westminster, that their practice is warranted by the laws of Justinian or Gregory, or is conformable to the decrees of the Rota or imperial chamber. For which reason it becomes highly necessary for every civilian and canonist that would act with safety as a judge, or with prudence and reputation as an advocate, to know in what cases and how far the English laws have given sanction to the Roman; in what points the latter are rejected; and where they are both so intermixed and blended together, as to form certain supplemental parts of the common law of England, distinguished by the titles of the king's maritime, the king's military, and the king's ecclesiastical law. The propriety of which

enquiry the university of Oxford has for more than a century so thoroughly seen, that in her statutes[l] she appoints, that one of the three questions to be annually discussed at the act by the jurist-inceptors shall relate to the common law; subjoining this reason, "*quia juris civilis studiosos decet haud imperitos esse juris municipalis, & differentias exteri patriique juris notas habere*." And the statutes[m] of the university of Cambridge speak expressly to the same effect.

[i] *Dedicatio corporis juris civilis. Edit.* 1663.

[k] Hale. Hist. C.L. c. 2. Selden *in Fletam*. 5 Rep. Caudrey's Case. 2 Inst. 599.

[l] *Tit. VII. Sect.* 2. §. 2.

[m] *Doctor legum mox a doctoratu dabit operam legibus Angliae, ut non sit imperitus earum legum quas habet sua patria, et differentias exteri patriique juris noscat. Stat.* Eliz. *R. c.* 14. Cowel. *Institut. in proëmio.*

FROM the general use and necessity of some acquaintance with the common law, the inference were extremely easy, with regard to the propriety of the present institution, in a place to which gentlemen of all ranks and degrees resort, as the fountain of all useful knowlege. But how it has come to pass that a design of this sort has never before taken place in the university, and the reason why the study of our laws has in general fallen into disuse, I shall previously proceed to enquire.

SIR John Fortescue, in his panegyric on the laws of England, (which was written in the reign of Henry the sixth) puts[n] a very obvious question in the mouth of the young prince, whom he is exhorting to apply himself to that branch of learning; "why the laws of England, being so good, so fruitful, and so commodious, are not taught in the universities, as the civil and canon laws are?" In answer to which he gives[o] what seems, with due deference be it spoken, a very jejune and unsatisfactory reason; being in short, that "as the proceedings at common law were in his time carried on in three different tongues, the English, the Latin, and the French, that science must be necessarily taught in those three several languages; but that in the universities all sciences were taught in the Latin tongue only; and therefore he concludes, that they could not be conveniently taught or studied in our universities." But without attempting to examine seriously the validity of this reason, (the very shadow of which by the wisdom of your late constitutions is entirely taken away) we perhaps may find out a better, or at least a more plausible account, why the study of the municipal laws has been banished from these seats of

science, than what the learned chancellor thought it prudent to give to his royal pupil.

[n] *c.* 47.

[o] *c.* 48.

THAT antient collection of unwritten maxims and customs, which is called the common law, however compounded or from whatever fountains derived, had subsisted immemorially in this kingdom; and, though somewhat altered and impaired by the violence of the times, had in great measure weathered the rude shock of the Norman conquest. This had endeared it to the people in general, as well because it's decisions were universally known, as because it was found to be excellently adapted to the genius of the English nation. In the knowlege of this law consisted great part of the learning of those dark ages; it was then taught, says Mr Selden[p], in the monasteries, *in the universities*, and in the families of the principal nobility. The clergy in particular, as they then engrossed almost every other branch of learning, so (like their predecessors the British druids[q]) they were peculiarly remarkable for their proficiency in the study of the law. *Nullus clericus nisi causidicus*, is the character given of them soon after the conquest by William of Malmsbury[r]. The judges therefore were usually created out of the sacred order[s], as was likewise the case among the Normans[t]; and all the inferior offices were supplied by the lower clergy, which has occasioned their successors to be denominated *clerks* to this day.

[p] *in Fletam.* 7. 7.

[q] Caesar *de bello Gal.* 6. 12.

[r] *de gest. reg. l.* 4.

[s] Dugdale *Orig. jurid. c.* 8.

[t] *Les juges sont sages personnes & autentiques,—sicome les archevesques, evesques, les chanoines les eglises cathedraulx, & les autres personnes qui ont dignitez in saincte eglise; les abbez, les prieurs conventaulx, & les gouverneurs des eglises, &c. Grand Coustumier, ch.* 9.

BUT the common law of England, being not committed to writing, but only handed down by tradition, use, and experience, was not so heartily relished by the foreign clergy; who came over hither in shoals during the reign of the conqueror and his two sons, and were utter strangers to our constitution as well as our language. And an accident, which soon after happened, had nearly completed it's ruin. A copy of Justinian's pandects, being newly[u] discovered at Amalfi, soon brought the civil law into vogue all over the west of Europe, where before it was quite laid aside[w] and in a manner forgotten; though some traces of it's authority remained in Italy[x] and the eastern provinces of the empire[y]. This now became in a particular manner the favourite of the popish clergy, who borrowed the method and many of the maxims of their canon law from this original. The study of it was introduced into several universities abroad, particularly that of Bologna; where exercises were performed, lectures read, and degrees conferred in this faculty, as in other branches of science: and many nations on the continent, just then beginning to recover from the convulsions consequent upon the overthrow of the Roman empire, and settling by degrees into peaceable forms of government, adopted the civil law, (being the best written system then extant) as the basis of their several constitutions; blending and interweaving it among their own feodal customs, in some places with a more extensive, in others a more confined authority[z].

[u] *circ. A.D.* 1130.

[w] *LL. Wisigoth.* 2. 1. 9.

[x] *Capitular. Hludov. Pii.* 4. 102.

[y] Selden *in Fletam.* 5. 5.

[z] Domat's treatise of laws. c. 13. §. 9. *Epistol. Innocent. IV. in M. Paris. ad A.D.* 1254.

NOR was it long before the prevailing mode of the times reached England. For Theobald, a Norman abbot, being elected to the see of Canterbury[a], and extremely addicted to this new study, brought over with him in his retinue many learned proficients therein; and among the rest Roger sirnamed

Vacarius, whom he placed in the university of Oxford[b], to teach it to the people of this country. But it did not meet with the same easy reception in England, where a mild and rational system of laws had been long established, as it did upon the continent; and, though the monkish clergy (devoted to the will of a foreign primate) received it with eagerness and zeal, yet the laity who were more interested to preserve the old constitution, and had already severely felt the effect of many Norman innovations, continued wedded to the use of the common law. King Stephen immediately published a proclamation[c], forbidding the study of the laws, then newly imported from Italy; which was treated by the monks[d] as a piece of impiety, and, though it might prevent the introduction of the civil law process into our courts of justice, yet did not hinder the clergy from reading and teaching it in their own schools and monasteries.

[a] *A.D.* 1138.

[b] Gervas. Dorobern. *Act. Pontif. Cantuar. col.* 1665.

[c] Rog. Bacon. *citat. per* Selden. *in Fletam.* 7. 6. *in Fortesc. c.* 33. & 8 Rep. Pref.

[d] Joan. Sarisburiens. *Polycrat.* 8. 22.

FROM this time the nation seems to have been divided into two parties; the bishops and clergy, many of them foreigners, who applied themselves wholly to the study of the civil and canon laws, which now came to be inseparably interwoven with each other; and the nobility and laity, who adhered with equal pertinacity to the old common law; both of them reciprocally jealous of what they were unacquainted with, and neither of them perhaps allowing the opposite system that real merit which is abundantly to be found in each. This appears on the one hand from the spleen with which the monastic writers[e] speak of our municipal laws upon all occasions; and, on the other, from the firm temper which the nobility shewed at the famous parliament of Merton; when the prelates endeavoured to procure an act, to declare all bastards legitimate in case the parents intermarried at any time afterwards; alleging this only reason, because holy church (that is, the canon law) declared such children legitimate: but "all the earls and barons (says the parliament roll[f])

with one voice answered, that they would not change the laws of England, which had hitherto been used and approved." And we find the same jealousy prevailing above a century afterwards[g], when the nobility declared with a kind of prophetic spirit, "that the realm of England hath never been unto this hour, neither by the consent of our lord the king and the lords of parliament shall it ever be, ruled or governed by the civil law[h]." And of this temper between the clergy and laity many more instances might be given.

[e] *Idem, ibid.* 5. 16. Polydor. Vergil. *Hist. l.* 9.

[f] *Stat. Merton.* 20 *Hen. III. c.* 9. *Et omnes comites & barones una voce responderunt, quod nolunt leges Angliae mutare, quae hucusque usitatae sunt & approbatae.*

[g] 11 Ric. II.

[h] Selden. *Jan. Anglor. l.* 2. §. 43. *in Fortesc. c.* 33.

WHILE things were in this situation, the clergy, finding it impossible to root out the municipal law, began to withdraw themselves by degrees from the temporal courts; and to that end, very early in the reign of king Henry the third, episcopal constitutions were published[i], forbidding all ecclesiastics to appear as advocates *in foro saeculari*; nor did they long continue to act as judges there, nor caring to take the oath of office which was then found necessary to be administred, that they should in all things determine according to the law and custom of this realm[k]; though they still kept possession of the high office of chancellor, an office then of little juridical power; and afterwards, as it's business increased by degrees, they modelled the process of the court at their own discretion.

[i] Spelman. *Concil. A.D.* 1217. Wilkins, *vol.* 1. *p.* 574, 599.

[k] Selden. *in Fletam.* 9. 3.

BUT wherever they retired, and wherever their authority extended, they carried with them the same zeal to introduce the rules of the civil, in exclusion of the municipal law. This appears in a particular manner from the spiritual courts of all denominations, from the chancellor's courts in both our

universities, and from the high court of chancery before-mentioned; in all of which the proceedings are to this day in a course much conformed to the civil law: for which no tolerable reason can be assigned, unless that these courts were all under the immediate direction of the popish ecclesiastics, among whom it was a point of religion to exclude the municipal law; pope Innocent the fourth having[l] forbidden the very reading of it by the clergy, because it's decisions were not founded on the imperial constitutions, but merely on the customs of the laity. And if it be considered, that our universities began about that period to receive their present form of scholastic discipline; that they were then, and continued to be till the time of the reformation, entirely under the influence of the popish clergy; (sir John Mason the first protestant, being also the first lay, chancellor of Oxford) this will lead us to perceive the reason, why the study of the Roman laws was in those days of bigotry[m] pursued with such alacrity in these seats of learning; and why the common law was entirely despised, and esteemed little better than heretical.

[l] M. Paris *ad A.D.* 1254.

[m] There cannot be a stronger instance of the absurd and superstitious veneration that was paid to these laws, than that the most learned writers of the times thought they could not form a perfect character, even of the blessed virgin, without making her a civilian and a canonist. Which Albertus Magnus, the renowned dominican doctor of the thirteenth century, thus proves in his *Summa de laudibus christiferae virginis (divinum magis quam humanum opus) qu.* 23. §. 5. *"Item quod jura civilia, & leges, & decreta scivit in summo, probatur hoc modo: sapientia advocati manifestatur in tribus; unum, quod obtineat omnia contra judicem justum & sapientem; secundo, quod contra adversarium astutum & sagacem; tertio, quod in causa desperata: sed beatissima virgo, contra judicem sapientissimum, Dominum; contra adversarium callidissimum, dyabolum; in causa nostra desperata; sententiam optatam obtinuit."* To which an eminent franciscan, two centuries afterwards, Bernardinus de Busti (*Mariale*, *part.* 4. *serm.* 9.) very gravely subjoins this note. *"Nec videtur incongruum mulieres habere peritiam juris. Legitur enim de uxore Joannis Andreae glossatoris, quod tantam peritiam in utroque jure habuit, ut publice in scholis legere ausa sit."*

AND, since the reformation, many causes have conspired to prevent it's becoming a part of academical education. As, first, long usage and established custom; which, as in every thing else, so especially in the forms of scholastic exercise, have justly great weight and authority. Secondly, the real intrinsic merit of the civil law, considered upon the footing of reason and not of obligation, which was well known to the instructors of our youth; and their total ignorance of the merit of the common law, though it's equal at least, and perhaps an improvement on the other. But the principal reason of all, that has hindered the introduction of this branch of learning, is, that the study of the common law, being banished from hence in the times of popery, has fallen into a quite different chanel, and has hitherto been wholly cultivated in another place. But as this long usage and established custom, of ignorance in the laws of the land, begin now to be thought unreasonable; and as by this means the merit of those laws will probably be more generally known; we may hope that the method of studying them will soon revert to it's antient course, and the foundations at least of that science will be laid in the two universities; without being exclusively confined to the chanel which it fell into at the times I have been just describing.

FOR, being then entirely abandoned by the clergy, a few stragglers excepted, the study and practice of it devolved of course into the hands of laymen; who entertained upon their parts a most hearty aversion to the civil law[n], and made no scruple to profess their contempt, nay even their ignorance[o] of it, in the most public manner. But still, as the ballance of learning was greatly on the side of the clergy, and as the common law was no longer *taught*, as formerly, in any part of the kingdom, it must have been subjected to many inconveniences, and perhaps would have been gradually lost and overrun by the civil, (a suspicion well justified from the frequent transcripts of Justinian to be met with in Bracton and Fleta) had it not been for a peculiar incident, which happened at a very critical time, and contributed greatly to it's support.

[n] Fortesc. *de laud. LL. c.* 25.

[o] This remarkably appeared in the case of the abbot of Torun, *M.* 22 *E.* 3. 24. who had caused a certain prior to be summoned to answer at Avignon for erecting an oratory *contra inhibitionem novi operis*; by which words Mr

Selden, (*in Flet.* 8. 5.) very justly understands to be meant the title *de novi operis nuntiatione* both in the civil and canon laws, (*Ff.* 39. 1. *C.* 8. 11. and *Decretal.* not *Extrav.* 5. 32.) whereby the erection of any new buildings in prejudice of more antient ones was prohibited. But Skipwith the king's serjeant, and afterwards chief baron of the exchequer, declares them to be flat nonsense; "*in ceux parolx*, contra inhibitionem novi operis, *ny ad pas entendment*:" and justice Schardelow mends the matter but little by informing him, that they signify a restitution *in their law*; for which reason he very sagely resolves to pay no sort of regard to them. "*Ceo n'est que un restitution en lour ley, pur que a ceo n'avomus regard, &c.*"

THE incident I mean was the fixing the court of common pleas, the grand tribunal for disputes of property, to be held in one certain spot; that the seat of ordinary justice might be permanent and notorious to all the nation. Formerly that, in conjunction with all the other superior courts, was held before the king's capital justiciary of England, in the *aula regis*, or such of his palaces wherein his royal person resided; and removed with his houshold from one end of the kingdom to the other. This was found to occasion great inconvenience to the suitors; to remedy which it was made an article of the great charter of liberties, both that of king John and king Henry the third[p], that "common pleas should no longer follow the king's court, but be held in some certain place:" in consequence of which they have ever since been held (a few necessary removals in times of the plague excepted) in the palace of Westminster only. This brought together the professors of the municipal law, who before were dispersed about the kingdom, and formed them into an aggregate body; whereby a society was established of persons, who (as Spelman[q] observes) addicting themselves wholly to the study of the laws of the land, and no longer considering it as a mere subordinate science for the amusement of leisure hours, soon raised those laws to that pitch of perfection, which they suddenly attained under the auspices of our English Justinian, king Edward the first.

[p] *c.* 11.

[q] *Glossar.* 334.

In consequence of this lucky assemblage, they naturally fell into a kind of collegiate order, and, being excluded from Oxford and Cambridge, found it necessary to establish a new university of their own. This they did by purchasing at various times certain houses (now called the inns of court and of chancery) between the city of Westminster, the place of holding the king's courts, and the city of London; for advantage of ready access to the one, and plenty of provisions in the other[r]. Here exercises were performed, lectures read, and degrees were at length conferred in the common law, as at other universities in the canon and civil. The degrees were those of barristers (first stiled apprentices[s] from *apprendre*, to learn) who answered to our bachelors; as the state and degree of a serjeant[t], *servientis ad legem*, did to that of doctor.

[r] Fortesc. *c.* 48.

[s] Apprentices or Barristers seem to have been first appointed by an ordinance of king Edward the first in parliament, in the 20th year of his reign. (Spelm. *Gloss.* 37. Dugdale. *Orig. jurid.* 55.)

[t] The first mention I have met with in our lawbooks of serjeants or countors, is in the statute of Westm. 1. 3 Edw. I. c. 29. and in Horn's Mirror, *c.* 1. §. 10. *c.* 2. §. 5. *c.* 3. §. 1. in the same reign. But M. Paris in his life of John II, abbot of St. Alban's, which he wrote in 1255, 39 Hen. III. speaks of advocates at the common law, or countors (*quos banci narratores vulgariter appellamus*) as of an order of men well known. And we have an example of the antiquity of the coif in the same author's history of England, *A.D.* 1259. in the case of one William de Bussy; who, being called to account for his great knavery and malpractices, claimed the benefit of his orders or clergy, which till then remained an entire secret; and to that end *voluit ligamenta coifae suae solvere, ut palam monstraret se tonsuram habere clericalem; sed non est permissus.——Satelles vero eum arripiens, non per coifae ligamina sed per guttur eum apprehendens, traxit ad carcerem*. And hence sir H. Spelman conjectures, (*Glossar.* 335.) that coifs were introduced to hide the tonsure of such renegade clerks, as were still tempted to remain in the secular courts in the quality of advocates or judges, notwithstanding their prohibition by canon.

THE crown seems to have soon taken under it's protection this infant seminary of common law; and, the more effectually to foster and cherish it, king Henry the third in the nineteenth year of his reign issued out an order directed to the mayor and sheriffs of London, commanding that no regent of any law schools *within* that city should for the future teach law therein[u]. The word, law, or *leges*, being a general term, may create some doubt at this distance of time whether the teaching of the civil law, or the common, or both, is hereby restrained. But in either case it tends to the same end. If the civil law only is prohibited, (which is Mr Selden's[w] opinion) it is then a retaliation upon the clergy, who had excluded the common law from *their* seats of learning. If the municipal law be also included in the restriction, (as sir Edward Coke[x] understands it, and which the words seem to import) then the intention is evidently this; by preventing private teachers within the walls of the city, to collect all the common lawyers into the one public university, which was newly instituted in the suburbs.

[u] *Ne aliquis scholas regens de legibus in eadem civitate de caetero ibidem leges doceat.*

[w] *in Flet.* 8. 2.

[x] 2 Inst. proëm.

IN this juridical university (for such it is insisted to have been by Fortescue[y] and sir Edward Coke[z]) there are two sorts of collegiate houses; one called inns of chancery, in which the younger students of the law were usually placed, "learning and studying, says Fortescue[a], the originals and as it were the elements of the law; who, profiting therein, as they grow to ripeness so are they admitted into the greater inns of the same study, called the inns of court." And in these inns of both kinds, he goes on to tell us, the knights and barons, with other grandees and noblemen of the realm, did use to place their children, though they did not desire to have them thoroughly learned in the law, or to get their living by it's practice: and that in his time there were about two thousand students at these several inns, all of whom he informs us were *filii nobilium*, or gentlemen born.

[y] *c.* 49.

[z] 3 Rep. pref.

[a] *ibid.*

HENCE it is evident, that (though under the influence of the monks our universities neglected this study, yet) in the time of Henry the sixth it was thought highly necessary and was the universal practice, for the young nobility and gentry to be instructed in the originals and elements of the laws. But by degres this custom has fallen into disuse; so that in the reign of queen Elizabeth sir Edward Coke[b] does not reckon above a thousand students, and the number at present is very considerably less. Which seems principally owing to these reasons: first, because the inns of chancery being now almost totally filled by the inferior branch of the profession, they are neither commodious nor proper for the resort of gentlemen of any rank or figure; so that there are now very rarely any young students entered at the inns of chancery: secondly, because in the inns of court all sorts of regimen and academical superintendance, either with regard to morals or studies, are found impracticable and therefore entirely neglected: lastly, because persons of birth and fortune, after having finished their usual courses at the universities, have seldom leisure or resolution sufficient to enter upon a new scheme of study at a new place of instruction. Wherefore few gentlemen now resort to the inns of court, but such for whom the knowlege of practice is absolutely necessary; such, I mean, as are intended for the profession: the rest of our gentry, (not to say our nobility also) having usually retired to their estates, or visited foreign kingdoms, or entered upon public life, without any instruction in the laws of the land; and indeed with hardly any opportunity of gaining instruction, unless it can be afforded them in these seats of learning.

[b] *ibid.*

AND that these are the proper places, for affording assistances of this kind to gentlemen of all stations and degrees, cannot (I think) with any colour of reason be denied. For not one of the objections, which are made to the inns of court and chancery, and which I have just enumerated, will hold with regard to the universities. Gentlemen may here associate with gentlemen of their own rank and degree. Nor are their conduct and studies left entirely to

their own discretion; but regulated by a discipline so wise and exact, yet so liberal, so sensible and manly, that their conformity to it's rules (which does at present so much honour to our youth) is not more the effect of constraint, than of their own inclinations and choice. Neither need they apprehend too long an avocation hereby from their private concerns and amusements, or (what is a more noble object) the service of their friends and their country. This study will go hand in hand with their other pursuits: it will obstruct none of them; it will ornament and assist them all.

BUT if, upon the whole, there are any still wedded to monastic prejudice, that can entertain a doubt how far this study is properly and regularly *academical*, such persons I am afraid either have not considered the constitution and design of an university, or else think very meanly of it. It must be a deplorable narrowness of mind, that would confine these seats of instruction to the limited views of one or two learned professions. To the praise of this age be it spoken, a more open and generous way of thinking begins now universally to prevail. The attainment of liberal and genteel accomplishments, though not of the intellectual sort, has been thought by our wisest and most affectionate patrons[c], and very lately by the whole university[d], no small improvement of our antient plan of education; and therefore I may safely affirm that nothing (how *unusual* soever) is, under due regulations, improper to be *taught* in this place, which is proper for a gentleman to *learn*. But that a science, which distinguishes the criterions of right and wrong; which teaches to establish the one, and prevent, punish, or redress the other; which employs in it's theory the noblest faculties of the soul, and exerts in it's practice the cardinal virtues of the heart; a science, which is universal in it's use and extent, accommodated to each individual, yet comprehending the whole community; that a science like this should have ever been deemed unnecessary to be studied in an university, is matter of astonishment and concern. Surely, if it were not before an object of academical knowlege, it was high time to make it one; and to those who can doubt the propriety of it's reception among us (if any such there be) we may return an answer in their own way; that ethics are confessedly a branch of academical learning, and Aristotle *himself has said*, speaking of the laws of his

own country, that jurisprudence or the knowlege of those laws is the principal and most[e] perfect branch of ethics.

[c] Lord chancellor Clarendon, in his dialogue of education, among his tracts, p. 325. appears to have been very solicitous, that it might be made "a part of the ornament of our learned academies to teach the qualities of riding, dancing, and fencing, at those hours when more serious exercises should be intermitted."

[d] By accepting in full convocation the remainder of lord Clarendon's history from his noble descendants, on condition to apply the profits arising from it's publication to the establishment of a *manage* in the university.

[e] Τελεια μαλιςα αρετη, ὁτι της τελειας αρετης χρησις εςι. *Ethic. ad Nicomach. l.* 5. *c.* 3.

FROM a thorough conviction of this truth, our munificent benefactor Mr VINER, having employed above half a century in amassing materials for new modelling and rendering more commodious the rude study of the laws of the land, consigned both the plan and execution of these his public-spirited designs to the wisdom of his parent university. Resolving to dedicate his learned labours "to the benefit of posterity and the perpetual service of his country[f]," he was sensible he could not perform his resolutions in a better and more effectual manner, than by extending to the youth of this place those assistances, of which he so well remembered and so heartily regretted the want. And the sense, which the university has entertained of this ample and most useful benefaction, must appear beyond a doubt from their gratitude in receiving it with all possible marks of esteem[g]; from their alacrity and unexampled dispatch in carrying it into execution[h]; and, above all, from the laws and constitutions by which they have effectually guarded it from the neglect and abuse to which such institutions are liable[i]. We have seen an universal emulation, who best should understand, or most faithfully pursue, the designs of our generous patron: and with pleasure we recollect, that those who are most distinguished by their quality, their fortune, their station, their learning, or their experience, have appeared the most zealous to promote the success of Mr Viner's establishment.

[f] See the preface to the eighteenth volume of his abridgment.

[g] Mr Viner is enrolled among the public benefactors of the university by decree of convocation.

[h] Mr Viner died June 5, 1756. His effects were collected and settled, near a volume of his work printed, almost the whole disposed of, and the accounts made up, in a year and a half from his decease, by the very diligent and worthy administrators with the will annexed, (Dr West and Dr Good of Magdalene, Dr Whalley of Oriel, Mr Buckler of All Souls, and Mr Betts of University college) to whom that care was consigned by the university. Another half year was employed in considering and settling a plan of the proposed institution, and in framing the statutes thereupon, which were finally confirmed by convocation on the 3d of July, 1758. The professor was elected on the 20th of October following, and two scholars on the succeeding day. And, lastly, it was agreed at the annual audit in 1761, to establish a fellowship; and a fellow was accordingly elected in January following.—The residue of this fund, arising from the sale of Mr Viner's abridgment, will probably be sufficient hereafter to found another fellowship and scholarship, or three more scholarships, as shall be thought most expedient.

[i] The statutes are in substance as follows:

1. THAT the accounts of this benefaction be separately kept, and annually audited by the delegates of accounts and professor, and afterwards reported to convocation.

2. THAT a professorship of the laws of England be established, with a salary of two hundred pounds *per annum*; the professor to be elected by convocation, and to be at the time of his election at least a master of arts or bachelor of civil law in the university of Oxford, of ten years standing from his matriculation; and also a barrister at law of four years standing at the bar.

3. THAT such professor (by himself, or by deputy to be previously approved by convocation) do read one solemn public lecture on the laws of England, and in the English language, in every academical term, at certain stated times previous to the commencement of the common law term; or

forfeit twenty pounds for every omission to Mr Viner's general fund: and also (by himself, or by deputy to be approved, if occasional, by the vice-chancellor and proctors; or, if permanent, both the cause and the deputy to be annually approved by convocation) do yearly read one complete course of lectures on the laws of England, and in the English language, consisting of sixty lectures at the least, to be read during the university term time, with such proper intervals that not more than four lectures may fall within any single week: that the professor do give a month's notice of the time when the course is to begin, and do read *gratis* to the scholars of Mr Viner's foundation; but may demand of other auditors such gratuity as shall be settled from time to time by decree of convocation: and that, for every of the said sixty lectures omitted, the professor, on complaint made to the vice-chancellor within the year, do forfeit forty shillings to Mr Viner's general fund; the proof of having performed his duty to lie upon the said professor.

4. THAT every professor do continue in his office during life, unless in case of such misbehaviour as shall amount to bannition by the university statutes; or unless he deserts the profession of the law by betaking himself to another profession; or unless, after one admonition by the vice-chancellor and proctors for notorious neglect, he is guilty of another flagrant omission: in any of which cases he be deprived by the vice-chancellor, with consent of the house of convocation.

5. THAT such a number of fellowships with a stipend of fifty pounds *per annum*, and scholarships with a stipend of thirty pounds be established, as the convocation shall from time to time ordain, according to the state of Mr Viner's revenues.

6. THAT every fellow be elected by convocation, and at the time of election be unmarried, and at least a master of arts or bachelor of civil law, and a member of some college or hall in the university of Oxford; the scholars of this foundation or such as have been scholars (if qualified and approved of by convocation) to have the preference: that, if not a barrister when chosen, he be called to the bar within one year after his election; but do reside in the university two months in every year, or in case of non-residence do forfeit the stipend of that year to Mr Viner's general fund.

7. THAT every scholar be elected by convocation, and at the time of election be unmarried, and a member of some college or hall in the university of Oxford, who shall have been matriculated twenty four calendar months at the least: that he do take the degree of bachelor of civil law with all convenient speed; (either proceeding in arts or otherwise) and previous to his taking the same, between the second and eighth year from his matriculation, be bound to attend two courses of the professor's lectures, to be certified under the professor's hand; and within one year after taking the same be called to the bar: that he do annually reside six months till he is of four years standing, and four months from that time till he is master of arts or bachelor of civil law; after which he be bound to reside two months in every year; or, in case of non-residence, do forfeit the stipend of that year to Mr Viner's general fund.

8. THAT the scholarships do become void in case of non-attendance on the professor, or not taking the degree of bachelor of civil law, being duly admonished so to do by the vice-chancellor and proctors: and that both fellowships and scholarships do expire at the end of ten years after each respective election; and become void in case of gross misbehaviour, non-residence for two years together, marriage, not being called to the bar within the time before limited, (being duly admonished so to be by the vice-chancellor and proctors) or deserting the profession of the law by following any other profession: and that in any of these cases the vice-chancellor, with consent of convocation, do declare the place actually void.

9. THAT in case of any vacancy of the professorship, fellowships, or scholarships, the profits of the current year be ratably divided between the predecessor or his representatives, and the successor; and that a new election be had within one month afterwards, unless by that means the time of election shall fall within any vacation, in which case it be deferred to the first week in the next full term. And that before any convocation shall be held for such election, or for any other matter relating to Mr Viner's benefaction, ten days public notice be given to each college and hall of the convocation, and the cause of convoking it.

THE advantages that might result to the science of the law itself, when a little more attended to in these seats of knowlege, perhaps would be very

considerable. The leisure and abilities of the learned in these retirements might either suggest expedients, or execute those dictated by wiser heads[k], for improving it's method, retrenching it's superfluities, and reconciling the little contrarieties, which the practice of many centuries will necessarily create in any human system: a task, which those who are deeply employed in business, and the more active scenes of the profession, can hardly condescend to engage in. And as to the interest, or (which is the same) the reputation of the universities themselves, I may venture to pronounce, that if ever this study should arrive to any tolerable perfection either here or at Cambridge, the nobility and gentry of this kingdom would not shorten their residence upon this account, nor perhaps entertain a worse opinion of the benefits of academical education. Neither should it be considered as a matter of light importance, that while we thus extend the *pomoeria* of university learning, and adopt a new tribe of citizens within these philosophical walls, we interest a very numerous and very powerful profession in the preservation of our rights and revenues.

[k] See lord Bacon's proposals and offer of a digest.

FOR I think it is past dispute that those gentlemen, who resort to the inns of court with a view to pursue the profession, will find it expedient (whenever it is practicable) to lay the previous foundations of this, as well as every other science, in one of our learned universities. We may appeal to the experience of every sensible lawyer, whether any thing can be more hazardous or discouraging than the usual entrance on the study of the law. A raw and unexperienced youth, in the most dangerous season of life, is transpanted on a sudden into the midst of allurements to pleasure, without any restraint or check but what his own prudence can suggest; with no public direction in what course to pursue his enquiries; no private assistance to remove the distresses and difficulties, which will always embarass a beginner. In this situation he is expected to sequester himself from the world, and by a tedious lonely process to extract the theory of law from a mass of undigested learning; or else by an assiduous attendance on the courts to pick up theory and practice together, sufficient to qualify him for the ordinary run of business. How little therefore is it to be wondered at, that we hear of so frequent miscarriages; that so many gentlemen of bright imaginations grow weary of so unpromising a search[l], and addict themselves wholly to amusements, or other less innocent pursuits; and that so many persons of moderate capacity confuse themselves at first setting out, and continue ever dark and puzzled during the remainder of their lives!

[l] Sir Henry Spelman, in the preface to his glossary, gives us a very lively picture of his own distress upon this occasion. *"Emisit me mater Londinum, juris nostri capessendi gratia; cujus cum vestibulum salutassem, reperissemque linguam peregrinam, dialectum barbaram, methodum inconcinnam, molem non ingentem solum sed perpetuis humeris sustinendam, excidit mihi (fateor) animus, &c."*

THE evident want of some assistance in the rudiments of legal knowlege, has given birth to a practice, which, if ever it had grown to be general, must have proved of extremely pernicious consequence: I mean the custom, by some so very warmly recommended, to drop all liberal education, as of no use to lawyers; and to place them, in it's stead, as the desk of some skilful

attorney; in order to initiate them early in all the depths of practice, and render them more dextrous in the mechanical part of business. A few instances of particular persons, (men of excellent learning, and unblemished integrity) who, in spight of this method of education, have shone in the foremost ranks of the bar, have afforded some kind of sanction to this illiberal path to the profession, and biassed many parents, of shortsighted judgment, in it's favour: not considering, that there are some geniuses, formed to overcome all disadvantages, and that from such particular instances no general rules can be formed; nor observing, that those very persons have frequently recommended by the most forcible of all examples, the disposal of their own offspring, a very different foundation of legal studies, a regular academical education. Perhaps too, in return, I could now direct their eyes to our principal seats of justice, and suggest a few hints, in favour of university learning[m]:—but in these all who hear me, I know, have already prevented me.

[m] The four highest offices in the law were at that time filled by gentlemen, two of whom had been fellows of All Souls college; another, student of Christ-Church; and the fourth a fellow of Trinity college, Cambridge.

MAKING therefore due allowance for one or two shining exceptions, experience may teach us to foretell that a lawyer thus educated to the bar, in subservience to attorneys and solicitors[n], will find he has begun at the wrong end. If practice be the whole he is taught, practice must also be the whole he will ever know: if he be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him: *ita lex scripta est*[o] is the utmost his knowlege will arrive at; he must never aspire to form, and seldom expect to comprehend, any arguments drawn *a priori*, from the spirit of the laws and the natural foundations of justice.

[n] See Kennet's life of Somner. p. 67.

[o] *Ff.* 40. 9. 12.

NOR is this all; for (as few persons of birth, or fortune, or even of scholastic education, will submit to the drudgery of servitude and the manual labour of

copying the trash of an office) should this infatuation prevail to any considerable degree, we must rarely expect to see a gentleman of distinction or learning at the bar. And what the consequence may be, to have the interpretation and enforcement of the laws (which include the entire disposal of our properties, liberties, and lives) fall wholly into the hands of obscure or illiterate men, is matter of very public concern.

THE inconveniences here pointed out can never be effectually prevented, but by making academical education a previous step to the profession of the common law, and at the same time making the rudiments of the law a part of academical education. For sciences are of a sociable disposition, and flourish best in the neighbourhood of each other: nor is there any branch of learning, but may be helped and improved by assistances drawn from other arts. If therefore the student in our laws hath formed both his sentiments and style, by perusal and imitation of the purest classical writers, among whom the historians and orators will best deserve his regard; if he can reason with precision, and separate argument from fallacy, by the clear simple rules of pure unsophisticated logic; if he can fix his attention, and steadily pursue truth through any the most intricate deduction, by the use of mathematical demonstrations; if he has enlarged his conceptions of nature and art, by a view of the several branches of genuine, experimental, philosophy; if he has impressed on his mind the sound maxims of the law of nature, the best and most authentic foundation of human laws; if, lastly, he has contemplated those maxims reduced to a practical system in the laws of imperial Rome; if he has done this or any part of it, (though all may be easily done under as able instructors as ever graced any seats of learning) a student thus qualified may enter upon the study of the law with incredible advantage and reputation. And if, at the conclusion, or during the acquisition of these accomplishments, he will afford himself here a year or two's farther leisure, to lay the foundation of his future labours in a solid scientifical method, without thirsting too early to attend that practice which it is impossible he should rightly comprehend, he will afterwards proceed with the greatest ease, and will unfold the most intricate points with an intuitive rapidity and clearness.

I SHALL not insist upon such motives as might be drawn from principles of oeconomy, and are applicable to particulars only: I reason upon more general topics. And therefore to the qualities of the head, which I have just enumerated, I cannot but add those of the heart; affectionate loyalty to the king, a zeal for liberty and the constitution, a sense of real honour, and well grounded principles of religion; as necessary to form a truly valuable English lawyer, a Hyde, a Hale, or a Talbot. And, whatever the ignorance of some, or unkindness of others, may have heretofore untruly suggested, experience will warrant us to affirm, that these endowments of loyalty and public spirit, of honour and religion, are no where to be found in more high perfection than in the two universities of this kingdom.

BEFORE I conclude, it may perhaps be expected, that I lay before you a short and general account of the method I propose to follow, in endeavouring to execute the trust you have been pleased to repose in my hands. And in these solemn lectures, which are ordained to be read at the entrance of every term, (more perhaps to do public honour to this laudable institution, than for the private instruction of individuals[p]) I presume it will best answer the intent of our benefactor and the expectation of this learned body, if I attempt to illustrate at times such detached titles of the law, as are the most easy to be understood, and most capable of historical or critical ornament. But in reading the complete course, which is annually consigned to my care, a more regular method will be necessary; and, till a better is proposed, I shall take the liberty to follow the same that I have already submitted to the public[q]. To fill up and finish that outline with propriety and correctness, and to render the whole intelligible to the uninformed minds of beginners, (whom we are too apt to suppose acquainted with terms and ideas, which they never had opportunity to learn) this must be my ardent endeavour, though by no means my promise to accomplish. You will permit me however very briefly to describe, rather what I conceive an academical expounder of the laws should do, than what I have ever known to be done.

[p] See Lowth's *Oratio Crewiana*, p. 365.

[q] The Analysis of the laws of England, first published, *A.D.* 1756, and exhibiting the order and principal divisions of the ensuing

COMMENTARIES; which were originally submitted to the university in a private course of lectures, *A.D.* 1753.

HE should consider his course as a general map of the law, marking out the shape of the country, it's connexions and boundaries, it's greater divisions and principal cities: it is not his business to describe minutely the subordinate limits, or to fix the longitude and latitude of every inconsiderable hamlet. His attention should be engaged, like that of the readers in Fortescue's inns of chancery, "in tracing out the originals and as it were the elements of the law." For if, as Justinian[r] has observed, the tender understanding of the student be loaded at the first with a multitude and variety of matter, it will either occasion him to desert his studies, or will carry him heavily through them, with much labour, delay, and despondence. These originals should be traced to their fountains, as well as our distance will permit; to the customs of the Britons and Germans, as recorded by Caesar and Tacitus; to the codes of the northern nations on the continent, and more especially to those of our own Saxon princes; to the rules of the Roman law, either left here in the days of Papinian, or imported by Vacarius and his followers; but, above all, to that inexhaustible reservoir of legal antiquities and learning, the feodal law, or, as Spelman[s] has entitled it, the law of nations in our western orb. These primary rules and fundamental principles should be weighed and compared with the precepts of the law of nature, and the practice of other countries; should be explained by reasons, illustrated by examples, and confirmed by undoubted authorities; their history should be deduced, their changes and revolutions observed, and it should be shewn how far they are connected with, or have at any time been affected by, the civil transactions of the kingdom.

[r] *Incipientibus nobis exponere jura populi Romani, ita videntur tradi posse commodissime, si primo levi ac simplici via singula tradantur: Alioqui, si statim ab initio rudem adhuc & infirmum animum studiosi multitudine ac varietate rerum oneravimus, duorum alterum, aut desertorem studiorum efficiemus, aut cum magno labore, saepe etiam cum diffidentia (quae plerumque juvenes avertit) serius ad id perducemus, ad quod leviore via ductus, sine magno labore & sine ulla diffidentia maturius perduci potuisset. Inst.* 1. 1. 2.

[s] Of Parliaments. 57.

A PLAN of this nature, if executed with care and ability, cannot fail of administring a most useful and rational entertainment to students of all ranks and professions; and yet it must be confessed that the study of the laws is not merely a matter of amusement: for as a very judicious writer[t] has observed upon a similar occasion, the learner "will be considerably disappointed if he looks for entertainment without the expence of attention." An attention, however, not greater than is usually bestowed in mastering the rudiments of other sciences, or sometimes in pursuing a favorite recreation or exercise. And this attention is not equally necessary to be exerted by every student upon every occasion. Some branches of the law, as the formal process of civil suits, and the subtile distinctions incident to landed property, which are the most difficult to be thoroughly understood, are the least worth the pains of understanding, except to such gentlemen as intend to pursue the profession. To others I may venture to apply, with a slight alteration, the words of sir John Fortescue[u], when first his royal pupil determines to engage in this study. "It will not be necessary for a gentleman, as such, to examine with a close application the critical niceties of the law. It will fully be sufficient, and he may well enough be denominated a lawyer, if under the instruction of a master he traces up the principles and grounds of the law, even to their original elements. Therefore in a very short period, and with very little labour, he may be sufficiently informed in the laws of his country, if he will but apply his mind in good earnest to receive and apprehend them. For, though such knowlege as is necessary for a judge is hardly to be acquired by the lucubrations of twenty years, yet with a genius of tolerable perspicacity, that knowlege which is fit for a person of birth or condition may be learned in a single year, without neglecting his other improvements."

[t] Dr Taylor's preface to Elem. of civil law.

[u] *Tibi, princeps, necesse non erit mysteria legis Angliae longo disciplinatu rimare. Sufficiet tibi,*—et fatis *denominari legista mereberis, si legum principia & causas, usque ad elementa, discipuli more indagaveris.—Quare tu, princeps serenissime, parvo tempore, parva industria, sufficienter eris in legibus regni Angliae eruditus, dummodo ad ejus apprehensionem tu conferas animum*

tuum.—Nosco namque ingenii tui perspicacitatem, quo audacter pronuntio quod in legibus illis (licet earum peritia, qualis judicibus necessaria est, vix viginti annorum lucubrationibus acquiratur) tu doctrinam principi congruam in anno uno sufficienter nancisceris; nec interim militarem disciplinam, ad quam tam ardenter anhelas, negliges; sed ea, recreationis loco, etiam anno illo tu ad libitum perfrueris. c. 8.

To the few therefore (the very few, I am persuaded,) that entertain such unworthy notions of an university, as to suppose it intended for mere dissipation of thought; to such as mean only to while away the aukward interval from childhood to twenty one, between the restraints of the school and the licentiousness of politer life, in a calm middle state of mental and of moral inactivity; to these Mr Viner gives no invitation to an entertainment which they never can relish. But to the long and illustrious train of noble and ingenuous youth, who are not more distinguished among us by their birth and possessions, than by the regularity of their conduct and their thirst after useful knowlege, to these our benefactor has consecrated the fruits of a long and laborious life, worn out in the duties of his calling; and will joyfully reflect (if such reflexions can be now the employment of his thoughts) that he could not more effectually have benefited posterity, or contributed to the service of the public, than by founding an institution which may instruct the rising generation in the wisdom of our civil polity, and inform them with a desire to be still better acquainted with the laws and constitution of their country.

SECTION THE THIRD.
OF THE LAWS OF ENGLAND.

THE municipal law of England, or the rule of civil conduct prescribed to the inhabitants of this kingdom, may with sufficient propriety be divided into two kinds; the *lex non scripta*, the unwritten, or common law; and the *lex scripta*, the written, or statute law.

THE *lex non scripta*, or unwritten law, includes not only *general customs*, or the common law properly so called; but also the *particular customs* of certain parts of the kingdom; and likewise those *particular laws*, that are by custom observed only in certain courts and jurisdictions.

WHEN I call these parts of our law *leges non scriptae*, I would not be understood as if all those laws were at present merely *oral*, or communicated from the former ages to the present solely by word of mouth. It is true indeed that, in the profound ignorance of letters which formerly overspread the whole western world, all laws were intirely traditional, for this plain reason, that the nations among which they prevailed had but little idea of writing. Thus the British as well as the Gallic druids committed all their laws as well as learning to memory[a]; and it is said of the primitive Saxons here, as well as their brethren on the continent, that *leges sola memoria et usu retinebant*[b]. But with us at present the monuments and evidences of our legal customs are contained in the records of the several courts of justice, in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity. However I therefore stile these parts of our law *leges non scriptae*, because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the

kingdom. In like manner as Aulus Gellius defines the *jus non scriptum* to be that, which is "*tacito et illiterato hominum consensu et moribus expressum*."

[a] *Caes. de b. G. lib.* 6. *c.* 13.

[b] Spelm. Gl. 362.

OUR antient lawyers, and particularly Fortescue[c], insist with abundance of warmth, that these customs are as old as the primitive Britons, and continued down, through the several mutations of government and inhabitants, to the present time, unchanged and unadulterated. This may be the case as to some; but in general, as Mr Selden in his notes observes, this assertion must be understood with many grains of allowance; and ought only to signify, as the truth seems to be, that there never was any formal exchange of one system of laws for another: though doubtless by the intermixture of adventitious nations, the Romans, the Picts, the Saxons, the Danes, and the Normans, they must have insensibly introduced and incorporated many of their own customs with those that were before established: thereby in all probability improving the texture and wisdom of the whole, by the accumulated wisdom of divers particular countries. Our laws, saith lord Bacon[d], are mixed as our language: and as our language is so much the richer, the laws are the more complete.

[c] *c.* 17.

[d] See his proposals for a digest.

AND indeed our antiquarians and first historians do all positively assure us, that our body of laws is of this compounded nature. For they tell us, that in the time of Alfred the local customs of the several provinces of the kingdom were grown so various, that he found it expedient to compile his *dome-book* or *liber judicialis*, for the general use of the whole kingdom. This book is said to have been extant so late as the reign of king Edward the fourth, but is now unfortunately lost. It contained, we may probably suppose, the principal maxims of the common law, the penalties for misdemesnors, and the forms of judicial proceedings. Thus much may at least be collected from that injunction to observe it, which we find in the laws of king Edward the elder,

the son of Alfred[e]. "*Omnibus qui reipublicae praesunt, etiam atque etiam mando, ut omnibus aequos se praebeant judices, perinde ac in judiciali libro* (*Saxonice*, ðom-bec) *scriptum habetur; nec quicquam formident quin jus commune* (*Saxonice*, folcrihte) *audacter libereque dicant.*"

[e] *c.* 1.

BUT the irruption and establishment of the Danes in England which followed soon after, introduced new customs and caused this code of Alfred in many provinces to fall into disuse; or at least to be mixed and debased with other laws of a coarser alloy. So that about the beginning of the eleventh century there were three principal systems of laws prevailing in different districts. 1. The *Mercen-Lage*, or Mercian laws, which were observed in many of the midland counties, and those bordering on the principality of Wales; the retreat of the antient Britons; and therefore very probably intermixed with the British or Druidical customs. 2. The *West-Saxon-Lage*, or laws of the west Saxons, which obtained in the counties to the south and west of the island, from Kent to Devonshire. These were probably much the same with the laws of Alfred abovementioned, being the municipal law of the far most considerable part of his dominions, and particularly including Berkshire, the seat of his peculiar residence. 3. The *Dane-Lage*, or Danish law, the very name of which speaks it's original and composition. This was principally maintained in the rest of the midland counties, and also on the eastern coast, the seat of that piratical people. As for the very northern provinces, they were at that time under a distinct government[f].

[f] Hal. Hist. 55.

OUT of these three laws, Roger Hoveden[g] and Ranulphus Cestrensis[h] inform us, king Edward the confessor extracted one uniform law or digest of laws, to be observed throughout the whole kingdom; though Hoveden and the author of an old manuscript chronicle[i] assure us likewise, that this work was projected and begun by his grandfather king Edgar. And indeed a general digest of the same nature has been constantly found expedient, and therefore put in practice by other great nations, formed from an assemblage of little provinces, governed by peculiar customs. As in Portugal, under king Edward, about the beginning of the fifteenth century[k]. In Spain under Alonzo X,

who about the year 1250 executed the plan of his father St. Ferdinand, and collected all the provincial customs into one uniform law, in the celebrated code entitled *las partidas*[l]. And in Sweden about the same aera, a universal body of common law was compiled out of the particular customs established by the laghman of every province, and intitled the *land's lagh*, being analogous to the *common law* of England[m].

[g] *in Hen. II.*

[h] *in Edw. Confessor.*

[i] *in Seld. ad Eadmer.* 6.

[k] Mod. Un. Hist. xxii. 135.

[l] Ibid. xx. 211.

[m] Ibid. xxxiii. 21, 58.

BOTH these undertakings, of king Edgar and Edward the confessor, seem to have been no more than a new edition, or fresh promulgation, of Alfred's code or dome-book, with such additions and improvements as the experience of a century and an half had suggested. For Alfred is generally stiled by the same historians the *legum Anglicanarum conditor*, as Edward the confessor is the *restitutor*. These however are the laws which our histories so often mention under the name of the laws of Edward the confessor; which our ancestors struggled so hardly to maintain, under the first princes of the Norman line; and which subsequent princes so frequently promised to keep and to restore, as the most popular act they could do, when pressed by foreign emergencies or domestic discontents. These are the laws, that so vigorously withstood the repeated attacks of the civil law; which established in the twelfth century a new Roman empire over most of the states on the continent: states that have lost, and perhaps upon that account, their political liberties; while the free constitution of England, perhaps upon the same account, has been rather improved than debased. These, in short, are the laws which gave rise and original to that collection of maxims and customs, which is now known by the name of the common law. A name either given to it, in contradistinction to other laws, as the statute law, the civil law, the law

merchant, and the like; or, more probably, as a law *common* to all the realm, the *jus commune* or *folcright* mentioned by king Edward the elder, after the abolition of the several provincial customs and particular laws beforementioned.

BUT though this is the most likely foundation of this collection of maxims and customs, yet the maxims and customs, so collected, are of higher antiquity than memory or history can reach: nothing being more difficult than to ascertain the precise beginning and first spring of an antient and long established custom. Whence it is that in our law the goodness of a custom depends upon it's having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it it's weight and authority; and of this nature are the maxims and customs which compose the common law, or *lex non scripta*, of this kingdom.

THIS unwritten, or common, law is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole kingdom, and form the common law, in it's stricter and more usual signification. 2. Particular customs; which for the most part affect only the inhabitants of particular districts. 3. Certain particular laws; which by custom are adopted and used by some particular courts, of pretty general and extensive jurisdiction.

I. AS to general customs, or the common law, properly so called; this is that law, by which proceedings and determinations in the king's ordinary courts of justice are guided and directed. This, for the most part, settles the course in which lands descend by inheritance; the manner and form of acquiring and transferring property; the solemnities and obligation of contracts; the rules of expounding wills, deeds, and acts of parliament; the respective remedies of civil injuries; the several species of temporal offences, with the manner and degree of punishment; and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires. Thus, for example, that there shall be four superior courts of record, the chancery, the king's bench, the common pleas, and the exchequer; —that the eldest son alone is heir to his ancestor;—that property may be

acquired and transferred by writing;—that a deed is of no validity unless sealed;—that wills shall be construed more favorably, and deeds more strictly;—that money lent upon bond is recoverable by action of debt;—that breaking the public peace is an offence, and punishable by fine and imprisonment;—all these are doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is, upon common law, for their support.

SOME have divided the common law into two principal grounds or foundations: 1. established customs; such as that where there are three brothers, the eldest brother shall be heir to the second, in exclusion of the youngest: and 2. established rules and maxims; as, "that the king can do no wrong, that no man shall be bound to accuse himself," and the like. But I take these to be one and the same thing. For the authority of these maxims rests entirely upon general reception and usage; and the only method of proving, that this or that maxim is a rule of the common law, is by shewing that it hath been always the custom to observe it.

BUT here a very natural, and very material, question arises: how are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositary of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. Their knowlege of that law is derived from experience and study; from the "*viginti annorum lucubrationes*," which Fortescue[n] mentions; and from being long personally accustomed to the judicial decisions of their predecessors. And indeed these judicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law. The judgment itself, and all the proceedings previous thereto, are carefully registered and preserved, under the name of *records*, in publick repositories set apart for that particular purpose; and to them frequent recourse is had, when any critical question arises, in the determination of which former precedents may give light or assistance. And therefore, even so early as the conquest, we find the "*praeteritorum memoria eventorum*" reckoned up as one of the chief qualifications of those who were held to be "*legibus patriae optime instituti*[o]." For it is an established rule to

abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined. And hence it is that our lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us, that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law. Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded[p]. And it hath been an antient observation in the laws of England, that whenever a standing rule of law, of which the reason perhaps could not be remembered or discerned, hath been wantonly broke in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation.

[n] *cap.* 8.

[o] Seld. review of Tith. c. 8.

[p] Herein agreeing with the civil law, *Ff.* 1. 3. 20, 21. *"Non omnium, quae a majoribus nostris constituta sunt, ratio reddi potest. Et ideo rationes eorum quae constituuntur, inquiri non oportet: alioquin multa ex his, quae certa sunt, subvertuntur."*

THE doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without consideration. To illustrate this doctrine by examples. It has been determined, time out of mind, that a brother of the half blood (i.e. where they have only one parent the same, and the other different) shall never succeed as heir to the estate of his half brother, but it shall rather escheat to the king, or other superior lord. Now this is a positive law, fixed and established by custom, which custom is evidenced by judicial decisions; and therefore can never be departed from by any modern judge without a breach of his oath and the law. For herein there is nothing repugnant to natural justice; though the reason of it, drawn from the feodal law, may not be quite obvious to every body. And therefore, on account of a supposed hardship upon the half brother, a modern judge might wish it had been otherwise settled; yet it is not in his power to alter it. But if any court were now to determine, that an elder brother of the half blood might enter upon and seise any lands that were purchased by his younger brother, no subsequent judges would scruple to declare that such prior determination was unjust, was unreasonable, and therefore was *not law*. So that *the law*, and the *opinion of the judge* are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law. Upon the whole however, we may take it as a general rule, "that the decisions of courts of justice are the evidence of what is common law:" in the same manner as, in the civil law, what the emperor had once determined was to serve for a guide for the future[q].

[q] *"Si imperialis majestas causam cognitionaliter examinaverit, et partibus cominus constitutis sententiam dixerit, omnes omnino judices, qui sub nostro imperio sunt, sciant hanc esse legem, non solum illi causae pro qua producta est, sed et in omnibus similibus." C.* 1. 14. 12.

THE decisions therefore of courts are held in the highest regard, and are not only preserved as authentic records in the treasuries of the several courts, but are handed out to public view in the numerous volumes of *reports* which furnish the lawyer's library. These reports are histories of the several cases, with a short summary of the proceedings, which are preserved at large in the record; the arguments on both sides; and the reasons the court gave for their judgment; taken down in short notes by persons present at the determination. And these serve as indexes to, and also to explain, the records; which always, in matters of consequence and nicety, the judges direct to be searched. The reports are extant in a regular series from the reign of king Edward the second inclusive; and from his time to that of Henry the eighth were taken by the prothonotaries, or chief scribes of the court, at the expence of the crown, and published *annually*, whence they are known under the denomination of the *year books*. And it is much to be wished that this beneficial custom had, under proper regulations, been continued to this day: for, though king James the first at the instance of lord Bacon appointed two reporters with a handsome stipend for this purpose, yet that wise institution was soon neglected, and from the reign of Henry the eighth to the present time this task has been executed by many private and cotemporary hands; who sometimes through haste and inaccuracy, sometimes through mistake and want of skill, have published very crude and imperfect (perhaps contradictory) accounts of one and the same determination. Some of the most valuable of the antient reports are those published by lord chief justice Coke; a man of infinite learning in his profession, though not a little infected with the pedantry and quaintness of the times he lived in, which appear strongly in all his works. However his writings are so highly esteemed, that they are generally cited without the author's name[r].

[r] His reports, for instance, are stiled, κατ' εξοχην, *the reports*; and in quoting them we usually say, 1 or 2 Rep. not 1 or 2 Coke's Rep. as in citing other authors. The reports of judge Croke are also cited in a peculiar manner, by

the name of those princes, in whose reigns the cases reported in his three volumes were determined; viz. Qu. Elizabeth, K. James, and K. Charles the first; as well as by the number of each volume. For sometimes we call them, 1, 2, and 3 Cro. but more commonly Cro. Eliz. Cro. Jac. and Cro. Car.

BESIDES these reporters, there are also other authors, to whom great veneration and respect is paid by the students of the common law. Such are Glanvil and Bracton, Britton and Fleta, Littleton and Fitzherbert, with some others of antient date, whose treatises are cited as authority; and are evidence that cases have formerly happened in which such and such points were determined, which are now become settled and first principles. One of the last of these methodical writers in point of time, whose works are of any intrinsic authority in the courts of justice, and do not entirely depend on the strength of their quotations from older authors, is the same learned judge we have just mentioned, sir Edward Coke; who hath written four volumes of institutes, as he is pleased to call them, though they have little of the institutional method to warrant such a title. The first volume is a very extensive comment upon a little excellent treatise of tenures, compiled by judge Littleton in the reign of Edward the fourth. This comment is a rich mine of valuable common law learning, collected and heaped together from the antient reports and year books, but greatly defective in method[s]. The second volume is a comment upon many old acts of parliament, without any systematical order; the third a more methodical treatise of the pleas of the crown; and the fourth an account of the several species of courts[t].

[s] It is usually cited either by the name of Co. Litt. or as 1 Inst.

[t] These are cited as 2, 3, or 4 Inst. without any author's name. An honorary distinction, which, we observed, was paid to the works of no other writer; the generality of reports and other tracts being quoted in the name of the compiler, as 2 Ventris, 4 Leonard, 1 Siderfin, and the like.

AND thus much for the first ground and chief corner stone of the laws of England, which is, general immemorial custom, or common law, from time to time declared in the decisions of the courts of justice; which decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law.

THE Roman law, as practised in the times of it's liberty, paid also a great regard to custom; but not so much as our law: it only then adopting it, when the written law is deficient. Though the reasons alleged in the digest[u] will fully justify our practice, in making it of equal authority with, when it is not contradicted by, the written law. "For since, says Julianus, the written law binds us for no other reason but because it is approved by the judgment of the people, therefore those laws which the people hath approved without writing ought also to bind every body. For where is the difference, whether the people declare their assent to a law by suffrage, or by a uniform course of acting accordingly?" Thus did they reason while Rome had some remains of her freedom; but when the imperial tyranny came to be fully established, the civil laws speak a very different language. "*Quod principi placuit legis habet vigorem, cum populus ei et in eum omne suum imperium et potestatem conferat*," says Ulpian[w]. "*Imperator solus et conditor et interpres legis existimatur*," says the code[x]. And again, "*sacrilegii instar est rescripto principis obviare*[y]." And indeed it is one of the characteristic marks of English liberty, that our common law depends upon custom; which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people.

[u] *Ff.* 1. 3. 32.

[w] *Ff.* 1. 4. 1.

[x] *C.* 1. 14. 12.

[y] *C.* 1. 23. 5.

II. THE second branch of the unwritten laws of England are particular customs, or laws which affect only the inhabitants of particular districts.

THESE particular customs, or some of them, are without doubt the remains of that multitude of local customs before mentioned, out of which the common law, as it now stands, was collected at first by king Alfred, and afterwards by king Edgar and Edward the confessor: each district mutually sacrificing some of it's own special usages, in order that the whole kingdom might enjoy the benefit of one uniform and universal system of laws. But, for

reasons that have been now long forgotten, particular counties, cities, towns, manors, and lordships, were very early indulged with the privilege of abiding by their own customs, in contradistinction to the rest of the nation at large: which privilege is confirmed to them by several acts of parliament[z].

[z] Mag. Cart. c. 9.—1 Edw. III. st. 2. c. 9.—14 Edw. III. st. 1. c. 1.—and 2 Hen. IV. c. 1.

SUCH is the custom of gavelkind in Kent and some other parts of the kingdom (though perhaps it was also general till the Norman conquest) which ordains, among other things, that not the eldest son only of the father shall succeed to his inheritance, but all the sons alike: and that, though the ancestor be attainted and hanged, yet the heir shall succeed to his estate, without any escheat to the lord.—Such is the custom that prevails in divers antient boroughs, and therefore called borough-english, that the youngest son shall inherit the estate, in preference to all his elder brothers.—Such is the custom in other boroughs that a widow shall be intitled, for her dower, to all her husband's lands; whereas at the common law she shall be endowed of one third part only.—Such also are the special and particular customs of manors, of which every one has more or less, and which bind all the copyhold-tenants that hold of the said manors.—Such likewise is the custom of holding divers inferior courts, with power of trying causes, in cities and trading towns; the right of holding which, when no royal grant can be shewn, depends entirely upon immemorial and established usage.—Such, lastly, are many particular customs within the city of London, with regard to trade, apprentices, widows, orphans, and a variety of other matters; which are all contrary to the general law of the land, and are good only by special custom, though those of London are also confirmed by act of parliament[a].

[a] 8 Rep. 126. Cro. Car. 347.

TO this head may most properly be referred a particular system of customs used only among one set of the king's subjects, called the custom of merchants or *lex mercatoria*; which, however different from the common law, is allowed for the benefit of trade, to be of the utmost validity in all commercial transactions; the maxim of law being, that "*cuilibet in sua arte credendum est*."

THE rules relating to particular customs regard either the proof of their existence; their legality when proved; or their usual method of allowance. And first we will consider the rules of proof.

AS to gavelkind, and borough-english, the law takes particular notice of them[b], and there is no occasion to prove that such customs actually exist, but only that the lands in question are subject thereto. All other private customs must be particularly pleaded[c], and as well the existence of such customs must be shewn, as that the thing in dispute is within the custom alleged. The trial in both cases (both to shew the existence of the custom, as, "that in the manor of Dale lands shall descend only to the heirs male, and never to the heirs female;" and also to shew that the lands in question are within that manor) is by a jury of twelve men, and not by the judges, except the same particular custom has been before tried, determined, and recorded in the same court[d].

[b] Co. Litt. 175 *b.*

[c] Litt. §. 265.

[d] Dr and St. 1. 10.

THE customs of London differ from all others in point of trial: for, if the existence of the custom be brought in question, it shall not be tried by a jury, but by certificate from the lord mayor and aldermen by the mouth of their recorder[e]; unless it be such a custom as the corporation is itself interested in, as a right of taking toll, &c., for then the law permits them not to certify on their own behalf[f].

[e] Cro. Car. 516.

[f] Hob. 85.

WHEN a custom is actually proved to exist, the next enquiry is into the legality of it; for if it is not a good custom it ought to be no longer used. "*Malus usus abolendus est*" is an established maxim of the law[g]. To make a particular custom good, the following are necessary requisites.

[g] Litt. §. 212. 4 Inst. 274.

1. THAT it have been used so long, that the memory of man runneth not to the contrary. So that if any one can shew the beginning of it, it is no good custom. For which reason no custom can prevail against an express act of parliament; since the statute itself is a proof of a time when such a custom did not exist[h].

[h] Co. Litt. 113 *b.*

2. IT must have been *continued*. Any interruption would cause a temporary ceasing: the revival gives it a new beginning, which will be within time of memory, and thereupon the custom will be void. But this must be understood with regard to an interruption of the *right*; for an interruption of the *possession* only, for ten or twenty years, will not destroy the custom[i]. As if I have a right of way by custom over another's field, the custom is not destroyed, though I do not pass over it for ten years; it only becomes more difficult to prove: but if the *right* be any how discontinued for a day, the custom is quite at an end.

[i] Co. Litt. 114 *b.*

3. IT must have been *peaceable*, and acquiesced in; not subject to contention and dispute[k]. For as customs owe their original to common consent, their being immemorially disputed either at law or otherwise is a proof that such consent was wanting.

[k] Co. Litt. 114.

4. CUSTOMS must be *reasonable*[l]; or rather, taken negatively, they must not be unreasonable. Which is not always, as sir Edward Coke says[m], to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law. Upon which account a custom may be good, though the particular reason of it cannot be assigned; for it sufficeth, if no good legal reason can be assigned against it. Thus a custom in a parish, that no man shall put his beasts into the common till the third of october, would be good; and yet it would be hard to shew the reason why that day in particular is fixed upon, rather than the day before or after. But a custom that no cattle shall be put in till the lord of the manor has first put in his, is

unreasonable, and therefore bad: for peradventure the lord will never put in his; and then the tenants will lose all their profits[n].

[l] Litt. §. 212.

[m] 1 Inst. 62.

[n] Co. Copyh. §. 33.

5. Customs ought to be *certain*. A custom, that lands shall descend to the most worthy of the owner's blood, is void; for how shall this worth be determined? But a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good[o]. A custom, to pay two pence an acre in lieu of tythes, is good; but to pay sometimes two pence and sometimes three pence, as the occupier of the land pleases, is bad for it's uncertainty. Yet a custom, to pay a year's improved value for a fine on a copyhold estate, is good: though the value is a thing uncertain. For the value may at any time be ascertained; and the maxim of law is, *id certum est, quod certum reddi potest*.

[o] 1 Roll. Abr. 565.

6. Customs, though established by consent, must be (when established) *compulsory*; and not left to the option of every man, whether he will use them or no. Therefore a custom, that all the inhabitants shall be rated toward the maintenance of a bridge, will be good; but a custom, that every man is to contribute thereto at his own pleasure, is idle and absurd, and, indeed, no custom at all.

7. Lastly, customs must be *consistent* with each other: one custom cannot be set up in opposition to another. For if both are really customs, then both are of equal antiquity, and both established by mutual consent: which to say of contradictory customs is absurd. Therefore, if one man prescribes that by custom he has a right to have windows looking into another's garden; the other cannot claim a right by custom to stop up or obstruct those windows: for these two contradictory customs cannot both be good, nor both stand together. He ought rather to deny the existence of the former custom[p].

[p] 9 Rep. 58.

NEXT, as to the allowance of special customs. Customs, in derogation of the common law, must be construed strictly. Thus, by the custom of gavelkind, an infant of fifteen years may by one species of conveyance (called a deed of feoffment) convey away his lands in fee simple, or for ever. Yet this custom does not impower him to use any other conveyance, or even to lease them for seven years: for the custom must be strictly pursued[q]. And, moreover, all special customs must submit to the king's prerogative. Therefore, if the king purchases lands of the nature of gavelkind, where all the sons inherit equally; yet, upon the king's demise, his eldest son shall succeed to those lands alone[r]. And thus much for the second part of the *leges non scriptae*, or those particular customs which affect particular persons or districts only.

[q] Co. Cop. §. 33.

[r] Co. Litt. 15 *b*.

III. THE third branch of them are those peculiar laws, which by custom are adopted and used only in certain peculiar courts and jurisdictions. And by these I understand the civil and canon laws.

IT may seem a little improper at first view to rank these laws under the head of *leges non scriptae*, or unwritten laws, seeing they are set forth by authority in their pandects, their codes, and their institutions; their councils, decrees, and decretals; and enforced by an immense number of expositions, decisions, and treatises of the learned in both branches of the law. But I do this, after the example of sir Matthew Hale[s], because it is most plain, that it is not on account of their being *written* laws, that either the canon law, or the civil law, have any obligation within this kingdom; neither do their force and efficacy depend upon their own intrinsic authority; which is the case of our written laws, or acts of parliament. They bind not the subjects of England, because their materials were collected from popes or emperors; were digested by Justinian, or declared to be authentic by Gregory. These considerations give them no authority here: for the legislature of England doth not, nor ever did, recognize any foreign power, as superior or equal to it in this kingdom; or as

having the right to give law to any, the meanest, of it's subjects. But all the strength that either the papal or imperial laws have obtained in this realm, or indeed in any other kingdom in Europe, is only because they have been admitted and received by immemorial usage and custom in some particular cases, and some particular courts; and then they form a branch of the *leges non scriptae*, or customary law: or else, because they are in some other cases introduced by consent of parliament, and then they owe their validity to the *leges scriptae*, or statute law. This is expressly declared in those remarkable words of the statute 25 Hen. VIII. c. 21. addressed to the king's royal majesty. —"This your grace's realm, recognizing no superior under God but only your grace, hath been and is free from subjection to any man's laws, but only to such as have been devised, made, and ordained *within* this realm for the wealth of the same; or to such other, as by sufferance of your grace and your progenitors, the people of this your realm, have taken at their free liberty, by their own consent, to be used among them; and have bound themselves by long use and custom to the observance of the same: not as to the observance of the laws of any foreign prince, potentate, or prelate; but as to the *customed* and antient laws of this realm, originally established as laws of the same, by the said sufferance, consents, and custom; and none otherwise."

[s] Hist. C.L. c. 2.

By the civil law, absolutely taken, is generally understood the civil or municipal law of the Roman empire, as comprized in the institutes, the code, and the digest of the emperor Justinian, and the novel constitutions of himself and some of his successors. Of which, as there will frequently be occasion to cite them, by way of illustrating our own laws, it may not be amiss to give a short and general account.

The Roman law (founded first upon the regal constitutions of their antient kings, next upon the twelve tables of the *decemviri*, then upon the laws or statutes enacted by the senate or people, the edicts of the praetor, and the *responsa prudentum* or opinions of learned lawyers, and lastly upon the imperial decrees, or constitutions of successive emperors) had grown to so great a bulk, or as Livy expresses it[t], "*tam immensus aliarum super alias acervatarum legum cumulus*," that they were computed to be many camels'

load by an author who preceded Justinian[u]. This was in part remedied by the collections of three private lawyers, Gregorius, Hermogenes, and Papirius; and then by the emperor Theodosius the younger, by whose orders a code was compiled, *A.D.* 438, being a methodical collection of all the imperial constitutions then in force: which Theodosian code was the only book of civil law received as authentic in the western part of Europe till many centuries after; and to this it is probable that the Franks and Goths might frequently pay some regard, in framing legal constitutions for their newly erected kingdoms. For Justinian commanded only in the eastern remains of the empire; and it was under his auspices, that the present body of civil law was compiled and finished by Tribonian and other lawyers, about the year 533.

[t] *l.* 3. *c.* 34.

[u] Taylor's elements of civil law. 17.

THIS consists of, 1. The institutes, which contain the elements or first principles of the Roman law, in four books. 2. The digests, or pandects, in fifty books, containing the opinions and writings of eminent lawyers, digested in a systematical method. 3. A new code, or collection of imperial constitutions, the lapse of a whole century having rendered the former code, of Theodosius, imperfect. 4. The novels, or new constitutions, posterior in time to the other books, and amounting to a supplement to the code; containing new decrees of successive emperors, as new questions happened to arise. These form the body of Roman law, or *corpus juris civilis*, as published about the time of Justinian: which however fell soon into neglect and oblivion, till about the year 1130, when a copy of the digests was found at Amalfi in Italy; which accident, concurring with the policy of the Romish ecclesiastics[w], suddenly gave new vogue and authority to the civil law, introduced it into several nations, and occasioned that mighty inundation of voluminous comments, with which this system of law, more than any other, is now loaded.

[w] See §. 1. pag. 18.

THE canon law is a body of Roman ecclesiastical law, relative to such matters as that church either has, or pretends to have, the proper jurisdiction over. This is compiled from the opinions of the antient Latin fathers, the decrees of general councils, the decretal epistles and bulles of the holy see. All which lay in the same disorder and confusion as the Roman civil law, till about the year 1151, one Gratian an Italian monk, animated by the discovery of Justinian's pandects at Amalfi, reduced them into some method in three books, which he entitled *concordia discordantium canonum*, but which are generally known by the name of *decretum Gratiani*. These reached as low as the time of pope Alexander III. The subsequent papal decrees, to the pontificate of Gregory IX, were published in much the same method under the auspices of that pope, about the year 1230, in five books entitled *decretalia Gregorii noni*. A sixth book was added by Boniface VIII, about the year 1298, which is called *sextus decretalium*. The Clementine constitutions, or decrees of Clement V, were in like manner authenticated in 1317 by his successor John XXII; who also published twenty constitutions of his own, called the *extravagantes Joannis*: all which in some measure answer to the novels of the civil law. To these have been since added some decrees of later popes in five books, called *extravagantes communes*. And all these together, Gratian's decree, Gregory's decretals, the sixth decretal, the Clementine constitutions, and the extravagants of John and his successors, form the *corpus juris canonici*, or body of the Roman canon law.

BESIDES these pontificial collections, which during the times of popery were received as authentic in this island, as well as in other parts of christendom, there is also a kind of national canon law, composed of *legatine* and *provincial* constitutions, and adapted only to the exigencies of this church and kingdom. The *legatine* constitutions were ecclesiastical laws, enacted in national synods, held under the cardinals Otho and Othobon, legates from pope Gregory IX and pope Adrian IV, in the reign of king Henry III about the years 1220 and 1268. The *provincial* constitutions are principally the decrees of provincial synods, held under divers arch-bishops of Canterbury, from Stephen Langton in the reign of Henry III to Henry Chichele in the reign of Henry V; and adopted also by the province of York[x] in the reign of Henry VI. At the dawn of the reformation, in the reign of king

Henry VIII, it was enacted in parliament[y] that a review should be had of the canon law; and, till such review should be made, all canons, constitutions, ordinances, and synodals provincial, being then already made, and not repugnant to the law of the land or the king's prerogative, should still be used and executed. And, as no such review has yet been perfected, upon this statute now depends the authority of the canon law in England.

[x] Burn's eccl. law, pref. viii.

[y] Statute 25 Hen. VIII. c. 19; revived and confirmed by 1 Eliz. c. 1.

As for the canons enacted by the clergy under James I, in the year 1603, and never confirmed in parliament, it has been solemnly adjudged upon the principles of law and the constitution, that where they are not merely declaratory of the antient canon law, but are introductory of new regulations, they do not bind the laity[z]; whatever regard the clergy may think proper to pay them.

[z] Stra. 1057.

THERE are four species of courts in which the civil and canon laws are permitted under different restrictions to be used. 1. The courts of the archbishops and bishops and their derivative officers, usually called in our law courts christian, *curiae christianitatis*, or the ecclesiastical courts. 2. The military courts. 3. The courts of admiralty. 4. The courts of the two universities. In all, their reception in general, and the different degrees of that reception, are grounded intirely upon custom; corroborated in the latter instance by act of parliament, ratifying those charters which confirm the customary law of the universities. The more minute consideration of these will fall properly under that part of these commentaries which treats of the jurisdiction of courts. It will suffice at present to remark a few particulars relative to them all, which may serve to inculcate more strongly the doctrine laid down concerning them[a].

[a] Hale Hist. c. 2.

1. AND, first, the courts of common law have the superintendency over these courts; to keep them within their jurisdictions, to determine wherein

they exceed them, to restrain and prohibit such excess, and (in case of contumacy) to punish the officer who executes, and in some cases the judge who enforces, the sentence so declared to be illegal.

2. THE common law has reserved to itself the exposition of all such acts of parliament, as concern either the extent of these courts or the matters depending before them. And therefore if these courts either refuse to allow these acts of parliament, or will expound them in any other sense than what the common law puts upon them, the king's courts at Westminster will grant prohibitions to restrain and control them.

3. AN appeal lies from all these courts to the king, in the last resort; which proves that the jurisdiction exercised in them is derived from the crown of England, and not from any foreign potentate, or intrinsic authority of their own.—And, from these three strong marks and ensigns of superiority, it appears beyond a doubt that the civil and canon laws, though admitted in some cases by custom in some courts, are only subordinate and *leges sub graviori lege*; and that, thus admitted, restrained, altered, new-modelled, and amended, they are by no means with us a distinct independent species of laws, but are inferior branches of the customary or unwritten laws of England, properly called, the king's ecclesiastical, the king's military, the king's maritime, or the king's academical, laws.

LET us next proceed to the *leges scriptae*, the written laws of the kingdom, which are statutes, acts, or edicts, made by the king's majesty by and with the advice and content of the lords spiritual and temporal and commons in parliament assembled[b]. The oldest of these now extant, and printed in our statute books, is the famous *magna carta*, as confirmed in parliament 9 Hen. III: though doubtless there were many acts before that time, the records of which are now lost, and the determinations of them perhaps at present currently received for the maxims of the old common law.

[b] 8 Rep. 20.

THE manner of making these statutes will be better considered hereafter, when we examine the constitution of parliaments. At present we will only

take notice of the different kinds of statutes; and of some general rules with regard to their construction[c].

[c] The method of citing these acts of parliament is various. Many of our antient statutes are called after the name of the place, where the parliament was held that made them: as the statutes of Merton and Marlbridge, of Westminster, Glocester, and Winchester. Others are denominated entirely from their subject; as the statutes of Wales and Ireland, the *articuli cleri*, and the *praerogativa regis*. Some are distinguished by their initial words, a method of citing very antient; being used by the Jews in denominating the books of the pentateuch; by the christian church in distinguishing their hymns and divine offices; by the Romanists in describing their papal bulles; and in short by the whole body of antient civilians and canonists, among whom this method of citation generally prevailed, not only with regard to chapters, but inferior sections also: in imitation of all which we still call some of our old statutes by their initial words, as the statute of *quia emptores*, and that of *circumspecte agatis*. But the most usual method of citing them, especially since the time of Edward the second, is by naming the year of the king's reign in which the statute was made, together with the chapter, or particular act, according to it's numeral order; as, 9 Geo. II. c. 4. For all the acts of one session of parliament taken together make properly but one statute; and therefore when two sessions have been held in one year, we usually mention stat. 1. or 2. Thus the bill of rights is cited, as 1 W. & M. st. 2. c. 2. signifying that it is the second chapter or act, of the second statute or the laws made in the second sessions of parliament, held in the first year of king William and queen Mary.

FIRST, as to their several kinds. Statutes are either *general* or *special*, *public* or *private*. A general or public act is an universal rule, that regards the whole community; and of these the courts of law are bound to take notice judicially and *ex officio*; without the statute being particularly pleaded, or formally set forth by the party who claims an advantage under it. Special or private acts are rather exceptions than rules, being those which only operate upon particular persons, and private concerns; such as the Romans intitled *senatus-decreta*, in contradistinction to the *senatus-consulta*, which regarded the whole community[d]: and of these the judges are not bound to take notice,

unless they be formally shewn and pleaded. Thus, to shew the distinction, the statute 13 Eliz. c. 10. to prevent spiritual persons from making leases for longer terms than twenty one years, or three lives, is a public act; it being a rule prescribed to the whole body of spiritual persons in the nation: but an act to enable the bishop of Chester to make a lease to A.B. for sixty years, is an exception to this rule; it concerns only the parties and the bishop's successors; and is therefore a private act.

[d] Gravin. *Orig.* 1. §. 24.

STATUTES also are either *declaratory* of the common law, or *remedial* of some defects therein. Declaratory, where the old custom of the kingdom is almost fallen into disuse, or become disputable; in which case the parliament has thought proper, *in perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been. Thus the statute of treasons, 25 Edw. III. cap. 2. doth not make any new species of treasons; but only, for the benefit of the subject, declares and enumerates those several kinds of offence, which before were treason at the common law. Remedial statutes are those which are made to supply such defects, and abridge such superfluities, in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned judges, or from any other cause whatsoever. And, this being done either by enlarging the common law where it was too narrow and circumscribed, or by restraining it where it was too lax and luxuriant, this has occasioned another subordinate division of remedial acts of parliament into *enlarging* and *restraining* statutes. To instance again in the case of treason. Clipping the current coin of the kingdom was an offence not sufficiently guarded against by the common law: therefore it was thought expedient by statute 5 Eliz. c. 11. to make it high treason, which it was not at the common law: so that this was an *enlarging* statute. At common law also spiritual corporations might lease out their estates for any term of years, till prevented by the statute 13 Eliz. beforementioned: this was therefore a *restraining* statute.

SECONDLY, the rules to be observed with regard to the construction of statutes are principally these which follow.

1. THERE are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy: that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act, as to suppress the mischief and advance the remedy[e]. Let us instance again in the same restraining statute of the 13 Eliz. By the common

law ecclesiastical corporations might let as long leases as they thought proper: the mischief was, that they let long and unreasonable leases, to the impoverishment of their successors: the remedy applied by the statute was by making void all leases by ecclesiastical bodies for longer terms than three lives or twenty one years. Now in the construction of this statute it is held, that leases, though for a longer term, if made by a bishop, are not void during the bishop's life; or, if made by a dean with concurrence of his chapter, they are not void during the life of the dean: for the act was made for the benefit and protection of the successor[f]. The mischief is therefore sufficiently suppressed by vacating them after the death of the grantor; but the leases, during their lives, being not within the mischief, are not within the remedy.

[e] 3 Rep. 7 *b.* Co. Litt. 11 *b.* 42.

[f] Co. Litt. 45. 3 Rep. 60.

2. A STATUTE, which treats of things or persons of an inferior rank, cannot by any *general words* be extended to those of a superior. So a statute, treating of "deans, prebendaries, parsons, vicars, *and others having spiritual promotion*," is held not to extend to bishops, though they have spiritual promotion; deans being the highest persons named, and bishops being of a still higher order[g].

[g] 2 Rep. 46.

3. PENAL statutes must be construed strictly. Thus a statute 1 Edw. VI. having enacted that those who are convicted of stealing *horses* should not have the benefit of clergy, the judges conceived that this did not extend to him that should steal but *one horse*, and therefore procured a new act for that purpose in the following year[h]. And, to come nearer our own times, by the statute 14 Geo. II. c. 6. stealing sheep, *or other cattle*, was made felony without benefit of clergy. But these general words, "or other cattle," being looked upon as much too loose to create a capital offence, the act was held to extend to nothing but mere sheep. And therefore, in the next sessions, it was found necessary to make another statute, 15 Geo. II. c. 34. extending the former to bulls, cows, oxen, steers, bullocks, heifers, calves, and lambs, by name.

[h] Bac. Elem. c. 12.

4. STATUTES against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule; most statutes against frauds being in their consequences penal. But this difference is here to be taken: where the statute acts upon the offender, and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly: but when the statute acts upon the offence, by setting aside the fraudulent transaction, here it is to be construed liberally. Upon this footing the statute of 13 Eliz. c. 5. which avoids all gifts of goods, &c., made to defraud creditors *and others*, was held to extend by the general words to a gift made to defraud the queen of a forfeiture[i].

[i] 3 Rep. 82.

5. ONE part of a statute must be so construed by another, that the whole may if possible stand: *ut res magis valeat, quam pereat*. As if land be vested in the king and his heirs by act of parliament, saving the right of A; and A has at that time a lease of it for three years: here A shall hold it for his term of three years, and afterwards it shall go to the king. For this interpretation furnishes matter for every clause of the statute to work and operate upon. But

6. A SAVING, totally repugnant to the body of the act, is void. If therefore an act of parliament vests land in the king and his heirs, saving the right of all persons whatsoever; or vests the land of A in the king, saving the right of A: in either of these cases the saving is totally repugnant to the body of the statute, and (if good) would render the statute of no effect or operation; and therefore the saving is void, and the land vests absolutely in the king[k].

[k] 1 Rep. 47.

7. WHERE the common law and a statute differ, the common law gives place to the statute; and an old statute gives place to a new one. And this upon the general principle laid down in the last section, that "*leges posteriores priores contrarias abrogant*." But this is to be understood, only when the latter statute is couched in negative terms, or by it's matter necessarily implies a negative. As if a former act says, that a juror upon such a trial shall have

twenty pounds a year; and a new statute comes and says, he shall have twenty marks: here the latter statute, though it does not express, yet necessarily implies a negative, and virtually repeals the former. For if twenty marks be made qualification sufficient, the former statute which requires twenty pounds is at an end[l]. But if both acts be merely affirmative, and the substance such that both may stand together, here the latter does not repeal the former, but they shall both have a concurrent efficacy. If by a former law an offence be indictable at the quarter sessions, and a latter law makes the same offence indictable at the assises; here the jurisdiction of the sessions is not taken away, but both have a concurrent jurisdiction, and the offender may be prosecuted at either; unless the new statute subjoins express negative words, as, that the offence shall be indictable at the assises, *and not elsewhere*[m].

[l] Jenk. Cent. 2. 73.

[m] 11 Rep. 63.

8. If a statute, that repeals another, is itself repealed afterwards, the first statute is hereby revived, without any formal words for that purpose. So when the statutes of 26 and 35 Hen. VIII, declaring the king to be the supreme head of the church, were repealed by a statute 1 & 2 Ph. and Mary, and this latter statute was afterwards repealed by an act of 1 Eliz. there needed not any express words of revival in queen Elizabeth's statute, but these acts of king Henry were impliedly and virtually revived[n].

[n] 4 Inst. 325.

9. Acts of parliament derogatory from the power of subsequent parliaments bind not. So the statute 11 Hen. VII. c. 1. which directs, that no person for assisting a king *de facto* shall be attainted of treason by act of parliament or otherwise, is held to be good only as to common prosecutions for high treason; but will not restrain or clog any parliamentary attainder[o]. Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowleges no superior upon earth, which the prior legislature must have been, if it's ordinances could bind the present parliament. And upon the same principle Cicero, in his letters to Atticus,

treats with a proper contempt these restraining clauses which endeavour to tie up the hands of succeeding legislatures. "When you repeal the law itself, says he, you at the same time repeal the prohibitory clause, which guards against such repeal[p]."

[o] 4 Inst. 43.

[p] *Cum lex abrogatur, illud ipsum abrogatur, quo non eam abrogari oporteat. l.* 3. *ep.* 23.

10. LASTLY, acts of parliament that are impossible to be performed are of no validity; and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. I lay down the rule with these restrictions; though I know it is generally laid down more largely, that acts of parliament contrary to reason are void. But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it: and the examples usually alleged in support of this sense of the rule do none of them prove, that where the main object of a statute is unreasonable the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government. But where some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it. Thus if an act of parliament gives a man power to try all causes, that arise within his manor of Dale; yet, if a cause should arise in which he himself is party, the act is construed not to extend to that; because it is unreasonable that any man should determine his own quarrel[q]. But, if we could conceive it possible for the parliament to enact, that he should try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no.

[q] 8 Rep. 118.

THESE are the several grounds of the laws of England: over and above which, equity is also frequently called in to assist, to moderate, and to explain it. What equity is, and how impossible in it's very essence to be reduced to stated rules, hath been shewn in the preceding section. I shall therefore only add, that there are courts of this kind established for the benefit of the subject, to correct and soften the rigor of the law, when through it's generality it bears too hard in particular cases; to detect and punish latent frauds, which the law is not minute enough to reach; to enforce the execution of such matters of trust and confidence, as are binding in conscience, though perhaps not strictly legal; to deliver from such dangers as are owing to misfortune or oversight; and, in short, to relieve in all such cases as are, *bona fide*, objects of relief. This is the business of our courts of equity, which however are only conversant in matters of property. For the freedom of our constitution will not permit, that in criminal cases a power should be lodged in any judge, to construe the law otherwise than according to the letter. This caution, while it admirably protects the public liberty, can never bear hard upon individuals. A man cannot suffer *more* punishment than the law assigns, but he may suffer *less*. The laws cannot be strained by partiality to inflict a penalty beyond what the letter will warrant; but in cases where the letter induces any apparent hardship, the crown has the power to pardon.