

BLACKSTONE'S
COMMENTARIES

ABRIDGED

By **WILLIAM C. SPRAGUE, A. B., LL. B.**

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PREFACE TO FIRST EDITION.

This Abridgment was prepared for the use of the pupils of The Sprague Correspondence School of Law, and was made with special reference to the needs of persons who are entering upon the study of the law, and of such as are reviewing the Commentaries.

The plan has been to omit the greater part of the obsolete, historical, and argumentative matter; to print in type smaller than that of the text, comments upon such matter as is omitted, or brief statements of such matter; to separate and emphasize the divisions of the text by "side heads;" and to give synopses where it is important that the student should have a condensed and connected view of the book, chapter or section. A short life of Sir William Blackstone precedes the text, and translations of the Latin and French occurring in the text, a short bibliography of the Commentaries, and a table of the important dates in the history of English Law follow it.

WILLIAM C. SPRAGUE.

DETROIT, MICH., May 1st, 1892.

Life of Sir William Blackstone.

Sir William Blackstone was born at Cheapside, Parish of St. Michael le Querne, July 10, 1723. He died at Wallingford, February 14, 1780. His father, Charles Blackstone, citizen and silk man of London, died before he was born, and he lost his mother at the early age of eleven. He was thus thrown upon the care of his maternal uncle, Dr. Thomas Bigg, an eminent surgeon of London.

In 1730, William, then about seven years old, was put to school at the Charter House; and in 1735 was, by the nomination of Sir Robert Walpole, admitted as a scholar upon its foundation. He is said to have been studious and exemplary in his habits and to have gained the favor of his masters. At the age of fifteen he was at the head of the school, and was thought sufficiently advanced to be removed to the University; and he was accordingly entered a commoner at Pembroke College, in Oxford, on the 30th of November, 1738. He was, however, allowed to remain at school until after the 12th of December, the anniversary commemoration of the foundation of the Charter House, in order that he might deliver the customary oration in honor of Richard Sutton—by which he gained great applause.

Having chosen the profession of the law, he was, on the 20th of November, 1741, being then eighteen, entered in the Middle Temple. Blackstone had given considerable attention to literature, and had produced verses of some merit, but now, recognizing that "the law is a jealous mistress," he determined to become one of her most assiduous devotees, and wrote "A Lawyer's Farewell to His Music," in which he gave utterance to the regret with which he abandoned the pleasing pursuits of youth for severer studies.

The course at the Temple was very loose and crude, and we are not told under whose advice or by whose direction Blackstone pursued his studies, but we may conjecture that he began with Finch, and then waded through the mazes of Coke upon Littleton, Bracton, Glanvil, Fleta, and the reports. Chief Justice Sharswood said: "The young student little thought that, in the design of Providence, he was the engineer selected to make a new road through this wild and almost impassable country, and that he would do so with so much skill and judgment, and at the same time adorn its sides and environs with so green and rich a land-

scape, as to convert the journey from a wearisome toil to an attractive pleasure. For, almost a century the Commentaries have been the first book of the student of law; and whatever criticisms have been or may be made upon their learning or accuracy, the fact is that no lawyer fails to make them a part of his course of study sooner or later."

Previous to his call to the bar, Blackstone had removed from Pembroke to All Souls, and in June, 1744, had become a fellow of the latter college. In 1745, he graduated Bachelor of Civil Law, and on November 28, 1746, he was called to the bar.

After his admission to the bar he was destined to undergo a long and trying novitiate. He was little known in Westminster Hall. As an advocate he was not a success. He had neither a graceful delivery; nor good flow of words; nor powerful friends—so necessary in those days. From 1746 to 1760 he only reports himself to have been engaged in two cases, and those are so unimportant that they are mentioned in no other report book.

Blackstone attempted to improve this period of professional idleness by broader studies; but, at the same time, hope so long deferred made his heart sick, and it was noticed that though from his call to the bar until Michaelmas term, 1750, he regularly attended the Court of King's Bench and took notes of cases, his diligence relaxed, and latterly he noted only the cases concerning the universities, in whose affairs he was always deeply interested. This interest caused him to spend much time at Oxford, and he was elected *bursar* of his college, in which position he rendered great service. In May, 1749, as a small reward for these services, he was appointed steward of their manors; and in the same year he was elected Recorder of the Borough of Wallingford, in Berkshire. On the 26th of April, 1750, he was made Doctor of Civil Law, and thereby became a member of the convocation.

It was about the year 1750 that Blackstone first began to plan his lectures on the Laws of England. Despairing of success at the bar he determined to confine himself to his fellowship and an academical life, continuing the practice of his profession as provincial counsel. In Michaelmas term, 1753, he delivered his first course at Oxford, which was numerously attended. Nor did the interest flag. In 1754 he found it worth while, from the number attending, to publish his Analysis of the Laws of England, for the use of his hearers.

In July, 1755, he was appointed to another office, that of a delegate of the Clarendon Press. Here again he rendered valuable services. In 1757 he was elected into Queen's College.

Mr. Viner having bequeathed to the University of Oxford a considerable sum of money and the copyright of his Abridgment

of Law, for the purpose of founding a professorship of Common Law, Blackstone was, on October 20th, 1758, unanimously elected first Vinerian professor. On the 25th of that month he delivered his introductory lecture on the study of law. His lectures soon became celebrated throughout the Kingdom, and he was requested to read them to the Prince of Wales, but declined the honor.

In 1756 he resumed his attendance at Westminster, showing himself in court at each Michaelmas and Hilary term, doubtless for the purpose of making himself known, but he does not record that he was engaged in any cause.

In June, 1759, he resigned his offices of Assessor in the Vice-Chancellor's Court and Steward of All Souls' manors, and came to reside in the Temple. But it does not seem that he ever acquired much celebrity as an advocate. His principal practice was as chamber counsel, and in that capacity he commanded the notice and regard of bench and bar, being invited by Lord Chief Justice Willes and Mr. Justice Bathurst to take the coif, which he declined.

In 1761 he was offered, but declined, the appointment of Chief Justice of the Common Pleas for Ireland. In March of the same year he was returned to Parliament for Hindon, and became a King's counsel. In May he was married to Sarah Clitherow, daughter of James Clitherow. This vacated the fellowship at All Souls, and in July he was appointed Principal of New Inn Hall. In 1762 he collected and published several of his pieces under the title of "Law Tracts." In 1763 he was appointed Solicitor General to the Queen, and elected Bencher in the Middle Temple. In 1765 appeared the first volume of the Commentaries—twelve years after the first delivery of his lectures, and the other three volumes appeared in the course of the four succeeding years. In 1766 he resigned the Vinerian professorship and also the Principality of New Inn Hall. In 1768 he was elected to Parliament for the Borough of Westbury, and his part in the debates relative to the election of John Wilkes drew upon him the caustic sarcasms of Junius.

In 1770 he was offered the Solicitor Generalship. He declined this, but accepted the position of a Judge of the Common Pleas. He exchanged places, however, with Mr. Justice Yates, taking that gentleman's seat as Judge of the King's Bench and receiving the honor of Knighthood. On Sir Joseph Yates' death shortly after, Blackstone again became a Judge of the Common Pleas. Here he maintained the high reputation he had previously acquired by his performance of his duties on the bench. Several of his judgments are very elaborate and upon difficult and important questions, and they display to great advantage his ability and research. During Blackstone's time the Court of Common Pleas differed in opinion

upon two cases only. In both he dissented, and in both he was sustained by the King's Bench and the House of Lords.

Shortly after his marriage he purchased a villa, called Priory Place, near Wallingford, and became one of the most active and public spirited of citizens. He was associated with John Howard in his efforts for prison reform, and in conjunction with him exerted himself to procure an act of Parliament for the establishment of Penitentiary Houses near London, in which they were successful. He also indulged in literary labors to some extent.

He was not, however, long permitted to enjoy this life of quiet usefulness and honor. Sedentary habits, never conducive to health, worked their natural results upon him, and after a short illness, he died, February 14th, 1780, and was buried in St. Peter's Church, Wallingford.

Probably no man has so thoroughly perpetuated his name in legal history. How great was his work we may conjecture, when we remember that, after the lapse of more than a century, the Commentaries is still the only book that is with entire confidence placed in the hands of the beginner. However, as said James Clitherow: "His professional abilities need not be dwelt upon. They will be universally acknowledged and admired as long as his works shall be read, or, in other words, as long as the Municipal laws of this country shall remain an object of study and practice."

INTRODUCTION.

OF THE STUDY, NATURE AND EXTENT OF THE LAWS OF ENGLAND.

SEC. 1. ON THE STUDY OF THE LAW. SEC. 2. THE NATURE OF LAWS IN GENERAL. SEC. 3. THE GROWTH AND FOUNDATION OF THE LAWS OF ENGLAND. SEC. 4. THE COUNTRIES SUBJECT TO THOSE LAWS.

Section I.

ON THE STUDY OF LAW.

1-38.

Section one is an address read by Sir William Blackstone at the opening of the Vinerian lectures at Oxford, October 25th, 1758, he having been elected first Vinerian professor the 20th of October previous. It was addressed "to the Vice-Chancellor and the gentlemen of the University." Its general subject is "The Study of the Laws of England." The following are the main heads of the discussion:

1. The general utility of the study of the English common law appears from considering the peculiar situation of, I. Gentlemen of Fortune; II. The Nobility; III. Persons in Liberal Professions.

2. The causes of its neglect were chiefly the revival of the study of the Roman laws in the twelfth century, their adoption by the clergy and universities and the illiberal jealousy that subsisted between the patrons and students of each.

3. The establishment of the Courts of Common Pleas at Westminster preserved the common law and promoted its study in that neighborhood exclusive of the two universities.

4. But the universities are now the most eligible places for laying the foundations of this as of every other liberal accomplishment; by tracing out the principles and grounds of the law, even to their original elements.

SYNOPSIS OF SECTION II

The Nature of Law.	1. Definition	{ 1. In General. 2. In Particular.
	2. Municipal Law	{ 1. Definition. 2. Properties.
	3. Parts of the Law	{ 1. Declaratory 2. Directory. 3. Remedial. 4. Vindictory.
	4. Interpretation of Laws. The method. The intention as obtained from	{ 1. The Words. 2. The Context 3. The Subject Matter. 4. The Effects and Consequences 5. The Spirit and Reason.
	5. Equity	{ 1. Source 2. Definition 3. Nature

Section II.

OF THE NATURE OF LAWS IN GENERAL.

38-63.

Law Defined.

Law, in its most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations. And it is that rule of action which is prescribed by some superior, and which the inferior is bound to obey.

But laws, in their more confined sense, denote the rules, not of action in general, but of *human* action or conduct; that is, the precepts by which man, a creature endowed with both reason and free will, is commanded to make use of those faculties in the general regulation of his behavior.

Here follows a discussion of the law of nature which is stated to be the will of God, such as that we should live honestly, should hurt nobody, and should render to every one his dues. This law of nature is superior in obligation to any other. In consequence of the defects of human reason by which we endeavor to know the will of God, there is made necessary the revealed or divine law, found only in the holy scriptures. Upon the law of nature and the law of revelation depend all human laws.

The law of nations arises to regulate the intercourse of states, and rests upon the rules of natural law or mutual compacts, treaties and agreements.

Municipal Law.

Municipal law is properly defined to be "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong."

Better perhaps is the definition given by Cicero: "Municipal law is a rule of civil conduct prescribed by the supreme power in a state, commanding what is to be done and forbidding the contrary."

Let us endeavor to explain its several properties, as they arise out of this definition. And, first, it is a *rule*; not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform and universal.

It is also called a *rule* to distinguish it from *advice* or *counsel*, which we are at liberty to follow or not, as we see proper. It is also called a *rule* to distinguish it from a *compact* or *agreement*; for a compact is a promise proceeding *from* us, law is a command directed *to* us.

Municipal law is also a "rule of *civil conduct*." This distinguishes municipal law from natural, or revealed.

It is likewise "a rule *prescribed*." Because a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. But the manner in which this notification is to be made, is matter of very great indifference. It may be notified by universal tradition and long practice, which supposes a previous publication, and is the case of the common law of England. It may be notified *viva voce*, by officers appointed for that purpose, as is done with regard to proclamations, and such acts of parliament as are appointed to be publicly read in churches and other assemblies. It may lastly be notified by writing, printing, or the like; which is the general course taken with all our acts of parliament. Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner.

Ex Post Facto Laws.

There is still a more unreasonable method than this, which is called making of laws *ex post facto*; when after an action (indif-

ferent in itself) is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it.

All laws should be therefore made to commence *in futuro*, and be notified before their commencement; which is implied in the term "*prescribed.*" But when this rule is in the usual manner notified, or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if ignorance of what he *might* know were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity.

But further: municipal law is "a rule of civil conduct prescribed by *the supreme power in a state.*" For legislature, as was before observed, is the greatest act of superiority that can be exercised by one being over another. Wherefore it is requisite to the very essence of a law, that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other.

Here follows a short inquiry concerning the nature of society and civil government. The wants and fears of individuals are the only true and natural foundations of society. Society originates in a contract; not perhaps formally expressed at the first institution of the state, yet always to be implied, that the whole should protect all its parts and that every part should pay obedience to the will of the whole. There are three forms of government recognized: *Democracy*, where the sovereign power is lodged in an aggregate assembly consisting of all the free members of a community. *Aristocracy*, where it is lodged in a council, composed of select members. *Monarchy*, where it is entrusted to the hands of a single person. All other species of government, say political writers of antiquity, are either corruptions of or reducible to these three."

From what has been advanced, the truth of the former branch of our definition is (I trust) sufficiently evident; that "*municipal law is a rule of civil conduct prescribed by the supreme power in a state.*" I proceed now to the latter branch of it; that it is a rule so prescribed, "*commanding what is right, and prohibiting what is wrong.*"

The Parts of a Law.

Now, in order to do this completely, it is first of all necessary that the boundaries of right and wrong be established and ascertained by law. And when this is once done, it will follow, of course, that it is likewise the business of the law, considered as a rule of civil conduct, to enforce these rights, and to restrain or redress these wrongs. It remains therefore only to consider in what manner the law is said to ascertain the boundaries of right and wrong: and the method which it takes to command the one and prohibit the other.

For this purpose every law may be said to consist of several

parts; one, declaratory: whereby the rights to be observed, and the wrongs to be eschewed, are clearly defined and laid down; another, directory: whereby the subject is instructed and enjoined to observe those rights; and to abstain from the commission of those wrongs; a third, remedial: whereby a method is pointed out to recover a man's private rights, or redress his private wrongs; to which may be added a fourth, usually termed the sanction, or vindicatory branch of the law: whereby it is signified what evil or penalty shall be incurred by such as commit any public wrongs, and transgress or neglect their duty.

The Declaratory Part.

With regard to the first of these, the *declaratory* part of the municipal law, this depends not so much upon the law of revelation or of nature, as upon the wisdom and will of the legislator. This doctrine, which before was slightly touched, deserves a more particular explication. Those rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture. Neither do divine or natural *duties* (such as, for instance, the worship of God, maintenance of children, and the like) receive any stronger sanction from being also declared to be duties by the law of the land. The case is the same as to crimes and misdemeanors, that are forbidden by the superior laws, and therefore styled *mala in se*, such as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature. For that legislature in all these cases acts only, as was before observed, in subordination of the great Law Giver, transcribing and publishing His precepts. So that, upon the whole, the declaratory part of the municipal law has no force or operation at all, with regard to actions that are naturally and intrinsically right or wrong.

But, with regard to things in themselves indifferent, the case is entirely altered. These become either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper, for promoting the welfare of the society, and more effectually carrying on the purposes of civil life. Thus our own common law has declared, that the goods of the wife do instantly upon marriage become the property and right of the husband; and our statute law has declared all monopolies a public offense; yet that right, and this offense have no foundation in na-

ture, but are merely created by the law, for the purposes of civil society, and sometimes, where the thing itself has its rise from the law of nature, the particular circumstances and mode of doing it become right or wrong, as the law of the land shall direct. Thus, for instance, in civil duties; obedience to superiors is the doctrine of revealed as well as natural religion; but who those superiors shall be, and in what circumstances or to what degrees they shall be obeyed, it is the province of human laws to determine. And so, as to injuries or crimes, it must be left to our own legislature to decide, in what cases the seizing another's cattle shall amount to a trespass or a theft; and where it shall be a justifiable action, as when a landlord takes them by way of distress for rent.

The Directory Part.

And the *directory* stands much upon the same footing; for this virtually includes the former, the declaration being usually collected from the direction. The law that says "thou shalt not steal," implies a declaration that stealing is a crime. And we have seen that, in things naturally indifferent, the very essence of right and wrong depends upon the direction of the laws to do or to omit them.

The Remedial Part.

The *remedial* part of a law is so necessary a consequence of the former two, that laws must be very vague and imperfect without it. For in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting these rights, when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of the law.

The Vindictory Part.

With regard to the sanction of laws, or the evils that may attend the breach of public duties, it is observed, that human legislators have for the most part chosen to make the sanction of their laws rather *vindictory*, than *remuneratory*, or to consist rather in punishments, than in actual particular rewards.

Of all the parts of a law the most effectual is the *vindictory*. For it is but lost labor to say, "do this, or avoid that," unless we also declare, "this shall be the consequence of your non-compliance." We must therefore observe, that the main strength and force of a law consists in the penalty annexed to it. Herein is to be found the principal obligation of human laws.

Interpretation of Laws.

The fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these

signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law.

1. Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use. Again, terms of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade, and science.

2. If words happen to be still dubious, we may establish their meaning from the context, with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus the proeme or preamble is often called in to help the construction of an act of parliament. Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point. Thus, when the law of England declares murder to be felony without benefit of clergy, we must resort to the same law of England to learn what the benefit of clergy is.

3. As to the *subject matter*, words are always to be understood as having a regard thereto, for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end.

4. As to the *effects* and *consequence*, the rule is, that where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them.

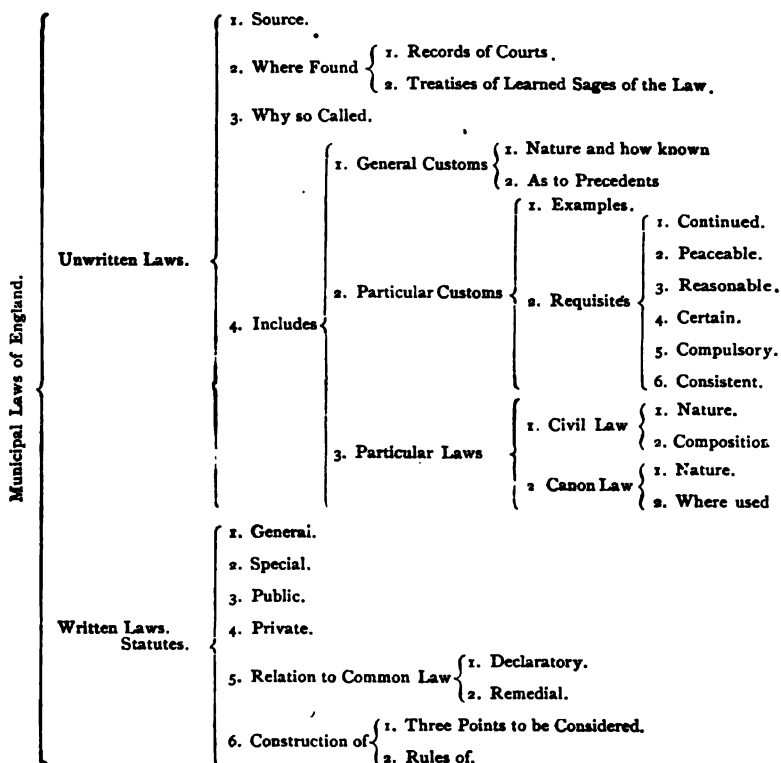
5. But, lastly, the most universal and effectual way of discovering the true meaning of law, when the words are dubious, is by considering the *reason* and *spirit* of it; or the cause which moved the legislator to enact it, for when this reason ceases, the law itself ought likewise to cease with it.

Equity.

From this method of interpreting laws by the reason of them, arises what we call *equity*, which is thus defined by Grotius: "the correction of that wherein the law (by reason of its universality) is deficient." For, since in laws all cases cannot be foreseen or expressed, it is necessary that, when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances, which (had they been foreseen) the legislator himself would have expressed.

SYNOPSIS OF SECTION III.

OF THE LAWS OF ENGLAND.



Section III.

OF THE LAWS OF ENGLAND.

63-93.

Municipal Law. Divisions.

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 Unwritten Laws.

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 entirely traditional, for this plain reason, because 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. 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 style 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.

Here follows a discussion of the origin of English Common Law. It is of mixed origin, coming from the Briton, the Roman, the Pict, the Saxon, the Dane and the Norman. It is therefore of compound nature. The first compilation of these customs was doubtless the *Dome Book*, compiled under the direction of King Alfred: It is little more than a collection of punishments for offenses. Said to be still in existence. After the invasion of the Danes it fell into disuse, and in the eleventh century there were three principal systems of laws, prevailing in different districts. 1. The Mercian Laws. 2. The West Saxon Laws. 3. The Danish Laws. Out of these King Edward the Confessor extracted one uniform system which was merely a revised edition of Alfred's code.

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 ancient and long established custom. Whence it is that in our law the goodness of a custom depends upon its 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 its weight and authority; and of this nature are the maxims and customs which compose the common law, or *lex non scripta*, of this kingdom.

Kinds of Unwritten Law.

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 its

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.

General Customs.

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 offenses, 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.

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 depositories 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. 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 public 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. 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 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 clearly 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.

Rule as to Precedents.

The doctrine of the law then is this: that the 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 that they acted wholly without consideration.

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 its 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 author proceeds to say that the reports are extant in a regular series from the reign of King Edward the Second inclusive. They were up to Henry VIII. published yearly and are known as year books. Some of the most valuable of the reports are those published by Lord Chief Justice Coke. Attention is called to other authors in whose publications are to be found the evidences of early decisions, as Glanvil and Bracton, Britton and Fleta, Hengham and Littleton, Statham, Brooke, Fitzherbert, Staundeforde and Coke. These treatises are cited as authority and are evidence that cases have formerly happened, in which such and such points were determined. Reference is also made to the great regard for custom shown in the Roman Law.

Particular Customs.

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 its 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 contradiction to the rest of the nation at large; which privilege is confirmed to them by several acts of parliament.

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 ancient 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 entitled, for her dower, to all her husband's lands; whereas, at the common law she shall be endowed of one-third part only. Such are many particular customs, within the city of London, with regard to trade, apprentices, widows, orphans, and a variety of other matters. All these are contrary to the general law of the land and are good only by special usage; though the customs of London are also confirmed by act of parliament.

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 general rules of the common law, is yet engrafted into it, and made part of it; being allowed for the benefit of trade, to be of the utmost validity in all commercial transactions.

Rules Relating to Particular Customs.

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*.

Proof of Customs.

As to gavelkind, and borough-English, the law takes particular notice of them, 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, and as well the existence of such customs must be shown, as that the thing in dispute is within the custom alleged.

When a custom is actually proved to exist, the next inquiry 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.

Requisites to Legality of a Particular Custom.

To make a particular custom good, the following are necessary requisites:

1. That it have been used so long, that the memory of man runneth not to the contrary. So that, if any one can show 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.

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.

3. It must have been *peaceable*, and acquiesced in; not subject to contention and dispute. 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.

4. Customs must be *reasonable*; or rather, taken negatively, they must not be unreasonable.

5. Customs ought to be *certain*.

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.

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.

Customs, in derogation of the common law, must be construed strictly.

Particular Laws.

III. The third branch of them (*Leges non Scriptae*) are those particular 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.

The Civil Law.

By the civil law, absolutely taken, is generally understood the civil or municipal law of the Roman empire, as comprised in the institutes, the code, and the digest of the Emperor Justinian, and the novel constitutions of himself and some of his successors.

It 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, in twelve books; the lapse of a whole century having rendered the former code of Theodosius imperfect. 4. The novels, or new constitutions, pos-

terior in time to the other books, and amounting to a supplement to the code; containing new decrees of successive emperors, as new questions happen 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 digest was found at Amalfi, in Italy; which accident, concurring with the policy of the Roman ecclesiastics, 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.

The Canon Law.

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 ancient Latin fathers, the decrees of general councils, and the decretal epistles and bulls of the holy see.

According to Blackstone there are:

Four species of Courts in which the civil and canon laws are permitted under different restrictions to be used.

- | | |
|---|--|
| } | 1. Ecclesiastical Courts, Courts of the Archbishops and Bishops. |
| | 2. The Military Courts. |
| | 3. The Courts of Admiralty. |
| | 4. Courts of the two 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.

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.

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 customs in some courts, are only subordinate, and *leges sub graviore 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.

The Written 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 consent of the lords spiritual and temporal, and commons in parliament assembled. The oldest of these now extant and printed in our statute books, is the famous *magna charta*, 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.

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.

Kinds of Statutes.

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 this 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, and of these the judges are not bound to take notice unless they be formally shown and pleaded.

As Related to the Common Law.

Statutes 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. 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 (or even learned) judges, or from any other cause whatsoever. And this being done, either by enlarging the com-

mon law, where it was too narrow and circumscribed, or by restraining it where it was too lax and luxuriant, hath occasioned another subordinate division of remedial acts of parliament into *enlarging* and *restraining* statutes.

Rules for Construction of Statutes.

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.

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.

3. Penal statutes must be construed strictly.

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 offense, by setting aside the fraudulent transaction, here it is to be construed liberally.

5. One part of a statute must be construed by another, that the whole may (if possible) stand: *ut res magis valeat, quam pereat*.

6. A saving, totally repugnant to the body of the act is void.

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 a general principle of universal law, that "*leges posteriores priores contrarias abrogant*;" consonant to which it was laid down by a law of the twelve tables at Rome, that "*quod populus postremum jussit, id jus ratum esto*." But this is to be understood only when the latter statute is couched in negative terms, or where its matter is so clearly repugnant that it necessarily implies a negative. 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 offense be indictable at the quarter sessions, and a later law makes the same offense indictable at the assizes, 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 offense shall be indictable at the assizes, *and not elsewhere*.

8. If a statute, that repeals another, is itself repealed afterwards, the first statute is thereby revived, without any formal words for that purpose.

9. Acts of parliament derogatory from the power of subsequent parliaments bind not.

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.

The Province of Equity.

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 them. What equity is, and how impossible in its very essence to be reduced to stated rules, hath been shown in the preceding section. I shall therefore only add, that (besides the liberality of sentiment with which our common law judges interpret acts of parliament, and such rules of the unwritten law as are not of a positive kind) there are also peculiar courts of equity established for the benefit of the subject; to detect latent frauds and concealments, which the process of the courts of law is not adapted to reach; to enforce the execution of such matters of trust and confidence, as are binding in conscience, though not cognizable in a court of law; to deliver from such dangers as are owing to misfortune or oversight; and to give a more specific relief, and more adapted to the circumstances of the case, than can always be obtained by the generality of the rules of the positive or common law. This is the business of our courts of equity, which, however, are only conversant in matters of property. For the freedom of our constitutions 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.

Section IV.
OF THE COUNTRIES SUBJECT TO THE LAWS OF
ENGLAND.

93-120.

The Kingdom of England, over which our municipal laws have jurisdiction, includes not, by the common law, either Wales, Scotland, or Ireland, or any other part of the king's dominions, except the territory of England only. And yet the civil laws and local customs of this territory do now obtain, in part or in all, with more or less restrictions, in these and many other adjacent countries; of which it will be proper first to take a review, before we consider the kingdom of England itself, the original and proper subject of these laws.

This section is mainly historical.

As to Wales.—The country remained practically independent until the reign of Edward the First. Their laws, however, for some time remained distinct and peculiar, and not until 27 Henry VIII. were the Welsh admitted to a thorough communication of laws with the subjects of England.

As to Scotland.—The union of crowns took place on the accession of King James VI. Still for over a century she remained a separate and distinct kingdom. As both kingdoms were anciently under the same government there was considerable resemblance in their laws. The union was completed in 1707, when twenty-five articles of union were agreed to by both nations. By these articles the laws of trade, customs and excise were made the same. All other laws of Scotland remained in force, though alterable by the parliament of Great Britain.

As to Ireland.—England and Ireland are (in time of B.) distinct kingdoms, although the latter is subordinate to the former. In general they agree in their laws. At the time of Ireland's conquest in the reign of Henry II. they were governed by what was called the Brehon law. King John afterwards carried the English law into Ireland and is said to have ordained and established that Ireland should be governed by the laws of England. By 6 Geo. I. c. 5, it is declared that the king's majesty with the consent of the lords and commons of Great Britain in parliament, hath power to make laws to bind the people of Ireland.

Several pages are devoted to the relation of the laws of England to certain islands of the sea and the colonies.

As to Colonies, with respect to their interior polity, there are three sorts:

1. Provincial establishments, depending on commissions issued by the crown to the governors, with a power defined by the commission to make local ordinances not repugnant to the laws of England.

2. Proprietary government, granted to individuals, in the nature of feudatory principalities.

3. Charter governments, in the nature of civil corporations, with the power of making by-laws for their own interior regulations, not contrary to the laws of England.

We come now to consider the kingdom of England in particular, the direct and immediate subject of these laws, concerning which we are to treat in the ensuing commentaries. And this comprehends not only Wales and Berwick, but also part of the sea. The main or high seas are part of the realm of England, for thereon our courts of admiralty have jurisdiction as will be shown hereafter; but they are not subject to the common law. This main sea begins at the low-water mark. But between the high-water mark and the low-water mark, where the sea ebbs and flows, the common law and admiralty have *divisum imperium*, an alternate jurisdiction; one upon the water, when it is full sea; the other upon the land, when it is an ebb.

The Ecclesiastical and Civil Divisions.

The territory of England is liable to two divisions; the one ecclesiastical, the other civil.

1. The ecclesiastical division is primarily into two provinces, those of Canterbury and York. A province is the circuit of an archbishop's jurisdiction. Each province contains divers dioceses, or sees of suffragan bishops. Every diocese is divided into archdeaconries, *each archdeaconry* into rural deaneries, which are the circuit of the archdeacon's and rural dean's jurisdiction, of whom hereafter; and every deanery is divided into parishes.

A parish is that circuit of ground which is committed to the charge of one parson or vicar, or other minister having cure of souls therein.

These districts are computed to be near ten thousand in number.

2. The civil division of the territory of England is into counties, of those counties into hundreds, of those hundreds into tithings or towns. Which division as it now stands, seems to owe its original to King Alfred, who, to prevent the rapines and disorders which formerly prevailed in the realm, instituted tithings, so called from the Saxon, because *ten* freeholders with their families composed one. These all dwelt together, and were sureties or free pledges to the king for the good behavior of each other; and, if any offense was committed in their district, they were bound to have the offender forthcoming. And therefore anciently no man was suffered to abide in England above forty days, unless he was enrolled in some tithing or decennary. One of the principal inhabitants of the tithing is annually appointed to preside over the rest, being called the tithing man, the headborough (words which speak their own etymology, and in some counties the borsholder or borough's-ealder), being supposed the discreetest man in the borough, town or tithing.

As ten families of freeholders made up a town or tithing, so ten tithings composed a superior division, called a hundred, as consisting of ten times ten families. The hundred is governed by a high constable, or bailiff, and formerly there was regularly held in it the hundred court for the trial of causes, though now fallen into disuse. In some of the more northern counties these hundreds are called wapentakes.

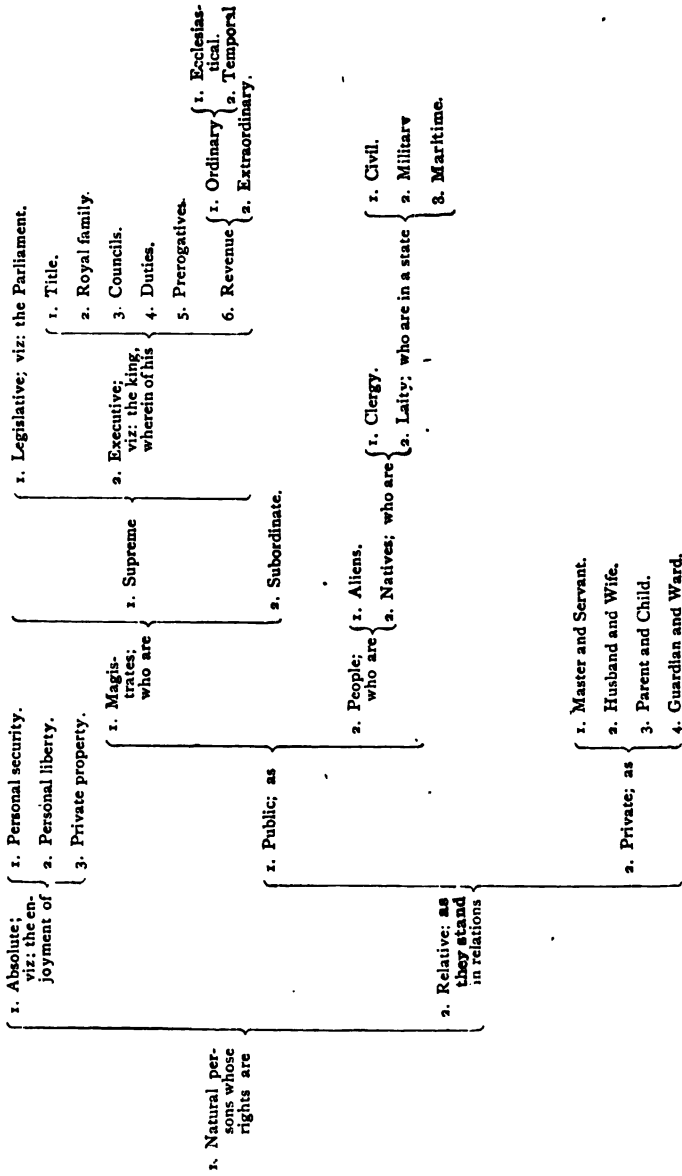
An indefinite number of these hundreds make up a county or shire. Shire is a Saxon word signifying a division; but a county, *comitatus*, is plainly derived from *comes*, the count of the Franks; that is, the earl, or alderman (as the Saxons called him), of the shire, to whom the government of it was entrusted. This he usually exercised by his deputy, still called in Latin *vice-comes*, and in English the sheriff, shrieve, or shirereeve, signifying the officer of the shire, upon whom, by process of time, the civil administration of it is now totally devolved.

[END OF INTRODUCTION.]

COMMENTARIES
ON
THE LAWS OF ENGLAND.

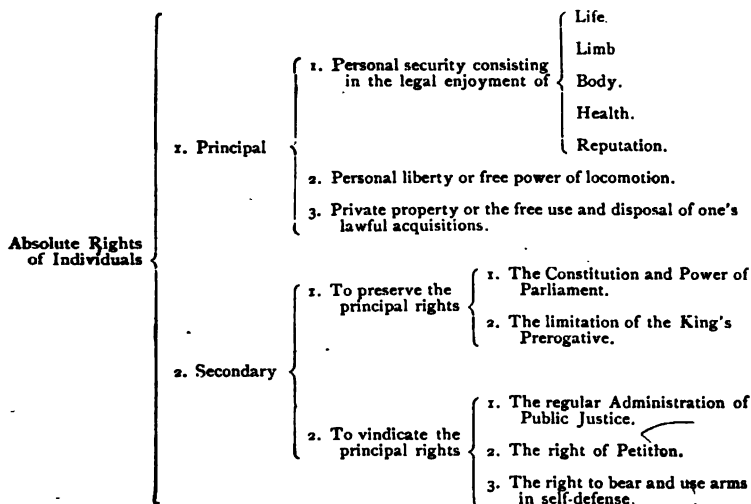
- BOOK I. The Rights of Persons.
BOOK II. The Rights of Things.
BOOK III. Private Wrongs.
BOOK IV. Public Wrongs.

SYNOPSIS OF BOOK I.—OF THE RIGHTS OF PERSONS.



2. Bodies politic; corporations.

SYNOPSIS OF CHAPTER I. BOOK I.



BOOK THE FIRST.

OF THE RIGHTS OF PERSONS.

Chapter I.

OF THE ABSOLUTE RIGHTS OF INDIVIDUALS.

121-146.

Objects of the Law.

The primary and principal objects of the law are RIGHTS and WRONGS.

Rights are, however, liable to another subdivision; being either, first, those which concern and are annexed to the persons of men, and are then called *jura personarum*, or the *rights of persons*; or they are, secondly, such as a man may acquire over external objects, or things unconnected with his person, which are styled *jura rerum*, or the *rights of things*. Wrongs also are divisible into, first, *private wrongs*, which being an infringement merely of particular rights, concern individuals only, and are called civil injuries; and secondly, *public wrongs*, which, being a breach of general and public rights, affect the whole community, and are called crimes and misdemeanors.

Divisions of the Commentaries.

The objects of the laws of England falling into this fourfold division, the present commentaries will therefore consist of the four following parts: 1. *The rights of persons*, with the means whereby such rights may be either acquired or lost. 2. *The rights of things*, with the means also of acquiring and losing them. 3. *Private wrongs*, or civil injuries, with the means of redressing them by law. 4. *Public wrongs*, or crimes and misdemeanors, with the means of prevention and punishment.

We are now first to consider the *rights of persons*, with the means of acquiring and losing them.

Rights of Persons.

Now the rights of persons that are commanded to be observed by the municipal law are of two sorts: First, such as are due *from* every citizen, which are usually called civil *duties*; and secondly, such as belong *to* him, which is the more popular acceptance of

rights. Both may indeed be comprised in this latter division; for as all social duties are of a relative nature, at the same time that they are due *from* one man or set of men, they must also be due to another. But I apprehend it will be more clear and easy to consider many of them as duties required from, rather, than as rights belonging to, particular persons.

Natural and Artificial Persons.

Persons are also divided by the law into either natural or artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.

Rights of Natural Persons.

The rights of persons considered in their natural capacities are also of two sorts, absolute and relative. Absolute, which are such as appertain and belong to particular men, merely as individuals or single persons; relative, which are incident to them as members of society, and standing in various relations to each other. The first, that is, absolute rights, will be the subject of the present chapter.

Absolute Rights.

By the absolute *rights* of individuals, we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it. But with regard to the absolute *duties* which man is bound to perform considered as a mere individual, it is not to be expected that any human municipal law should at all explain or enforce them. For the end and intent of such laws being only to regulate the behavior of mankind, as they are members of society, and stand in various relations to each other, they have consequently no concern with any other but social or relative duties. But with respect to *rights*, the case is different. Human laws define and enforce as well those rights which belong to a man considered as an individual, as those which belong to him considered as related to others.

For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature, but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities. Hence, it follows, that the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals. Such rights as are social and *relative* result from, and are posterior to, the formation of states and societies: so that to maintain and regulate these is clearly a subsequent consideration. And, therefore,

the principal view of human laws is or ought always to be, to explain, protect, and enforce such rights as are absolute, which in themselves are few and simple; and then such rights as are relative, which, arising from a variety of connections, will be far more numerous and more complicated. These will take up a greater space in any code of laws, and hence may appear to be more attended to—though in reality they are not—than the rights of the former kind. Let us, therefore, proceed to examine how far all laws ought, and how far the laws of England actually do, take notice of these absolute rights, and provide for their lasting security.

Natural Liberty. Civil Liberty.

The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with the power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature: being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of free will. But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it. For no man that considers a moment would wish to retain the absolute and uncontrolled power of doing whatever he pleases; the consequence of which is, that every other man would also have the same power, and then there would be no security to individuals in any of the enjoyments of life. Political, therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public. Hence we may collect that the law, which restrains a man from doing mischief to his fellow citizens, though it diminishes the natural increases the civil liberty of mankind; but that every wanton and causeless restraint of the will of the subject, whether practised by a monarch, a nobility, or a popular assembly, is a degree of tyranny; nay, that even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are regulations destructive of liberty; whereas, if any public advantage can arise from

observing such precepts, the control of our private inclinations, in one or two particular points, will conduce to preserve our general freedom in others of more importance; by supporting that state of society, which alone can secure our independence. But then, on the other hand, that constitution or frame of government, that system of laws, is alone calculated to maintain civil liberty, which leaves the subject entire master of his own conduct, except in the points wherein the public good requires some direction or restraint.

The fundamental articles of rights and liberties have been asserted in parliament as often as they were thought to be in danger, by the following:

The great charter (*Magna Charta*) obtained from King John, and afterwards confirmed in parliament by King Henry III., his son. This charter contained very few grants, but was for the most part declaratory of the principal grounds of the fundamental laws of England.

The statute called *Confirmatio Cartarum*; whereby the great charter is directed to be allowed as the common law.

Many corroborating statutes (about 32), from Edward I. to Henry IV.

The *Petition of Right*, a parliamentary declaration of the liberties of the people assented to by Charles the First.

The *Habeas Corpus* act under Charles the Second. The *Bill of Rights* in the reign of William and Mary. Finally the *Act of Settlement*.

Three Primary Rights.

Thus much for the *declaration* of our rights and liberties. The rights themselves, thus defined by these several statutes, consist in a number of private immunities; which will appear, from what has been promised, to be indeed no other, than either that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals. These, therefore, were formerly, either by inheritance or purchase, the rights of all mankind; but in most other countries of the world being now more or less debased and destroyed, they at present may be said to remain in a peculiar and emphatical manner, the rights of the people of England. And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property; because as there is no other known method of compulsion, or abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.

Personal Security.

I. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation.

1. Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in its mother's womb.

An infant *in ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate, made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born.

2. A man's limbs (by which for the present we only understand those members which may be useful to him in fight, and the loss of which alone amounts to mayhem by the common law) are also the gift of the wise Creator, to enable him to protect himself from external injuries in a state of nature. To these, therefore, he has a natural inherent right; and they cannot be wantonly destroyed or disabled without a manifest breach of civil liberty.

Duress.

Both the life and limbs of a man are of such high value, in the estimation of the law of England, that it pardons even homicide if committed *se defendendo*, or in order to preserve them. For whatever is done by a man to save either life or member, is looked upon as done upon the highest necessity and compulsion. Therefore, if a man through fear of death or mayhem, is prevailed upon to execute a deed, or do any other legal act, these, though accompanied with all other requisite solemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs, in case of his non-compliance. The constraint a man is under in these circumstances is called in law *duress*, from the Latin *durities*, of which there are two sorts; duress of imprisonment, where a man actually loses his liberty, of which we shall presently speak; and duress *per minas*, where the hardship is only threatened and impending, which is that we are now discoursing of. Duress *per minas* is either for fear of loss of life, or else for fear of mayhem, or loss of limb. And this fear must be upon sufficient reason. A fear of battery, of being beaten, though never so well grounded, is no duress; neither is the fear of having one's house burned or one's goods taken away and destroyed; because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages; but no suitable atonement can be made for the loss of life or limb.

Civil Death.

These rights of life and member, can only be determined by the death of the person; which was formerly accounted to be either a civil or natural death. The civil death commenced, if any man was banished or abjured the realm by the process of the common

law, or entered into religion; that is, went into a monastery, and became there a monk professed; in which cases he was absolutely dead in law, and his next heir should have his estate.

This natural life, being, as was before observed, the immediate donation of the great Creator, cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow-creatures, merely upon their own authority. Yet nevertheless it may, by the divine permission, be frequently forfeited for the breach of those laws of society, which are enforced by the sanction of capital punishments. The constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law. "*Nullus liber homo,*" says the great charter, "*aliquo modo destruetur, nisi per legale iudicium parium suorum aut per legem terrae.*"

3. Besides those limbs and members that may be necessary to a man in order to defend himself or annoy his enemy, the rest of his person or body is also entitled, by the same natural right, to security from the corporal insults of menaces, assaults, beating, and wounding; though such insults amount not to destruction of life or member.

4. The preservation of a man's health from such practices as may prejudice or annoy it; and

5. The security of his reputation or good name from the arts of detraction and slander, are rights to which every man is entitled by reason and natural justice; since, without these, it is impossible to have the perfect enjoyment of any other advantage or right.

Personal Liberty.

II. Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power or locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. It is a right strictly natural. The laws of England have never abridged it without sufficient cause. In this kingdom, it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws. Here again the language of the great charter is, that no freeman shall be taken or imprisoned but by the lawful judgment of his equals, or by the law of the land. By the petition of right, 3 Car. I., it is enacted, that no freeman shall be imprisoned or detained without cause shown, to which he may make answer according to law.

Habeas Corpus.

By 16 Car. I. c. 10, if any person be restrained of his liberty by order or decree of any illegal court, or by command of the king's majesty in person, or by warrant of the council board, or of

any of the privy council, he shall, upon demand of his counsel, have a writ of *habeas corpus*, to bring his body before the court of king's bench or common pleas, who shall determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain. And by 31 Car. II. c. 2, commonly called the *habeas corpus* act, the methods of obtaining this writ are so plainly pointed out and enforced, that, so long as this statute remains unimpeached, no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer. And, lest this act should be evaded by demanding unreasonable bail or sureties for the prisoner's appearance, it is declared by 1 W. and M. st. 2, c. 2, that excessive bail ought not to be required.

Imprisonment.

The confinement of the person, in any wise, is an imprisonment; so that the keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment. And the law so much discourages unlawful confinement, that if a man is under *duress of imprisonment*, which we before explained to mean a compulsion by an illegal restraint of liberty, until he seals a bond or the like, he may allege this duress, and avoid the extorted bond. But if a man be lawfully imprisoned, and either to procure his discharge, or on any other fair account, seals a bond or deed, this is not by duress of imprisonment and he is not at liberty to avoid it. To make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison; which warrant must be in writing, under the hand and *seal* of the magistrate, and express the causes of the commitment, in order to be examined into, if necessary, upon a *habeas corpus*. If there be no cause expressed, the jailer is not bound to detain the prisoner.

Ne Exeat Regno.

A natural and regular consequence of this personal liberty is, that every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law. The king, indeed, by his royal prerogative, may issue out his writ *ne exeat regno*, and prohibit any of his subjects from going into foreign parts without license. This may be necessary for the public service and safeguard of the commonwealth. But no power on earth, except the authority of parliament, can send any subject of England *out* of the land against his will; no, not even a criminal. For exile and transportation are punishments at present unknown to the common law; and, wherever

the latter is now inflicted it is either by the choice of the criminal himself to escape a capital punishment, or else by the express direction of some modern act of parliament. To this purpose the great charter declares, that no freeman shall be banished, unless by the judgment of his peers, or by the law of the land.

The law is in this respect so benignly and liberally construed for the benefit of the subject, that, though *within* the realm the king may command the attendance and service of all his liegemen, yet he cannot send any man *out* of the realm, even upon the public service; excepting sailors and soldiers, the nature of whose employment necessarily implies an exception; he cannot even constitute a man lord deputy or lieutenant of Ireland against his will, nor make him a foreign ambassador. For this might, in reality, be no more than an honorable exile.

Right of Property.

III. The third absolute right, inherent in every Englishman, is that of property; which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. The great charter has declared that no freeman shall be disseised, or divested, of his freehold, or of his liberties, or free customs, but by the judgment of his peers, or by the law of the land. And by a variety of ancient statutes it is enacted, that no man's lands or goods shall be seized into the king's hands, against the great charter, and the law of the land; and that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law; and if anything be done to the contrary, it shall be redressed, and holden for none.

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full

indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.

Nor is this the only instance in which the law of the land has postponed even public necessity to the sacred and inviolable rights of private property. For no subject of England can be constrained to pay any aids or taxes, even for the defense of the realm or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament. And as this fundamental law has been shamefully evaded under many succeeding princes, by compulsive loans, and benevolences extorted without a real and voluntary consent, it was made an article in the petition of right 3 Car. I., that no man shall be compelled to yield any gift, loan, or benevolence, tax, or such like charge without common consent by act of parliament. And, lastly, by the statute 1 W. and M. st. 2, c. 2, it is declared, that levying money for or to the use of the crown, by pretense of prerogative, without grant of parliament, or for longer time, or in other manner, than the same is or shall be granted, is illegal.

In the three preceding articles we have taken a short view of the principal absolute rights which appertain to every Englishman. But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property.

Subordinate Rights.

These are: 1. The constitution, powers, and privileges of parliament; of which I shall treat at large in the ensuing chapter.

2. The limitation of the king's prerogative, by bounds so certain and notorious, that it is impossible he should either mistake or legally exceed them without the consent of the people.

3. A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein. The emphatical words of *magna charta*, spoken in the person of the king, who in judgment of law (says Sir Edward Coke) is ever present and repeating them in all his courts, are these: *nulli vendemus, nulli ne-*

gabimus, aut differemus rectum vel justitiam : "and therefore every subject," continues the same learned author, "for injury done to him *in bonis, in terris, vel persona*, by any other subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the course of the law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay."

Not only the substantial part, or judicial decisions, of the law, but also the formal part or method of proceeding, cannot be altered but by parliament; for, if once those outworks were demolished there would be an inlet to all manner of innovation in the body of the law itself. The king, it is true, may erect new courts of justice; but then they must proceed according to the old established forms of the common law.

4. If there should happen any uncommon injury, or infringement of the rights before mentioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right, appertaining to every individual, namely the right of petitioning the king, or either house of parliament, for the redress of grievances. It is declared by the statute 1 W. and M. st. 2, c. 2, that the subject hath the right to petition; and that all commitments and prosecutions for such petitioning are illegal.

5. The fifth and last auxiliary right of the subject that I shall at present mention, is that of having arms for their defense, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute, 1 W. and M. st. 2, c. 2, and is indeed a public allowance, under due restrictions, of the natural right of resistance, and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.

And lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next, to the right of petitioning the king and parliament for redress of grievances; and, lastly, to the right of having and using arms for self-preservation and defense.

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Chapter II. OF THE PARLIAMENT.

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We are next to treat of the rights and duties of persons, as they are members of society, and stand in various relations to each other. These relations are either public or private; and we will first consider those that are public.

Public Relations.

The most universal public relation, by which men are connected together, is that of government; namely, as governors or governed; or in other words, as magistrate and people. Of magistrates, some also are *supreme*, in whom the sovereign power of the state resides; others are *subordinate*, deriving all their authority from the supreme magistrate, accountable to him for their conduct, and acting in an inferior secondary sphere.

In all tyrannical governments, the supreme magistracy, or the right of both *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he, as legislator, thinks proper to give himself. But, where the legislative and executive authority are in distinct hands, the former will take care not to intrust the latter with so large a power as may tend to the subversion of its own independence, and therewith of the liberty of the subject. With us, therefore, in England, this supreme power is divided into two branches; the one legislative, to wit, the parliament, consisting of king, lords, and commons; the other executive, consisting of the king alone. It will be the business of this chapter to consider the British parliament, in which the legislative power, and (of course) the supreme and absolute authority of the state, is vested by our constitution.

The Origin of Parliament.

The original or first institution of parliament is one of those matters which lie so far hidden in the dark ages of antiquity, that the tracing of it out is a thing equally difficult and uncertain.

The author proceeds to seek out the original and first institution of parliament. He finds in the earliest periods a general council, which he states has been in England held immemorially under various names. Instances of its meeting are shown in the reigns of Ina, Offa, Ethelbert, and Alfred, succeeding Saxon and Danish monarchs, and the first princes of the Norman line.

Hence it indisputably appears, that parliaments or general councils, are coeval with the kingdom itself. How those parliaments were constituted and composed, is another question, which has been matter of great dispute among our learned antiquaries; and, particularly, whether the commons were summoned at all; or, if summoned, at what period they began to form a distinct assembly. But it is not my intention here to enter into controversies of this sort. I hold it sufficient that it is generally agreed, that in the main the constitution of parliament, as it now stands, was marked out so long ago as the seventeenth year of king John, A. D. 1215, in the great charter granted by that prince; wherein he promises to summon all archbishops, bishops, abbots, earls, and greater barons, personally; and all other tenants in chief under the crown, by the sheriff and bailiffs; to meet at a certain place, with forty days' notice, to assess aids and scutages when necessary. And this constitution has subsisted, in fact, at least from the year 1266, 49 Hen. III.: there being still extant writs of that date, to summon knights, citizens and burgesses to parliament. I proceed, therefore, to inquire wherein consists this constitution of parliament, as it now stands, and has stood for the space of at least five hundred years. And in the prosecution of this inquiry, I shall consider, first, the manner and time of its assembling; secondly, its constituent parts; thirdly, the laws and customs relating to parliament, considered as one aggregate body; fourthly and fifthly, the laws and customs relating to each house, separately and distinctly taken; sixthly, the methods of proceeding, and of making statutes, in both houses; and lastly, the manner of the parliament's adjournment, prorogation, and dissolution.

How Assembled.

I. As to the manner and time of assembling. The parliament is regularly to be summoned by the king's writ or letter, issued out of chancery by advice of the privy council, at least forty days before it begins to sit. It is a branch of the royal prerogative, that no parliament can be convened by its own authority, or by the authority of any, except the king alone.

Its Parts.

II. The constituent parts of a parliament are the next objects of our inquiry. And these are, the king's majesty, sitting there in his royal political capacity, and the three estates of the realm: the lords spiritual, the lords temporal (who sit, together with the king, in one house), and the commons, who sit by themselves in another. And the king and these three estates, together, form the great corporation or body politic of the kingdom of which the king is said to be *caput, principium et finis*. For upon their coming together the king meets them, either in person or by representation, without

which there can be no beginning of a parliament; and he also has alone the power of dissolving them.

It is highly necessary for preserving the balance of the constitution that the executive power should be a branch, though not the whole, of the legislative. The total union of them would be productive of tyranny; the total disjunction of them, for the present, would in the end produce the same effects, by causing that union against which it seems to provide. The legislative would soon become tyrannical, by making continual encroachments, and gradually assuming to itself the rights of the executive power. To hinder, therefore, any such encroachments, the king is himself a part of the parliament; and as this is the reason of his being so, very properly, therefore, the share of legislation, which the constitution has placed in the crown, consists in the power of *rejecting* rather than *resolving*,—this being sufficient to answer the end proposed. And herein indeed consists the true excellence of the English government, that all the parts of it form a mutual check upon each other. In the legislature, the people are a check upon the nobility, and the nobility a check upon the people, by the mutual privilege of rejecting what the other has resolved; while the king is a check upon both, which preserves the executive power from encroachments. And this very executive power is again checked and kept within due bounds by the two houses, through the privilege they have of inquiring into, impeaching, and punishing the conduct (not indeed of the king, which would destroy his constitutional independence, but, which is more beneficial to the public) of his evil and pernicious counsellors.

Let us now consider these constituent parts of the sovereign power, or parliament, each in a separate view. The king's majesty will be the subject of the next, and many subsequent chapters, to which we must at present refer.

The Lords Spiritual.

The next in order are the spiritual lords. These consist of two archbishops and twenty-four bishops. All these hold, or are supposed to hold, certain ancient baronies under the king. But though these lords spiritual are, in the eye of the law, a distinct estate from the lords temporal, and are so distinguished in most of our acts of parliament, yet in practice they are usually blended together under the one name of *the lords*; they intermix in their votes; and the majority of such intermixture binds both estates. And from this want of a separate assembly and separate negative of the prelates, some writers have argued very cogently, that the lords temporal and spiritual are now, in reality, only one estate, which is unquestionably true in every effectual sense, though the ancient distinction between them still nominally continues.

The Lords Temporal.

The lords temporal consist of all the peers of the realm (the bishops not being in strictness held to be such, but merely lords of parliament), by whatever title of nobility distinguished, dukes, marquesses, earls, viscounts, or barons. Some of these sit by descent, as do all ancient peers; some by creation, as do all new-made ones; others, since the union with Scotland, by election, which is the case of the sixteen peers who represent the body of the Scots nobility. Their number is indefinite, and may be increased at will by the power of the crown.

The author says: The distinction of rank is necessary in a well governed state. 1. To reward persons for eminent services in a manner not burdensome to the people. 2. To excite ambition and emulation in others. 3. To act as a barrier against the crown and against the people. 4. To create and preserve the gradual scale of dignity from peasant to prince necessary to the stability of the government.

The Commons.

The commons consist of all such men of property in the kingdom as have not seats in the house of lords; every one of whom has a voice in parliament, either personally, or by his representatives. In a free state every man, who is supposed a free agent, ought to be in some measure his own governor; and therefore a branch at least of the legislative power should reside in the whole body of the people. In so large a state as ours, it is very wisely contrived that the people should do that by their representatives, which it is impracticable to perform in person; representatives, chosen by a number of minute and separate districts, wherein all the voters are, or easily may be distinguished. The counties are therefore represented by knights, elected by the proprietors of land; the cities and boroughs are represented by citizens and burgesses, chosen by the mercantile part, or supposed trading interest of the nation.

These are the constituent parts of a parliament; the king, the lords spiritual and temporal, and the commons. Parts, of which each is so necessary, that the consent of all three is required to make any new law that shall bind the subject. Whatever is enacted for law by one, or by two only, of the three, is no statute; and to it no regard is due, unless in matters relating to their own privileges.

Laws and Customs of Parliament.

III. We are next to examine the laws and customs relating to parliament, thus mixed together, and considered as one aggregate body.

The power and jurisdiction of parliament, says Sir Edward Coke, is so transcendent and absolute that it cannot be confined,

either for causes or persons, within any bounds. It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new-model the succession to the crown: as was done in the reign of Henry VIII. and William III. It can alter the established religion of the land: as was done in a variety of instances, in the reigns of King Henry VIII. and his three children. It can change and create afresh even the constitution of the kingdom and of parliaments themselves; as was done by the act of union, and the several statutes for triennial and septennial elections. It can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament.

The whole of the law and custom of parliament has its original from this one maxim, "that whatever matter arises concerning either house of parliament ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere." Hence, for instance, the lords will not suffer the commons to interfere in settling the election of a peer of Scotland; the commons will not allow the lords to judge of the election of a burgess; nor will either house permit the subordinate courts of law to examine the merits of either case.

Privileges of Parliament.

The *privileges* of parliament are likewise very large and indefinite. Privilege of parliament was principally established, in order to protect its members, not only from being molested by their fellow subjects, but also more especially from being oppressed by the power of the crown. Some, however, of the more notorious privileges of the members of either house are, privilege of speech, of person, of their domestics, and of their lands and goods. As to the first, privilege of speech, it is declared by the statute 1 W. and M. st. 2, c. 2, as one of the liberties of the people, "that the freedom of speech and debates, and proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament." And this freedom of speech is particularly demanded of the king in person, by the speaker of the house of commons, at the opening of every new parliament. So likewise are the other privileges, of persons, servants, lands, and

goods, which are immunities as ancient as Edward the Confessor. This included formerly not only privilege from illegal violence, but also from legal arrests, and seizures by process from the courts of law. And still, to assault by violence a member of either house, or his menial servant, is a high contempt of parliament, and there punished with the utmost severity. Neither can any member of either house be arrested and taken into custody, unless for some indictable offense, without a breach of the privilege of parliament.

But all other privileges which derogate from the common law in matters of civil right are now at an end, save only as to the freedom of the member's person, which in a peer (by the privilege of peerage) is forever sacred and inviolable, and in a commoner (by the privilege of parliament) for forty days after every prorogation and forty days before the next appointed meeting, which is now in effect as long as the parliament subsists, it seldom being prorogued for more than fourscore days at a time. All other privileges which obstruct the ordinary course of justice are now totally abolished by statute 10 George III. c. 50, which enacts that any suit may at any time be brought against any peer or member of parliament, their servants, or any other person entitled to privilege of parliament, which shall not be impeached or delayed by pretense of any such privilege, except that the person of a member of the house of commons shall not thereby be subjected to any arrest or imprisonment.

The only way by which courts of justice could anciently take cognizance of privilege of parliament was by writ of privilege, in the nature of a *supersedeas*, to deliver the party out of custody when arrested in a civil suit. It is to be observed, that there is no precedent of any such writ of privilege, but only in civil suits. And therefore the claim of privilege hath been usually guarded with an exception as to the case of indictable crimes; or as it has been frequently expressed, of treason, felony, and breach (or surety) of the peace. Whereby it seems to have been understood that no privilege was allowable to the members, their families or servants, in any *crime* whatsoever, for all crimes are treated by the law as being *contra pacem domini regis*.

Laws and Customs of House of Lords.

IV. We will next proceed to the laws and customs relating to the house of lords in particular.

One very ancient privilege is that declared by the charter of the forest, confirmed in parliament 9 Hen. III.; viz., that every lord spiritual or temporal summoned to parliament, and passing through the king's forests, may, both in going and returning, kill one or two of the king's deer without warrant; in view of the forester if he be present, or in blowing a horn if he be absent; that he may not seem to take the king's venison by stealth.

In the next place they have a right to be attended, and constantly are, by the judges of the court of King's Bench and Common Pleas, and such of the barons of the Exchequer as are of the degree of the coif, or have been made serjeants at law; as likewise by the king's learned counsel, being serjeants, and by the masters of the court of chancery; for their advice in point of law, and for the greater dignity of their proceedings. The secretaries of state, with the attorney and solicitor general, were also used to attend the house of peers, and have to this day (together with the judges, etc.) their regular writs of summons issued out at the beginning of every parliament, *ad tractandum et consilium impendendum*, though not *ad consentiendum*; but, whenever of late years they have been members of the house of commons, their attendance here hath fallen into disuse.

Another privilege is, that every peer, by license obtained from the king, may make another lord of parliament his proxy, to vote for him in his absence. A privilege which a member of the other house can by no means have, as he is himself but a proxy for a multitude of other people.

Each peer has also a right, by leave of the house, when a vote passes contrary to his sentiments, to enter his dissent on the journals of the house, with the reasons for such dissent; which is usually styled his protest.

All bills likewise, that may in their consequences any way affect the right of the peerage, are by the custom of parliament to have their first rise and beginning in the house of peers, and to suffer no changes or amendments in the house of commons.

There is also one statute peculiarly relative to the house of lords; 6 Anne, c. 23, which regulates the election of the sixteen representative peers of North Britain, in consequence of the twenty-second and twenty-third articles of the union; and for that purpose prescribes the oaths, etc., to be taken by the electors; directs the mode of balloting; prohibits the peers electing from being attended in an unusual manner; and expressly provides that no other matter shall be treated of in that assembly, save only the election, on pain of incurring a *praemunire*.

Peculiar Laws and Customs of Commons.

V. The peculiar laws and customs of the house of commons relate principally to the raising of taxes, and the election of members to serve in parliament.

First, with regard to taxes: it is the ancient indisputable privilege and right of the house of commons, that all grants of subsidies or parliamentary aids do begin in their house, and are first be-

stowed by them; although their grants are not effectual to all intents and purposes, until they have the assent of the other two branches of the legislature.

The general reason given for this exclusive privilege is that the supplies are raised from the people. This reason is not the true reason, says Blackstone. It is this: It would be dangerous for this power to be placed in the hands of the lords, being a permanent, hereditary body erected by the king, and so liable to be influenced by him.

It would therefore be extremely dangerous to give the lords any power of framing new taxes for the subject; it is sufficient that they have a power of rejecting, if they think the commons too lavish or improvident in their grants. But so reasonably jealous are the commons of this valuable privilege that herein they will not suffer the other house to exert any power but that of rejecting; they will not permit the least alteration or amendment to be made by the lords to the mode of taxing the people by a money bill; under which appellation are included all bills, by which money is directed to be raised upon the subject, for any purpose or in any shape whatsoever; either for the exigencies of government, and collected from the kingdom in general, as the land tax; or for private benefit, and collected in any particular district, as by turnpikes, parish rates, and the like.

Regarding Elections.

Next, with regard to the election of knights, citizens and burgesses; we may observe that herein consists the exercise of the democratical part of our constitution; for in a democracy there can be no exercise of sovereignty but by suffrage, which is the declaration of the people's will.

In England, where the people do not debate in a collective body, but by representation, the exercise of this sovereignty consists in the choice of representatives. The laws have therefore very strictly guarded against usurpation or abuse of this power by many salutary provisions; which may be reduced to these three points: 1. The qualifications of the electors. 2. The qualifications of the elected. 3. The proceedings at elections.

The following is a general outline of the discussion of these divisions:

- | | | | | |
|--|--|--|---|---|
| <p>I As to qualifications of the electors</p> | <p>1. For electors of knights of the shire</p> | <p>}</p> | 1. Shall have a freehold to value of 40 shillings by the year within the county. | |
| | | | 2. Must be twenty-one years of age or over. | |
| | | | 3. No person convicted of perjury or subornation of perjury may vote. | |
| | | | 4. No person to whom a freehold is granted fraudulently to qualify him to vote, shall vote. | |
| | | | 5. Must have been in possession of freehold twelve months, except in certain cases. | |
| | | | 6. Requires registration in certain cases. | |
| | | | 7. As to mortgaged estates. | |
| | | | 8. One person only may vote for any one house or tenement. | |
| | | | 9. The estate must have been assessed to some land tax. | |
| | | | 10. No tenant by copy of court rolls shall vote as freeholder. | |
| | <p>2. For electors of citizens and burgesses</p> | <p>}</p> | 1. The ancient customs of summoning representatives from the trading towns. | |
| | | | | 2. The granting to the University of the permanent right to send representatives. |
| | | | | 3. The right of election in the towns varies |
| | | | | 4. No freeman unless admitted twelve months to his freedom may vote. |
| <p>II. As to qualifications of persons to be elected members of the house of commons</p> | <p>}</p> | 1. Must not be aliens or minors. | | |
| | | 2. Must not be any of the twelve judges, nor the clergy, nor persons attainted of treason or felony. | | |
| | | 3. Nor mayors nor bailiffs of boroughs, nor sheriffs of counties. | | |
| | | 4. Must be inhabitants of places for which chosen. | | |
| | | 5. Excludes certain classes of officials. | | |
| | | 6. Crown pensioners not eligible. | | |
| | | 7. Accepting a crown office with certain exceptions, renders a member's seat vacant. | | |
| | | 8. All knights of the shire shall be actual knights, or have estates sufficient to be knights. | | |
| | | 9. Requires certain property holdings. | | |

The third point is regarding elections and the method of proceeding therein, and is treated minutely and at length.

Method of Making Laws.

VI. I proceed now to the method of making laws, which is much the same in both houses; and I shall touch it very briefly, beginning in the house of commons. But first I must premise, that for dispatch of business each house of parliament has its speaker. The speaker of the house of lords, whose office it is to preside there, and manage the formality of business, is the lord chancellor or keeper of the king's great seal, or any other appointed by the king's commission; and, if none be so appointed, the house of lords (it is said) may elect. The speaker of the house of commons is chosen by the house: but must be approved by the king. And herein the usage of the two houses differ, that the speaker of the house of commons cannot give his opinion or argue any question in the house; but the speaker of the house of lords, if a lord of parliament, may. In each house the act of the majority binds the whole; and this majority is declared by votes openly and publicly given, not as at Venice, and many other senatorial assemblies, privately or by ballot.

To bring a bill into the house, if the relief sought by it is of a private nature, it is first necessary to prefer a petition; which must be presented by a member, and usually sets forth the grievance desired to be remedied. This petition (when founded on facts that may be in their nature disputed) is referred to a committee of members, who examine the matter alleged, and accordingly report it to the house; and then (or otherwise, upon the mere petition) leave is given to bring in the bill. In public matters the bill is brought in upon motion made to the house, without any petition at all.

The persons directed to bring in the bill present it in a competent time to the house, drawn out on paper, with a multitude of blanks, or void spaces where anything occurs that is dubious or necessary to be settled by the parliament itself (such, especially, as the precise date of times, the nature and quantity of penalties, or of any sums of money to be raised), being indeed only the skeleton of the bill. In the house of lords, if the bill begins there, it is (when of a private nature) referred to two of the judges, to examine and report the state of the facts alleged, to see that all necessary parties consent, and to settle all points of technical propriety. This is read a first time, and at a convenient distance a second time; and, after each reading, the speaker opens to the house the substance of the bill, and puts the question whether it shall proceed any further. The introduction of the bill may be originally opposed, as the bill itself may at either of the readings, and, if the opposition succeeds, the bill must be dropped for that session; as it must also if opposed with success in any of the subsequent stages.

After the second reading it is committed, that is, referred to

a committee; which is either selected by the house in matters of small importance, or else, upon a bill of consequence, the house resolves itself into a committee of the whole house. A committee of the whole house is composed of every member; and, to form it the speaker quits the chair (another member being appointed chairman), and may sit and debate as a private member. In these committees the bill is debated clause by clause, amendments made, the blanks filled up, and sometimes the bill entirely new-modelled. After it has gone through the committee, the chairman reports it to the house with such amendments as the committee have made; and then the house reconsiders the whole bill again, and the question is repeatedly put upon every clause and amendment. When the house hath agreed or disagreed to the amendments of the committee, and sometimes added new amendments of its own, the bill is then ordered to be engrossed, or written in a strong gross hand, on one or more long rolls (or presses) of parchment sewed together. When this is finished it is read a third time, and amendments are sometimes then made to it; and if a new clause be added, it is done by tacking a separate piece of parchment on the bill, which is called a rider. The speaker then again opens the contents; and, holding it up in his hands, puts the question whether the bill shall pass. If this is agreed to, the title to it is then settled, which used to be a general one for all the acts passed in the session, till in the first year of Henry III., distinct titles were introduced for each chapter. After this, one of the members is directed to carry it to the lords and desire their concurrence; who, attended by several more, carries it to the bar of the house of peers, and then delivers it to their speaker, who comes down from his wool-sack to receive it.

It there passes through the same forms as in the other house (except engrossing, which is already done), and, if rejected, no more notice is taken, but it passes *sub silentio*, to prevent unbecoming altercations. But if it is agreed to, the lords send a message by two masters in chancery (or upon matter of high dignity or importance, by two of the judges), that they have agreed to the same; and the bill remains with the lords, if they have made no amendment to it. But, if any amendments are made, such amendments are sent down with the bill to receive the concurrence of the commons. If the commons disagree to the amendments a conference usually follows between members deputed from each house, who, for the most part, settle and adjust the difference; but if both houses remain inflexible, the bill is dropped. If the commons agree to the amendments, the bill is sent back to the lords by one of the members, with a message to acquaint them therewith. The same forms are observed, *mutatis mutandis*, when the bill begins in the house of lords. But, when an act of grace or pardon

is passed, it is first signed by his majesty, and then read once only in each of the houses, without any new engrossing or amendment. And when both houses have done with any bill, it always is deposited in the house of peers, to wait the royal assent; except in the case of a bill of supply, which, after receiving the concurrence of the lords is sent back to the house of commons. And, when the bill has received the royal assent in either of these ways, it is then, and not before, a statute or act of parliament.

The Royal assent may be given

1. In person, by the words *Le roy le veut*. If to a private bill, *soit fait comme il est desire*, or if refused, by the words *Le roy s'avisera*.
2. By letters patent under the great seal, signed with his hand and notified, in his absence, to both houses assembled together.

This statute or act is placed among the records of the kingdom; there needing no formal promulgation to give it the force of the law, as was necessary by the civil law with regard to the emperor's edicts; because every man in England is, in judgment of law, party to the making of an act of parliament, being present thereat by his representatives. However, a copy thereof is usually printed at the king's press, for the information of the whole land.

An act of parliament, thus made, is the exercise of the highest authority that this kingdom acknowledges upon earth. It hath power to bind every subject in the land, and the dominions thereto belonging; nay even the king himself, if particularly named therein. And it cannot be altered, amended, dispensed with, suspended, or repealed, but in the same forms, and by the same authority of parliament; for it is a maxim in law, that it requires the same strength to dissolve, as to create an obligation.

How Adjourned, Prorogued, etc.

VII. There remains only, in the seventh and last place, to add a word or two concerning the manner in which parliaments may be adjourned, prorogued, or dissolved.

An adjournment is no more than a continuance of the session from one day to another, as the word itself signifies; and this is done by the authority of each house separately every day; and sometimes for a fortnight or a month together, as at Christmas or Easter, or upon other particular occasions. But the adjournment of one house is no adjournment of the other.

A prorogation is the continuance of the parliament from one session to another, as an adjournment is a continuation of the session from day to day. This is done by the royal authority, expressed either by the lord chancellor in his majesty's presence or by commission from the crown, or frequently by proclamation. Both houses are necessarily prorogued at the same time, it not being a prorogation of the house of lords or commons, but of parliament. The session is never understood to be at an end until a prorogation; though, unless some act be passed or some judgment given in parliament it is in truth no session at all.

- Parliament may be dissolved
- 1. By the king's will expressed in person or by representation.
 - 2. By demise of the crown, until the reign of Anne, when it was enacted that Parliament shall continue for six months after the death of the king, unless sooner prorogued or dissolved by the successor.
 - 3. By length of time. By a statute of the reign of George the First the limit of life of a parliament is seven years, unless sooner dissolved.

Chapter III. OF THE KING AND HIS TITLE.

190-218.

This chapter is mainly historical, tracing the descent of the crown.

- Six Points regarding the King's rights and authority treated in this and succeeding chapters
- 1. His Title
 - 1. It is hereditary.
 - 2. It is hereditary in a manner peculiar to itself.
 - 3. It is subject to limitation by parliament.
 - 4. It is hereditary in the new proprietor.
 - 2. Family (chapter IV).
 - 3. Councils (chapter V).
 - 4. Duties (chapter VI).
 - 5. Prerogatives (chapter VII)
 - 6. Revenues (chapter VIII).

Chapter IV. OF THE KING'S ROYAL FAMILY.

218-227.

This chapter treats of the Queen and her prerogatives, revenues, perquisites, the Queen Dowager, Prince of Wales, and other kindred of the King.

Chapter V. OF THE COUNCILS BELONGING TO THE KING.

227-233.

- Four Councils enumerated and described
- 1. Parliament.
 - 2. Peers.
 - 3. Judges of the Law Courts.
 - 4. Privy Council.

The main body of the chapter is devoted to the qualifications, duties, privileges, manner of dissolution of the Privy Council.

Chapter VI. OF THE KING'S DUTY.

233-237.

The substance of this chapter may be stated as follows:

- | | | |
|-------------------|---|--|
| The King's duties | } | <ol style="list-style-type: none"> 1. To govern according to law. 2. To execute judgment in mercy. 3. To maintain the established religion. |
|-------------------|---|--|

SYNOPSIS OF CHAPTER VII.

The King's Prerogatives	}	1. Direct	}	<ol style="list-style-type: none"> 1. As to the King's Royal character 	}	<ol style="list-style-type: none"> 1. Sovereignty. 2. Perfection. 3. Perpetuity.
			}	<ol style="list-style-type: none"> 2. As to his Royal Authority 	}	<ol style="list-style-type: none"> 1. Sending ambassadors 2. Making treaties. 3. Making war and peace. 4. Rejecting acts of the Parliament. 5. Head of the military forces. 6. Appointing Ports and Havens. 7. Erection of Light-houses, etc. 8. Restraints of Subjects from leaving the Kingdom, etc. 9. The fountain of Justice. 10. The fountain of honor and privilege. 11. The Arbiter of Commerce. 12. Head of the Church.
			}	<ol style="list-style-type: none"> 3. As to his Royal income. 	}	Chapter VIII.
		2. Incidental.				

Chapter VII. OF THE KING'S PREROGATIVE.

237-281.

By the word prerogative we usually understand that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity.

Kinds of Prerogatives.

Prerogatives are either *direct* or *incidental*. The *direct* are such positive substantial parts of the royal character and authority,

as are rooted in and spring from the king's political person considered merely by itself, without reference to any other extrinsic circumstance; as the right of sending ambassadors, of creating peers, and of making war or peace. But such prerogatives as are *incidental* bear always a relation to something else, distinct from the king's person; and are, indeed, only exceptions in favor of the crown, to those general rules that are established for the rest of the community; such as, that no costs shall be recovered against the king; that the king can never be a joint-tenant; and that his debt shall be preferred before a debt to any of his subjects.

Direct Prerogatives.

These substantiative or direct prerogatives may again be divided into three kinds: being such as regard, first, the king's royal *character*; secondly, his royal *authority*; and, lastly, his royal *income*.

In the present chapter we shall only consider the two first of these divisions, which relate to the king's political *character* and *authority*; or, in other words, his *dignity* and regal *power*; to which last the name of prerogative is frequently narrowed and confined.

The Royal Dignity.

First, then, of the royal dignity. Under every monarchical establishment, it is necessary to distinguish the prince from his subjects, not only by the outward pomp and decorations of majesty, but also by ascribing to him certain qualities, as inherent in his royal capacity, distinct from and superior to those of any other individual in the nation.

Sovereignty.

I. And, first, the law ascribes to the king the attribute of *sovereignty* or pre-eminence.

Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power: authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it. Hence it is likewise, that by law the person of the king is sacred, even though the measures pursued in his reign be completely tyrannical and arbitrary; for no jurisdiction upon earth has power to try him in a criminal way; much less to condemn him to punishment. If any foreign jurisdiction had this power, as was formerly claimed by the pope, the independence of the kingdom would be no more; and if such a power were vested in any domestic tribunal, there would soon be an end of the constitution, by destroying the free agency of one of the constituent parts of the sovereign legislative power.

Are then, it may be asked, the subjects of England totally destitute of remedy, in case the crown should invade their rights, either by private injuries, or public oppressions? To this we may answer, that the law has provided a remedy in both cases.

And, first, as to private injuries: if any person has, in point of property a just demand upon the king, he must petition him in his court of chancery, where his chancellor will administer right as a matter of grace, though not upon compulsion.

Next, as to cases of ordinary public oppression, where the vitals of the constitution are not attacked, the law hath also assigned a remedy. For, as the king cannot misuse his power, without the advice of evil counsellors, and the assistance of wicked ministers, these men may be examined and punished. The constitution has therefore provided, by means of indictments and parliamentary impeachments, that no man shall dare to assist the crown in contradiction to the laws of the land. But it is at the same time a maxim in those laws, that the king himself can do no wrong; since it would be a great weakness and absurdity in any system of positive law to define any possible wrong without any possible redress.

For, as to such public oppressions as tend to dissolve the constitution and subvert the fundamentals of government, they are cases which the law will not, out of decency, suppose; being incapable of distrusting those whom it has invested with any part of the supreme power; since such distrust would render the exercise of that power precarious and impracticable. For, wherever the law expresses its distrust of abuse of power, it always vests a superior coercive authority in some other hand to correct it; the very notion of which destroys the idea of sovereignty. If therefore for example, the two houses of parliament, or either of them, had avowedly a right to animadvert on the king, or each other, or if the king had a right to animadvert on either of the houses, that branch of the legislature, so subject to animadversion, would instantly cease to be part of the supreme power; the balance of the constitution would be overturned, and that branch or branches, in which this jurisdiction resided, would be completely sovereign. The supposition of *law* therefore is, that neither the king nor either house of parliament, collectively taken, is capable of doing any wrong: since in such cases the law feels itself incapable of furnishing any adequate remedy. For which reason all oppression which may happen to spring from any branch of the sovereign power, must necessarily be out of the reach of any *stated rule*, or *express legal provision*; but if ever they unfortunately happen, the prudence of the times must provide new remedies upon new emergencies.

Indeed, it is found by experience, that whenever the unconstitutional oppressions, even of the sovereign power, advance with

gigantic strides, and threaten desolation to a state, mankind will not be reasoned out of the feelings of humanity; nor will sacrifice their liberty by a scrupulous adherence to those political maxims which were originally established to preserve it. And, therefore, though the positive laws are silent, experience will furnish us with a very remarkable case wherein nature and reason prevailed. When King James the Second invaded the fundamental constitution of the realm, the convention declared an abdication, whereby the throne was rendered vacant, which induced a new settlement of the crown. And so far as the precedent leads, and no farther, we may now be allowed to lay down the *law* of redress against public oppression. If, therefore, any future prince should endeavor to subvert the constitution by breaking the original contract between king and people, should violate the fundamental laws, and should withdraw himself out of the kingdom; we are now authorized to declare that this conjunction of circumstances would amount to an abdication, and the throne would be thereby vacant. But it is not for us to say that anyone, or two, of these ingredients would amount to such a situation; for there our precedent would fail us. In these, therefore, or other circumstances, which a fertile imagination may furnish, since both law and history are silent, it becomes us to be silent too; leaving to future generations, whenever necessity and the safety of the whole shall require it, the exertion of those inherent, though latent, powers of society, which no climate, no time, no constitution, no contract can ever destroy or diminish.

Perfection.

II. Besides the attribute of sovereignty, the law also ascribes to the king, in his political capacity, absolute *perfection*. The king can do no wrong: which ancient and fundamental maxim is not to be understood, as if everything transacted by the government was of course just and lawful, but means only two things. First, that whatever is exceptionable in the conduct of public affairs, is not to be imputed to the king, nor is he answerable for it personally to his people; for this doctrine would totally destroy that constitutional independence of the crown, which is necessary for the balance of power in our free and active, and therefore compounded constitution. And, secondly, it means that the prerogative of the crown extends not to any injury; it is created for the benefit of the people, and therefore cannot be exerted to their prejudice.

The king, moreover, is not only incapable of *doing* wrong, but even of *thinking* wrong; he can never mean to do an improper thing: in him is no folly or weakness. And, therefore, if the crown should be induced to grant any franchise or privilege to a subject contrary to reason, or in any wise prejudicial to the commonwealth, or a private person, the law will not suppose the king

to have meant either an unwise or an injurious action, but declares that the king was deceived in his grant; and thereupon such grant is rendered void, merely upon the foundation of fraud and deception, either by or upon those agents whom the crown has thought proper to employ.

King's Laches, etc.

In further pursuance of this principle, the law also determines that in the king can be no negligence, or *laches*, and therefore no delay will bar his right. *Nullum tempus occurrit regi* has been the standing maxim upon all occasions; for the law intends that the king is always busied for the public good, and therefore has not leisure to assert his right within the times limited to subjects. In the king also can be no stain or corruption of blood; for, if the heir to the crown were attainted of treason or felony, and afterwards the crown should descend to him, this would purge the attainder, *ipso facto*. Neither can the king in judgment of law, as king, ever be a minor or under age; and therefore his royal grants and assents to acts of parliament are good, though he has not in his natural capacity attained the legal age of twenty-one. It has also been usually thought prudent, when the heir-apparent hath been very young, to appoint a protector, guardian, or regent, for a limited time: but the very necessity of such extraordinary provision is sufficient to demonstrate the truth of that maxim of the common law, that in the king is no minority; and therefore he hath no legal guardian.

Perpetuity.

III. A third attribute of the king's majesty is his *perpetuity*. The law ascribes to him in his political capacity an absolute immortality. The king never dies. Henry, Edward, or George may die; but the king survives them all. For immediately upon the decease of the reigning prince in his natural capacity, his kingship or imperial dignity, by act of law, without any *interregnum* or interval, is vested at once in his heir, who is *eo instanti*, king to all intents and purposes. And so tender is the law of supposing even a possibility of his death that his natural dissolution is generally called his *demise*; an expression which signifies merely a transfer of property; for as is observed in Plowden, when we say the demise of the crown, we mean only that, in consequence of the disunion of the king's natural body from his body politic, the kingdom is transferred or demised to his successor; and so the royal dignity remains perpetual.

Here follows a consideration of the executive branches of the royal prerogative, introduced by an argument for the absolute exercise of the king's prerogative. With regard to foreign concerns the king is the representative of his people. He has the power as such of sending ambassadors to foreign states and receiving ambassadors. The inquiry follows as to

how far the municipal laws of England intermeddle with or protect the rights of ambassadors.

It is the king's prerogative to make treaties, leagues and alliances, to make war and peace. This power is held in check by the parliamentary power of impeachment.

Marque and Reprisal.

As the delay of making war may sometimes be detrimental to individuals who have suffered by depredations from foreign potentates, our laws have in some respects armed the subject with powers to impel the prerogative, by directing the ministers of the crown to issue letters of marque and reprisal upon due demand: the prerogative of granting which is nearly related to, and plainly derived from, that other of making war; this being, indeed, only an incomplete state of hostilities, and generally ending in a formal declaration of war. These letters are grantable by the law of nations, whenever the subjects of one state are oppressed and injured by those of another, and justice is denied by that state to which the oppressor belongs. In this case letters of marque and reprisal (words used as synonymous, and signifying, the latter a taking in return; the former the passing the frontiers in order to such taking) may be obtained, in order to seize the bodies or goods of the subjects of the offending state, until satisfaction be made, wherever they happen to be found. And indeed this custom of reprisal seems dictated by nature herself.

Upon exactly the same reason stands the prerogative of granting safe conducts, without which, by the law of nations, no member of one society has a right to intrude into another.

In domestic affairs the king has many prerogatives. He is a constitutional part of the legislative power, and has the power of rejecting such provisions of parliament as he deems improper; is generalissimo of the military forces; has the power to appoint ports and havens; to erect beacons, light-houses, and sea-marks, to prohibit the exportation of arms, and to confine his subjects within the realm or to recall them from beyond the seas.

The Fountain of Justice.

IV. Another capacity, in which the king is considered in domestic affairs, is as the fountain of justice and general conservator of the peace of the kingdom. By the fountain of justice, the law does not mean the *author* or *original*, but only the *distributor*. Justice is not derived from the king, as from his *free gift*, but he is the steward of the public, to dispense it to whom it is *due*. He is not the spring, but the reservoir, from whence right and equity are conducted by a thousand channels to every individual. The original power of judicature, by the fundamental principles of society, is lodged in the society at large; but as it would be impracticable to render complete justice to every individual, by the people in their collective capacity, therefore every nation has com-

mitted that power to certain select magistrates, who with more ease and expedition can hear and determine complaints; and in England this authority has immemorially been exercised by the king or his substitutes. He, therefore, has alone the right of erecting courts of judicature; for, though the constitution of the kingdom hath intrusted him with the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust; it is consequently necessary that courts should be erected to assist him in executing this power; and equally necessary that, if erected they should be erected by his authority. And hence it is that all jurisdictions of courts are either mediately or immediately derived from the crown, their proceedings run generally in the king's name, they pass under his seal, and are executed by his officers.

It is probable, and almost certain, that in very early times, before our constitution arrived at its full perfection, our kings in person often heard and determined causes between party and party. But at present, by the long and uniform usage of many ages, our kings have delegated their whole judicial power to the judges of their several courts; which are the grand depositories of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain established rules, which the crown itself cannot now alter but by act of parliament. And in order to maintain both the dignity and independence of the judges in the superior courts, it is enacted by the statute 13 W. III. c. 2, that their commissions shall be made (not as formerly, *durante bene placito*, but *quamdiu bene se gesserint*) and their salaries ascertained and established; but that it may be lawful to remove them on the address of both houses of parliament. And now, by the noble improvements of that law, in statute of 1 George III. c. 23, enacted at the earnest recommendation of the king himself from the throne, the judges are continued in their offices during their good behavior, notwithstanding any demise of the crown (which was formerly held immediately to vacate their seats), and their full salaries are absolutely secured to them during the continuance of their commissions; his majesty having been pleased to declare, that "he looked upon the independence and uprightness of the judges as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honor of the crown."

In criminal proceedings, or prosecutions for offenses, it would still be a higher absurdity if the king personally sat in judgment; because in regard to these, he appears in another capacity; that of *prosecutor*. All offenses are either against the king's peace, or his crown and dignity; and are so laid in every indictment. For though in their consequences they generally seem (except in the

case of treason, and a very few others) to be rather offenses against the kingdom than the king, yet as the public, which is an invisible body, has delegated all its powers and rights, with regard to the execution of the laws, to one visible magistrate, all affronts to that power, and breaches of those rights, are immediately offenses against him to whom they are so delegated by the public. He is therefore the proper person to prosecute for all public offenses and breaches of the peace, being the person injured in the eye of the law.

In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown, consists one main preservative of the public liberty, which cannot subsist long in any state unless the administration of common justice be in some degree separated both from the legislative and also from the executive power.

The King's Legal Ubiquity.

A consequence of this prerogative is the legal *ubiquity* of the king. His majesty, in the eye of the law, is always present in all his courts, though he cannot personally distribute justice. And from this ubiquity it follows that the king can never be nonsuit; for a nonsuit is the desertion of a suit or action by the non-appearance of the plaintiff in court. For the same reason, also, in the forms of legal proceedings, the king is not said to appear *by his attorney* as other men do; for in contemplation of law he is always present in court.

The Issuing of Proclamations.

From the same original, of the king's being the fountain of justice, we may also deduce the prerogative of issuing proclamations, which is vested in the king alone. These proclamations have then a binding force, when (as Sir Edward Coke observes) they are grounded upon and enforce the laws of the realm. For, though the making of laws is entirely the work of a distinct part, the legislative branch, of the sovereign power, yet the manner, time, and circumstances of putting those laws in execution must frequently be left to the discretion of the executive magistrate. And therefore his constitutions or edicts concerning these points, which we call proclamations, are binding upon the subject, where they do not either contradict the old laws or tend to establish new ones; but only enforce the execution of such laws as are already in being, in such manner as the king shall judge necessary. Thus the established law is that the king may prohibit any of his subjects from leaving the realm; a proclamation therefore forbidding this in general for three weeks, by laying an embargo on all shipping in time of war, will be equally binding as an act of parliament, because founded upon a prior law.

Further, the king is the fountain of honor, office and privilege, and possesses the right of converting aliens into citizens, and of erecting corporations.

Arbiter of Commerce.

Another light, in which the laws of England consider the king with regard to domestic concerns, is as the arbiter of commerce. By commerce I at present mean domestic commerce only. The affairs of commerce are regulated by a law of their own called the law merchant, or *lex mercatoria*, which all nations agree in and take notice of. And in particular it is held to be a part of the laws of England, which decides the causes of merchants by the general rules which obtain in all commercial countries; and that often even in matters relating to domestic trade, as, for instance, with regard to the drawing, the acceptance, and the transfer of inland bills of exchange.

With us in England, the king's prerogative, so far as it relates to mere domestic commerce, will fall principally under the following articles:

First, the establishment of public marts or places of buying and selling, such as markets and fairs, with the tolls thereunto belonging. These can only be set up by virtue of the king's grant, or by long and immemorial usage and prescription, which presupposes such a grant. The limitation of these public resorts to such time and place as may be most convenient for the neighborhood, forms a part of economics, or domestic polity, which, considering the kingdom as a large family, and the king as the master of it, he clearly has a right to dispose and order as he pleases.

Secondly, the regulation of weights and measures. These, for the advantage of the public, ought to be universally the same throughout the kingdom, being the general criterions which reduce all things to the same or an equivalent value. But, as weight and measure are things in their nature arbitrary and uncertain, it is therefore expedient that they be reduced to some fixed rule or standard; which standard it is impossible to fix by any written law or oral proclamation; for no man can, by words only, give another an adequate idea of a foot-rule, or a pound-weight. It is therefore necessary to have recourse to some visible, palpable, material standard; by forming a comparison with which all weights and measures may be reduced to one uniform size; and the prerogative of fixing this standard our ancient law vested in the crown, as in Normandy it belonged to the duke.

Thirdly, as money is the medium of commerce, it is the king's prerogative, as the arbiter of domestic commerce, to give it authority or make it current.

Head of the Church.

The king is, lastly, considered by the laws of England as the head and supreme governor of the national church.

From this prerogative also, of being the head of the church, arises the king's right of nomination to vacant bishoprics, and certain other ecclesiastical preferments.

As head of the church, the king is likewise the *dernier resort* in all ecclesiastical causes; an appeal lying ultimately to him in chancery from the sentence of every ecclesiastical judge.

Chapter VIII.

OF THE KING'S REVENUE.

281-338.

This chapter treats in great detail of the revenue of the king. This revenue is either ordinary or extraordinary. The following are termed the ordinary:

1. The custody of the temporalities of bishops.
2. Corodies.
3. Tithes arising in extra parochial places.
4. The first fruits and tenths of all spiritual preferments in the kingdom.
5. The rents and profits of the crown demesne lands.
6. Profits of the military tenures.
7. Wine licenses.
8. Profits from forests.
9. Profits from ordinary courts of justice.
10. Rights of royal fish.
11. Shipwrecks.
12. Royal mines.
13. Treasure trove.
14. Waifs.
15. Estrays.
16. Forfeitures of lands and goods for offenses.
17. Escheats of lands.
18. Custody of idiots and lunatics.

These sources of ordinary revenue formerly so large have been largely cut off or circumscribed, and methods to supply the deficiency in the king's revenue subsequently grew up and are known as the king's extraordinary revenue. These are called aids, subsidies or supplies, and are granted by parliament.

Taxes are either annual or perpetual.

The usual annual taxes are those upon land and malt. The perpetual taxes are the customs, the excise duty, duty on salt, postoffice duties, stamp duties, duties upon houses and windows, tax upon servants, licenses upon coaches and chairs, duties upon offices and pensions.

Wrecks.

Another maritime revenue is that of shipwrecks. Wreck by the ancient common law was where any ship was lost at sea, and the goods or cargo were thrown upon the land; in which case the goods so wrecked were adjudged to belong to the king; for it was held that by the loss of the ship all property was gone out of the original owner. But this was undoubtedly adding sorrow to sor-

row, and was consonant neither to reason nor humanity. The statute of Westminster, the first, enacts, that if a man, a dog, or a cat escape alive the vessel shall not be judged a wreck. These animals, as in Bracton, are only put for examples; for it is now held that not only if any live thing escape, but if proof can be made of the property of any of the goods or lading which come to shore, they shall not be forfeited as wreck. The statute further ordains that the sheriff of the county shall be bound to keep the goods a year and a day, that if any man can prove a property in them, either in his own right or by right of representation, they shall be restored to him without delay; but if no such property be proved within that time, they then shall be the king's. If the goods are of a perishable nature, the sheriff may sell them, and the money shall be liable in their stead. This revenue of wrecks is frequently granted out to lords of manors as a royal franchise; and if any one be thus entitled to wrecks in his own land, and the king's goods are wrecked thereon, the king may claim them any time, even after the year and day.

Jetsam, Flotsam, Ligan, Salvage.

It is to be observed, that in order to constitute a legal *wreck* the goods must come to land. If they continue at sea, the law distinguishes them by the barbarous and uncouth appellations of *jetsam*, *flotsam* and *ligan*. *Jetsam* is where goods are cast into the sea, and there sink and remain under water; *flotsam* is where they continue swimming on the surface of the waves; *ligan* is where they are sunk in the sea, but tied to a cork or buoy in order to be found again. These are also the king's, if no owner appears to claim them; but if any owner appears he is entitled to recover the possession. For, even if they be cast overboard without any mark or buoy, in order to lighten the ship, the owner is not by this act of necessity construed to have renounced his property; much less can things *ligan* be supposed to be abandoned, since the owner has done all in his power to assert and retain his property. These three are therefore accounted so far a distinct thing from the former, that by the king's grant to a man of wrecks, things *jetsam*, *flotsam*, and *ligan* will not pass.

By the statute 27 Edw. III., c. 13, if any ship be lost on the shore, and the goods come to land (which cannot, says the statute, be called wreck), they shall be presently delivered to the merchants, paying only a reasonable reward to those that saved and preserved them, which is entitled *salvage*. And by the common law, if any persons (other than the sheriff) take any goods so cast on shore, which are not legal wreck, the owners might have a commission to inquire and find them out, and compel them to make restitution.

Treasure Trove.

To the same original (the king's prerogative of coinage) may in part be referred the revenue of treasure trove (derived from the French word *trover*, to find, which is where any money or coin gold, silver, plate, or bullion is found hidden in the earth, or other private place, the owner thereof being unknown; in which case the treasure belongs to the king; but if he that hid it be known, or afterwards found out, the owner, and not the king, is entitled to it. Also if it be found in the sea, or upon the earth, it doth not belong to the king, but the finder, if no owner appears. So that it seems it is the *hiding*, and not the *abandoning* of it, that gives the king a property.

Waifs.

Waifs, *bona waviata*, are goods stolen, and waived or thrown away by the thief in his flight, for fear of being apprehended. These are given to the king by the law, as a punishment upon the owner for not himself pursuing the felon and taking away his goods from him. And therefore if the party robbed do his diligence immediately to follow and apprehend the thief (which is called making fresh *suit*), or do convict him afterwards, or procure evidence to convict him, he shall have his goods again. Waived goods do also not belong to the king till seized by somebody for his use; for if the party robbed can seize them first, though at the distance of twenty years, the king shall never have them. If the goods are hid by the thief, or left anywhere by him, so that he had them not about him when he fled, and therefore did not throw them away in his flight; these also are not *bona waviata*, but the owner may have them again when he pleases. The goods of a foreign merchant, though stolen and thrown away in flight, shall never be waifs; the reason whereof may be, not only for the encouragement of trade, but also because there is no wilful default in the foreign merchant's not pursuing the thief, he being generally a stranger to our laws, our usages, and our language.

Estrays.

Estrays are such valuable animals as are found wandering in any manor or lordship, and no man knoweth the owner of them; in which case the law gives them to the king, as the general owner and lord paramount of the soil, in recompense for the damage which they may have done therein; and they now most commonly belong to the lord of the manor by special grant from the crown. But, in order to vest an absolute property in the king, or his grantees, they must be proclaimed in the church and two market towns next adjoining to the place where they are found; and then, if no man claims them, after proclamation and a year and a day passed, they belong to the king or his substitute without redemption; ever

though the owner were a minor, or under any other legal incapacity. The king or lord has no property till the year and day passed; for if a lord keepeth an estray three-quarters of a year, and within the year it strayeth again, and another lord getteth it, the first lord cannot take it again. Any beasts may be estrays, that are by nature tame or reclaimable, and in which there is a valuable property, as sheep, oxen, swine, and horses, which we in general call cattle, for animals upon which the law sets no value, as a dog or cat, and animals *ferae naturae*, as a bear or wolf, cannot be considered as estrays. So swans may be estrays; but not any other fowl; whence they are said to be royal fowls. The reason of which distinction seems to be, that cattle and swans being of a reclaimable nature, the owner's property in them is not lost merely by their temporary escape, and they also, from their intrinsic value, are a sufficient pledge for the expense of the lord of the franchise in keeping them the year and day. For he that takes an estray is bound, so long as he keeps it, to find it in provisions and preserve it from damage; and may not use it by way of labour, but is liable to an action for so doing. Yet he may milk a cow, or the like; for that tends to the preservation, and is for the benefit, of the animal.

Escheats.

Another branch of the king's ordinary revenue arises from escheats of land, which happen upon the defect of heirs to succeed to the inheritance, whereupon they in general revert to and vest in the king, who is esteemed in the eye of the law the original proprietor of all the lands in the kingdom.

Custody of Idiots.

I proceed therefore to the eighteenth and last branch of the king's ordinary revenue; which consists in the custody of idiots, from whence we shall be naturally led to consider also the custody of lunatics.

An idiot, or natural fool, is one that hath had no understanding from his nativity; and therefore is by law presumed never likely to attain any. For which reason the custody of him and of his lands was formerly vested in the lord of the fee (and therefore still, by special custom, in some manors the lord shall have the ordering of idiot and lunatic copyholders); but by reason of the manifold abuses of this power by subjects, it was at last provided by common consent that it should be given to the king, as the general conservator of his people; in order to prevent the idiot from wasting his estate, and reducing himself and his heirs to poverty and distress. This fiscal prerogative of the king is declared in parliament by statute 17 Edw. II., c. 9, which directs (in affirmance of the common law) that the king shall have ward of the lands of natural fools, taking the profits without waste or destruction, and shall find

them necessaries; and after the death of such idiots he shall render the estate to the heirs; in order to prevent such idiots from alienating their lands, and their heirs from being disinherited.

By the old common law there is a writ *de idiota inquirendo*, to inquire whether a man be an idiot or not; which must be tried by a jury of twelve men.

A man is not an idiot if he hath any glimmering of reason, so that he can tell his parents, his age or the like common matters. But a man who is born deaf, dumb, and blind is looked upon by the law as in the same state with an idiot: he being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas.

A lunatic or *non compos mentis*, is one who hath had understanding, but by disease, grief, or other accident, hath lost the use of his reason. A lunatic is indeed properly one that hath lucid intervals; sometimes enjoying his senses, and sometimes not, and that frequently depending upon the change of the moon. But under the general name of *non compos mentis* (which Sir Edward Coke says is the most legal name) are comprised not only lunatics, but persons under frenzies; or who lose their intellects by disease; those that *grow* deaf, dumb, and blind, not being born so; or such, in short, as are judged by the court of chancery incapable of conducting their own affairs. To these also, as well as idiots, the king is guardian, but to a very different purpose. For the law always imagines that these accidental misfortunes may be removed; and therefore only constitutes the crown a trustee for the unfortunate persons to protect their property, and to account to them for all profits received, if they recover, or, after their decease, to their representatives. And therefore it is declared by the statute 17 Edw. II., c. 10, that the king shall provide for the custody and sustentation of lunatic, and preserve their lands and the profits of them to their use, when they come to their right mind; and the king shall take nothing to his own use; and, if the parties die in such estate, the residue shall be distributed for their souls by the advice of the ordinary and of course (by the subsequent amendments of the law of administration) shall now go to their executors or administrators.

The method of proving a person *non compos* is very similar to that of proving him an idiot. The lord chancellor, to whom, by special authority from the king, the custody of idiots and lunatics is entrusted, upon petition or information, grants a commission in nature of the writ *de idiota inquirendo*, to inquire into the party's state of mind; and if he be found *non compos*, he usually commits the care of his person, with a suitable allowance for his maintenance, to some friend, who is then called his committee. However, to prevent sinister practices, the next heir is seldom permitted to be

this committee of the person; because it is his interest that the party should die. But, it hath been said, there lies not the same objection against his next of kin, provided he be not his heir; for it is his interest to preserve the lunatic's life, in order to increase the personal estate by savings, which he or his family may hereafter be entitled to enjoy. The heir is generally made the manager or committee of the estate, it being clearly his interest by good management to keep it in condition; accountable, however, to the court of chancery, and to the *non compos* himself, if he recovers, or otherwise to his administrators.

Chapter IX.

OF SUBORDINATE MAGISTRATES.

338-366.

This chapter treats of the rights and duties of principal subordinate magistrates—such as sheriffs, coroners, justices of the peace, constables, surveyors of highways, and overseers of the poor.

The enquiry is made into their antiquity and original, the manner of their appointment and removal, and their rights and duties.

The Sheriff.

1. The sheriff is an officer of very great antiquity in this kingdom, his name being derived from two Saxon words, the reeve bailiff, or officer of the shire. He is called in Latin *vice-comes*, as being the deputy of the earl or *comes*; to whom the custody of the shire is said to have been committed at the first division of this kingdom into counties. But the earls in process of time, by reason of their high employments and attendance on the king's person, not being able to transact the business of the county, were delivered of that burden; reserving to themselves the honor, but the labour was laid on the sheriff. So that now the sheriff does all the king's business in the county; and though he be still called *vice-comes* yet he is entirely independent of, and not subject to, the earl; the king by his letters patent committing *custodiam comitatus* to the sheriff and him alone.

Power and Duty.

The sheriff's power and duty are either as a judge, as the keeper of the king's peace, as a ministerial officer of the superior courts of justice, or as the king's bailiff.

In his judicial capacity he is to hear and determine all causes of forty shillings value and under, in his county court, of which more in its proper place; and he has also a judicial power in divers other civil causes. He is likewise to decide the elections of knights of the shire (subject to the control of the house of commons), of coroners, and of verderers; to judge of the qualifications of voters, and to return such as he shall determine to be duly elected.

As the keeper of the king's peace, both by common law and special commission, he is the first man in the county, and superior in rank to any nobleman therein, during his office. He may apprehend, and commit to prison, all persons who break the peace or attempt to break it; and may bind any one in recognizance to keep the king's peace. He may and is bound *ex officio* to pursue and take all traitors, murderers, felons and other misdoers, and commit them to gaol for safe custody. He is also to defend his county against any of the king's enemies when they come into the land; and for this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him, which is called the *posse comitatus* or power of the county; and this summons every person above fifteen years old, and under the degree of a peer, is bound to attend upon warning, under pain of fine and imprisonment. But though the sheriff is thus the principal conservator of the peace in his county, yet by the express directions of the great charter, he, together with the constable, coroner, and certain other officers of the king, are forbidden to hold any pleas of the crown, or, in other words, to try any criminal offense.

In his ministerial capacity the sheriff is bound to execute all process issuing from the king's courts of justice. In the commencement of civil causes, he is to serve the writ, to arrest, and to take bail; when the cause comes to trial, he must summon and return the jury; when it is determined, he must see the judgment of the court carried into execution. In criminal matters, he also arrests and imprisons, he returns the jury, he has the custody of the delinquent, and he executes the sentence of the court, though it extends to death itself.

As the king's bailiff, it is his business to preserve the rights of the king within his bailiwick; for so his county is frequently called in the writs; a word introduced by the princes of the Norman line, in imitation of the French, whose territory is divided into bailiwicks, as that of England into counties. He must seize to the king's use all lands devolved to the crown by attainder or escheat; must levy all fines and forfeitures; must seize and keep all waifs, wrecks, estrays and the like; unless they be granted to some subject; and must also collect the king's rents within the bailiwick, if commanded by process from the exchequer.

To execute these various offices, the sheriff has under him many inferior officers; as under-sheriff, bailiffs, and gaolers; who must neither buy, sell, nor farm their offices, on forfeiture of 500*l*.

The Under-Sheriff.

The under-sheriff usually performs all the duties of the office, a very few only excepted, where the personal presence of the high-sheriff is necessary.

The Bailiff.

Bailiffs, or sheriff's officers, are either bailiffs of hundreds, or special bailiffs. Bailiffs of hundreds are officers appointed over those respective districts by the sheriffs, to collect fines therein; to summon juries; to attend the judges and justices at the assizes, and quarter sessions; and also to execute writs and process in the several hundreds.

The Gaoler.

Gaolers are also the servants of the sheriff, and he must be responsible for their conduct. Their business is to keep safely all such persons as are committed to them by lawful warrant; and, if they suffer any such to escape, the sheriff shall answer it to the king, if it be a criminal matter; or, in a civil case, to the party injured. And to this end the sheriff must have lands sufficient within the county to answer the king and his people.

The Coroner.

II. The coroner's is also a very ancient office at the common law. He is called coroner, *coronator*, because he hath principally to do with pleas of the crown, or such wherein the king is more immediately concerned. And in this light the lord chief justice of the King's Bench is the principal coroner in the kingdom; and may, if he pleases, exercise the jurisdiction of a coroner in any part of the realm. But there are also particular coroners for every county of England; usually four, but sometimes six, and sometimes fewer. This office is of equal antiquity with the sheriff; and was ordained together with him to keep the peace, when the earls gave up the wardship of the county.

Office and Power.

The office and power of a coroner are also, like those of the sheriff, either judicial or ministerial; but principally judicial.

This consists, first, in inquiring when any person is slain, or dies suddenly, or in prison, concerning the manner of his death. And this must be "*super visum corporis*;" for, if the body be not found the coroner cannot sit. He must also sit at the very place where the death happened; and his inquiry is made by a jury from four, five, or six of the neighboring towns over whom he is to preside. If any be found guilty by this inquest, of murder or other homicide, he is to commit them to prison for further trial, and is also to inquire concerning their lands, goods, and chattels, which are forfeited thereby; but, whether it be homicide or not, he must inquire whether any deodand has accrued to the king, or the lord of the franchise, by his death; and must certify the whole of this inquisition (under his own seal and the seals of his jurors), together with the evidence thereon, to the court of King's Bench, or the next assizes. Another branch of his office is to inquire con-

cerning shipwrecks, and certify whether wreck or not, and who is in possession of the goods. Concerning treasure-trove, he is also to inquire who were the finders, and where it is, and whether any one be suspected of having found or concealed a treasure.

The ministerial office of the coroner is only as the sheriff's substitute. For when just exception can be taken to the sheriff, for suspicion of partiality (as that he is interested in the suit, or of kindred to either plaintiff or defendant), the process must then be awarded to the coroner instead of the sheriff, for execution of the king's writs.

Justices of the Peace.

III. The next species of subordinate magistrates, whom I am to consider, are justices of the peace; the principal of whom is the *custos rotulorum*, or keeper of the records of the county. The common law hath ever had a special care and regard for conservation of the peace; for peace is the very end and foundation of civil society.

The king's majesty is, by his office and dignity royal, the principal conservator of the peace within all his dominions; and may give authority to any other to see the peace kept, and to punish such as break it; hence it is usually called the king's peace. The lord chancellor or keeper, the lord treasurer, the lord high steward of England, the lord mareschal, the lord high constable of England (when any such officers are in being), and all the justices of the court of King's Bench (by virtue of their offices), and the master of the rolls (by prescription), are general conservators of the peace throughout the whole kingdom, and may commit all breakers of it, or bind them in recognizances to keep it; the other judges are only so in their own courts. The coroner is also a conservator of the peace within his own county; as is also the sheriff; and both of them may take a recognizance or security for the peace. Constables, tithing-men, and the like, are also conservators of the peace within their own jurisdictions, and may apprehend all breakers of the peace, and commit them, till they find sureties for their keeping it.

How Appointed.

Justices are appointed by the king's special commission under the great seal, the form of which was settled by all the judges, A. D. 1590. This appoints them all, jointly and severally, to keep the peace, and any two or more of them to inquire of and determine felonies and other misdemeanors; in which number some particular justices, or one of them, are directed to be always included, and no business to be done without their presence.

Power, Office and Duty.

The power, office, and duty of a justice of the peace depend on

his commission, and on the several statutes which have created objects of his jurisdiction. His commission, first, empowers him singly to conserve the peace; and thereby gives him all the power of the ancient conservators at the common law, in suppressing riots and affrays, in taking securities for the peace, and in apprehending and committing felons and other inferior criminals. It also empowers any two or more to hear and determine all felonies and other offenses; which is the ground of their jurisdiction at sessions of which more will be said in its proper place.

Constables.

IV. Fourthly, of the constables. Constables are of two sorts, high constables and petty constables. The former were first ordained by the statute of Winchester, as before mentioned; are appointed at the court-leets of the franchise or hundred over which they preside, or in default of that, by the justices at their quarter sessions; and are removable by the same authority that appoints them. The petty constables are inferior officers in every town and parish, subordinate to the high constable of the hundred, first instituted about the reign of Edw. III.

Their Duties.

The general duties of all constables, both high and petty, as well as of the other officers, is to keep the king's peace in the several districts; and to that purpose they are armed with very large powers, of arresting and imprisoning, of breaking open houses, and the like.

Surveyors of the Highways.

V. We are next to consider the surveyors of the highways. Every parish is bound of common right to keep the high roads that go through it in good and sufficient repair; unless by reason of the tenure of lands, or otherwise this case is consigned to some particular private person. From this burthen no man was exempt by our ancient laws, whatever other immunities he might enjoy; this being part of the *trinoda necessitas* to which every man's estate was subject; viz., *expeditio, contra hostem, arcium constructio, et pontium reparatio*. For, though the reparation of bridges only is expressed, yet that on roads also must be understood. And indeed now, for the most part, the care of the roads only seem to be left to parishes, that of bridges being in a great measure devolved upon the county at large by statute 22 Hen. VIII. c. 5. If the parish neglected these repairs, they might formerly, as they may still, be indicted for such their neglect; but it was not then incumbent on any particular officer to call the parish together and set them upon this work; for which reason, surveyors of the highways were ordered to be chosen in every parish.

Their office and duty consists in putting in execution a variety

of laws for the repairs of the public highways; that is, of ways leading from one town to another.

Overseers of the Poor.

Under this head the author enumerates the laws passed from time to time looking to the relief of the poor, the office and duty of overseers of the poor, and the law of settlements.

Chapter X.

OF THE PEOPLE, WHETHER ALIENS, DENIZENS, OR NATIVES.

366-376.

Having in the eight preceding chapters, treated of persons as they stand in the public relations of *magistrates*, I now proceed to consider such persons as fall under the denomination of the *people*. And herein all the inferior and subordinate magistrates, treated of in the last chapter, are included.

Allegiance.

The first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the crown of England; that is, within the ligeance, or, as it is generally called the allegiance, of the king, and aliens, such as are born out of it. Allegiance is the tie, or *ligamen*, which bind the subject to the king, in return for that protection which the king affords to the subject. The thing itself, or substantial part of it, is founded in reason and the nature of government; the name and the form are derived to us from our Gothic ancestors. Under the feudal system, every owner of lands held them in subjection to some superior or lord, from whom, or whose ancestors, the tenant or vassal had received them; and there was a mutual trust or confidence subsisting between the lord and vassal, that the lord should protect the vassal in the enjoyment of the territory he had granted him, and, on the other hand, that the vassal should be faithful to the lord, and defend him against all his enemies. This obligation on the part of the vassal was called *fidelitas*, or fealty; and an oath of fealty was required by the feudal law, to be taken by all tenants to their landlord, which is couched in almost the same terms as our ancient oath of allegiance, except that in the usual oath of fealty there was frequently a saving or exception of the faith due to a superior lord by name, under whom the landlord himself was perhaps only a tenant or vassal. But when the acknowledgment was made to the absolute superior himself, who was vassal to no man, it was no longer called the oath of fealty, but the oath of allegiance; and therein the tenant swore to bear faith to his sovereign lord in opposition to all men, without any saving or exception—“*contra omnes homines fidelitatem fecit.*”

Land held by this exalted species of fealty was called *feudum ligium*, a liege fee; the vassals, *homines ligii*, or liege men; and the sovereign, their *dominus ligius*, or liege lord. And when sovereign princes did homage to each other for lands held under their respective sovereignties, a distinction was always made between *simple* homage which was only an acknowledgment of tenure, and *liege* homage, which included the fealty before mentioned, and the services consequent upon it.

But with us in England, it becoming a settled principle in tenure that *all* lands in the kingdom are holden of the king as their sovereign and lord paramount, no oath but that of fealty could ever be taken to inferior lords, and the oath of allegiance was necessarily confined to the person of the king alone. By an easy analogy, the term of allegiance was soon brought to signify all other engagements which are due from subjects to their prince, as well as those duties which were simply and merely territorial. And the oath of allegiance, as administered for upwards of six hundred years, contained a promise "to be true and faithful to the king and his heirs, and truth and faith to bear of life and limb and terrene honour, and not to know or hear of any ill or damage intended him, without defending him therefrom." But, at the revolution, the terms of this oath being thought perhaps to favor too much the notion of non-resistance, the present form was introduced by the convention parliament, which is more general and indeterminate than the former; the subject only promising "that he will be faithful and bear *true* allegiance to the king," without mentioning "his heirs," or specifying in the least wherein that allegiance consists. The oath of supremacy is principally calculated as a renunciation of the pope's pretended authority; and the oath of abjuration, introduced in the reign of King William, very amply supplies the loose and general texture of the oath of allegiance; it recognizing the right of his majesty, derived under the act of settlement; engaging to support him to the utmost of the juror's power; promising to disclose all traitorous conspiracies against him; and expressly renouncing any claim of the descendants of the late pretender, in as clear and explicit terms as the English language can furnish. This oath must be taken by all persons in any office, trust or employment; and may be tendered by two justices of the peace to any person whom they shall suspect of disaffection. And the oath of allegiance may be tendered to all persons above the age of twelve years, whether natives, denizens, or aliens, either in the court-leet or the manor, or in the sheriff's toun, which is the court-leet of the county.

But besides these express engagements, the law also holds that there is an implied, original, and virtual allegiance, owing from every subject to his sovereign, antecedently to any express prom-

ise; and although the subject never swore any faith or allegiance in form. For as the king, by the descent of the crown, is fully invested with all the rights, and bound to all the duties, of sovereignty, before his coronation; so the subject is bound to his prince by an intrinsic allegiance before the superinduction of those outward bonds of oath, homage, and fealty, which are nothing more than a declaration in words of what was before implied in law; which occasions Sir Edward Coke very justly to observe, that "all subjects are equally bounden to their allegiance as if they had taken the oath; because it is written by the finger of the law in their hearts, and the taking of the corporal oath is but an outward declaration of the same." The sanction of an oath, it is true, in case of violation of duty, makes the guilt still more accumulated, by superadding perjury to treason; but it does not increase the civil obligation to loyalty; it only strengthens the *social* tie by uniting it with that of *religion*.

Natural Allegiance.

Allegiance, both express and implied, is, however, distinguished by the law into two sorts of species, the one natural, the other local; the former being also perpetual, the latter temporary. Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth. For, immediately upon their birth, they are under the king's protection; at a time, too, when (during their infancy) they are incapable of protecting themselves. Natural allegiance is therefore a debt of gratitude, which cannot be forfeited, cancelled, or altered by any change of time, place, or circumstance, nor by anything but the united concurrence of the legislature. An Englishman who removes to France or to China, owes the same allegiance to the king of England there as at home, and twenty years hence as well as now. For it is a principle of universal law, that the natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former; for his natural allegiance was intrinsic, and primitive, and antecedent to the other; and cannot be divested without the concurrent act of the prince to whom it was first due. Indeed, the natural-born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another; but it is his own act that brings him into these straits and difficulties, of owing service to two masters; and it is unreasonable that, by such voluntary act of his own, he should be able at pleasure to unloose those bands by which he is connected to his natural prince.

Local Allegiance.

Local allegiance is such as is due from an alien, or stranger born, for so long time as he continues within the king's dominion

and protection; and it ceases the instant such stranger transfers himself from this kingdom to another. Natural allegiance is therefore perpetual, and local temporary only; and that for this reason, evidently founded upon the nature of government, that allegiance is a debt due from the subject, upon an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully. As therefore the prince is always under a constant tie to protect his natural-born subjects, at all times and in all countries, for this reason their allegiance due to him is equally universal and permanent. But, on the other hand, as the prince affords his protection to an alien only during his residence in this realm, the allegiance of an alien is confined, in point of time, to the duration of such his residence, and in point, of locality, to the dominions of the British empire. From which considerations Sir Matthew Hale deduces this consequence, that though there be a usurper of the crown, yet it is treason for any subject, while the usurper is in full possession of the sovereignty, to practice anything against his crown and dignity; wherefore, although the true prince regain the sovereignty, yet such attempts against the usurper (unless in defense or aid of the rightful king) have been afterwards punished with death; because of the breach of that temporary allegiance which was due to him as king *de facto*.

This oath of allegiance, or rather the allegiance itself is held to be applicable not only to the political capacity of the king, or regal office, but to his natural person, and blood-royal.

Rights of Aliens.

An alien born may purchase lands, or other estates; but not for his own use, for the king is thereupon entitled to them. Yet an alien may acquire a property in goods, money, and other personal estate, or may hire a house for his habitation; for personal estate is of a transitory and movable nature; and, besides, this indulgence to strangers is necessary for the advancement of trade. Aliens also may trade as freely as other people. Also, an alien may bring an action concerning personal property, and may make a will and dispose of his personal estate. When I mention these rights of an alien, I must be understood of alien friends only, or such whose countries are in peace with ours; for alien enemies have no rights, no privileges, unless by the king's special favor, during the time of war.

When I say that an alien is one who is born out of the king's dominions, or allegiance, this also must be understood with some restrictions. The common law, indeed, stood absolutely so, with only a very few exceptions; so that a particular act of parliament became necessary after the restoration, "for the naturalization of the children of his majesty's English subjects, born in foreign

countries during the late troubles." And this maxim of the law proceeded upon a general principle, that every man owes natural allegiance where he is born, and cannot owe two such allegiances, or serve two masters, at once. Yet the children of the king's ambassadors born abroad were always held to be natural subjects: for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent; so, with regard to the son also, he was held (by a kind of *post-liminium*) to be born under the king of England's allegiance, represented by his father the ambassador. To encourage also foreign commerce, it was enacted by statute 25 Edw. III. st. 2, that all children born abroad, provided *both* their parents were at the time of the birth in allegiance to the king, and the mother had passed the seas by her husband's consent, might inherit as if born in England; and accordingly it hath been so adjudged in behalf of merchants. But by several more modern statutes these restrictions are still further taken off; so that all children, born out of the king's ligeance, whose *fathers* (or *grandfathers* by the father's side) were natural-born subjects, are now deemed to be natural-born subjects themselves to all intents and purposes; unless their said ancestors were attainted, or banished beyond sea, for high treason; or were at the birth of such children in the service of a prince at enmity with Great Britain. Yet the grandchildren of such ancestors shall not be privileged in respect to the alien's duty, except they be protestants, and actually reside within the realm; nor shall be enabled to claim any estate or interest, unless the claim be made within five years after the same shall accrue.

The children of aliens, born here in England, are, generally speaking, natural-born subjects, and entitled to all the privileges of such.

Denizens.

A denizen is an alien born, but who has obtained *ex donatione regis* letters patent to make him an English subject: a high and incommunicable branch of the royal prerogative. A denizen is in a kind of middle state between an alien and natural-born subject, and partakes of both of them. He may take lands by purchase or devise, which an alien may not; but cannot take by inheritance: for his parent, through whom he must claim, being an alien, had no inheritable blood; and therefore could convey none to the son. And, upon a like defect of hereditary blood, the issue of a denizen, born *before* denization, cannot inherit to him: but his issue born *after* may. A denizen is not excused from paying the alien's duty, and some other mercantile burdens. And no denizen can be of the privy council, or either house of parliament, or have any office of trust, civil or military, or be capable of any grant of lands, etc., from the crown.

Naturalization.

Naturalization cannot be performed but by act of parliament: for by this an alien is put in exactly the same state as if he had been born in the king's ligeance; except only that he is incapable, as well as a denizen, of being a member of the privy council, or parliament, holding offices, grants, etc. No bill for naturalization can be received in either house of parliament without such disabling clause in it: nor without a clause disabling the person from obtaining any immunity in trade thereby in any foreign country, unless he shall have resided in Britain for seven years next after the commencement of the session in which he is naturalized. Neither can any person be naturalized or restored in blood unless he hath received the sacrament of the Lord's supper within one month before the bringing in of the bill; and unless he also takes the oaths of allegiance and supremacy in the presence of the parliament. But these provisions have been usually dispensed with by special acts of parliament, previous to bills of naturalization of any foreign princes or princesses.

Chapter XI. OF THE CLERGY.

376-396.

The people, whether aliens, denizens, or natives, are also either clergy or laity.

The chapter treats of the clergy, that is all persons in holy orders, or in ecclesiastical offices.

The clerical part of the nation thus defined are:

- I. Archbishops and bishops elected by their several chapters, at the nomination of the crown, and afterwards consecrated by each other.
- II. Deans and chapters.
- III. Archdeacons.
- IV. Rural deans.
- V. Parsons and vicars.
- VI. Curates.
- VII. Churchwardens.
- VIII. Parish clerks and sextons.

CHAPTER XII. OF THE CIVIL STATE.

396-408.

Divisions of Laity.

The lay part of his majesty's subjects, or such of the people as are not comprehended under the denomination of clergy, may be divided into three distinct states, the civil, the military, and the maritime.

The Civil State.

That part of the nation which falls under our first and most comprehensive division, the civil state, includes all orders of men, from the highest nobleman to the meanest peasant, that are not included under either our former division, of clergy, or under one of the two latter, the military and the maritime states; and it may sometimes include individuals of the other three orders; since a nobleman, a knight, a gentleman, or a peasant, may become either a divine, a soldier, or a seaman.

The civil state consists of the nobility and the commonality. Of the nobility, the *péage* of Great Britain, or lords temporal, as forming, together with the bishops, one of the supreme branches of the legislature, I have before sufficiently spoken; we are here to consider them according to their several degrees, or titles of honor.

All degrees of nobility and honor are derived from the king as their fountain: and he may institute what new titles he pleases. Hence it is that all degrees of nobility are not of equal antiquity. Those now in use are dukes marquesses, earls, viscounts, and barons.

Here follows an inquiry into the origin of these degrees, and the manner in which they are created, and the principal incidents attending them.

Chapter XIII.

OF THE MILITARY AND MARITIME STATES.

408-422.

The chapter treats of *first*, the military state, that is the militia of each county, raised by lot from among the people, officered by the principal landholders, and commanded by the lord lieutenant; *second*, the more disciplined occasional troops kept on foot only from year to year, by parliament and during that period governed by arbitrary articles of war, formed at the crown's pleasure; and *third*, the maritime state, the officers and mariners of the British navy, who are governed by express and permanent laws, or the articles of the navy, established by act of parliament. The chapter is largely historical.

Chapter XIV.

OF MASTER AND SERVANT.

422-433.

Having thus commented on the rights and duties of persons, as standing in the *public* relations of magistrates and people, the method I have marked out now leads me to consider their rights and duties in *private* economical relations.

Relations in Private Life.

The three great relations in private life are, 1. That of *master and servant*: which is founded in convenience, whereby a man is directed to call in the assistance of others, where his own skillful labor will not be sufficient to answer the cares incumbent upon him. 2. That of *husband and wife*: which is founded in nature, but modified by civil society; the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated. 3. That of *parent and child*: which is consequential to that of marriage, being its principal end and design; and it is by virtue of this relation that infants are protected, maintained, and educated. But, since the parents, on whom this care is primarily incumbent, may be snatched away by death before they have completed their duty, the law has therefore provided a fourth relation; 4. That of *guardian and ward*: which is a kind of artificial parentage in order to supply the deficiency, whenever it happens, of the natural. Of all these relations in their order.

Master and Servant.

In discussing the relation of *master and servant*, I shall, first, consider the several sorts of servants, and how this relation is created and destroyed; secondly, the effect of this relation with regard to the parties themselves; and, lastly, its effect with regard to other persons.

Slavery pure and proper does not exist in England. It is repugnant to reason, and the principles of natural law. The three origins of the right of slavery assigned by Justinian are analyzed and found to be built upon false foundations.

Menials.

1. The first sort of servants, acknowledged by the laws of England, are *menial servants*; so-called from being *intra moenia*, or domestics. The contract between them and their masters arises upon the hiring. If the hiring be general, without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons, as well when there is work to be done, as when there is not, but the contract may be made for any larger or smaller term. All single men between twelve years old and sixty, and married ones under thirty years of age, and all single women between twelve and forty, not having any visible livelihood, are compellable by two justices to go out to service in husbandry or certain specific trades, for the promotion of honest industry: and no master can put away his servant, or servant leave his master, after being so retained, either before or at the end of his term, without

a quarter's warning; unless upon reasonable cause, to be allowed by a justice of the peace: but they may part by consent, or make a special bargain.

Apprentices.

2. Another species of servants are called *apprentices* (from *apprendre*, to learn), and are usually bound for a term of years, by deed indented or indentures, to serve their masters, and to be maintained and instructed by them. This is usually done to persons of trade, in order to learn their art and mystery; and sometimes very large sums are given with them, as a premium for such their instruction; but it may be done to husbandmen, nay, to gentlemen, and others. And children of poor persons may be apprenticed out by the overseers, with the consent of two justices, till twenty-one years of age, to such persons as are thought fitting; who are also compellable to take them; and it is held that gentlemen of fortune, and clergymen, are equally liable with others to such compulsion; for which purposes our statutes have made the indentures obligatory, even though such parish-apprentice be a minor.

Labourers.

3. A third species of servants are *labourers*, who are only hired by the day or the week, and do not live *intra moenia*, as part of the family; concerning whom the statutes before cited have made very good regulations: 1. Directing that all persons who have no visible effects may be compelled to work. 2. Defining how long they must continue at work in summer and in winter. 3. Punishing such as leave or desert their work. 4. Empowering the justices at sessions or the sheriff of the county to settle their wages; and, 5. Inflicting penalties on such as either give, or exact, more wages than are so settled.

Stewards, Factors, etc.

4. There is yet a fourth species of servants, if they may be so called, being rather in a superior, a ministerial capacity, such as *stewards*, *factors* and *bailiffs*; whom, however, the law considers as servants *pro tempore*, with regard to such of their acts as affect their master's or employer's property. Which leads me to consider the manner in which this relation of service affects either the master or servant.

Effect of the Relation on Master and Servant.

And, first, by hiring and service for a year, or apprenticeship under indentures, a person gains a settlement in that parish wherein he last served forty days. In the next place, persons serving seven years as apprentices to any trade, have an exclusive right to exercise that trade in any part of England.

A master may by law correct his apprentice for negligence or

other misbehaviour, so it be done with moderation: though if the master or master's wife beats any other servant of full age, it is a good cause of departure. But if any servant, workman or labourer assaults his master or dame, he shall suffer one year's imprisonment, and other open corporal punishment, not extending to life or limb.

By service all servants and laborers, except apprentices, become entitled to wages: according to their agreement, if menial servants: or according to the appointment of the sheriff or sessions, if labourers or servants in husbandry: for the statutes for the regulation of wages extend to such servants only; it being impossible for any magistrate to be a judge of the employment of menial servants, or of course to assess their wages.

Effects of Relation on Others.

III. Let us, lastly, see how strangers may be affected by this relation of master and servant: or how a master may behave toward others on behalf of his servant; and what a servant may do on behalf of his master.

And, first, the master may *maintain*, that is, abet and assist his servant in any action at law against a stranger: whereas, in general, it is an offense against public justice to encourage suits and animosities by helping to bear the expense of them, and is called in law maintenance. A master also may bring an action against any man for beating or maiming his servant; but in such case he must assign, as a special reason for so doing, his own damage by the loss of his service, and this loss must be proved upon the trial. A master likewise may justify an assault in defense of his servant, and a servant in defense of his master: the master, because he has an interest in his servant not to be deprived of his service; the servant because it is part of his duty, for which he receives his wages, to stand by and defend his master. Also if any person do hire or retain my servant, being in my service, for which the servant departeth from me and goeth to serve the other, I may have an action for damages against both the new master and the servant, or either of them: but if the new master did not know that he is my servant, no action lies; unless he afterwards refuse to restore him upon information and demand. The reason and foundation upon which all this doctrine is built, seem to be the property that every man has in the service of his domestics; acquired by the contract of hiring, and purchased by giving them wages.

As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressly given or implied: *nam qui facit per alium, facit per se*. Therefore, if a servant commit a trespass by the command or

encouragement of his master, the master shall be guilty of it: though the servant is not thereby excused, for he is only to obey his master in matters that are honest and lawful. If an innkeeper's servants rob his guests, the master is bound to restitution: for as there is a confidence reposed in him, that he will take care to provide honest servants, his negligence is a kind of implied consent to the robbery; *nam qui non prohibet, cum prohibere possit, jubet*. So likewise if the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring an action against the master: for though the master did not expressly order the servant to sell it to that person in particular, yet his permitting him to draw and sell it at all is impliedly a general command.

In the same manner, whatever a servant is permitted to do in the usual course of his business, is equivalent to a general command. If I pay money to a banker's servant, the banker is answerable for it. If I pay it to a clergyman's or a physician's servant, whose usual business it is not to receive money for his master, and he embezzles it, I must pay it over again. If a steward lets a lease of a farm, without the owner's knowledge, the owner must stand to the bargain; for this is the steward's business. A wife, a friend, a relation, that used to transact business for a man, are *quoad hoc* his servants; and the principal must answer for their conduct: for the law implies, that they act under a general command; and without such a doctrine as this no mutual intercourse between man and man could subsist with any tolerable convenience. If I usually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant takes up upon trust; for here is no implied order to the tradesman to trust my servant; but if I usually send him upon trust, or sometimes on trust and sometimes with ready money, I am answerable for all he takes up; for the tradesman cannot possibly distinguish when he comes by my order, and when upon his own authority.

If a servant, lastly, by his negligence does any damage to a stranger, the master shall answer for his neglect. If a smith's servant lames a horse while he is shoeing him, an action lies against the master and not against the servant. But in these cases the damage must be done while he is actually employed in the master's service; otherwise the servant shall answer for his own misbehaviour. Upon this principle, by the common law, if a servant kept his master's fire negligently, so that his neighbor's house was burned down thereby, an action lay against the master; because his negligence happened in his service; otherwise, if the servant going along the street with a torch, by negligence sets fire to a house; for there he is not in his master's immediate service; and must himself answer the damage personally. A master is, lastly, chargeable if any of his family layeth or casteth anything out of his house into

the street or common highway, to the damage of any individual, or the common nuisance of his majesty's liege people: for the master hath the superintendence and charge of all his household.

We may observe that in all the cases here put, the master may be frequently a loser by the trust reposed in his servant, but never can be a gainer; he may frequently be answerable for his servant's misbehaviour, but can never shelter himself from punishment by laying the blame on his agent. The reason of this is still uniform and the same; that the wrong done by the servant is looked upon in law as the wrong of the master himself; and it is a standing maxim, that no man shall be allowed to make any advantage of his own wrong.

Chapter XV.

OF HUSBAND AND WIFE.

433-446.

The second private relation of persons is that of marriage, which includes the reciprocal rights and duties of husband and wife; or, as most of our elder law books call them, of *baron* and *feme*. In the consideration of which I shall in the first place inquire, how marriages may be contracted or made; shall next point out the manner in which they may be dissolved; and shall, lastly, take a view of the legal effects and consequence of marriage.

Nature of Marriage.

I. Our law considers marriage in no other light than as a civil contract. The *holiness* of the matrimonial state is left entirely to the ecclesiastical law: the temporal courts not having jurisdiction to consider unlawful marriage as a sin, but merely as a civil inconvenience. The punishment, therefore, or annulling, of incestuous or other unscriptural marriage, is the province of the spiritual courts; *which act pro salute animae*. And taking it in this civil light, the law treats it as it does all other contracts; allowing it to be good and valid in all cases, where the parties at the time of making it were, in the first place, *willing* to contract; secondly, *able* to contract; and, lastly, actually *did* contract, in the proper forms and solemnities required by law.

Requisites.

First, they must be *willing* to contract. "*Consensus non cubitus, facit nuptias,*" is the maxim of the civil law in this case; and it is adopted by the common lawyers, who indeed have borrowed, especially in ancient times, almost all their notions of the legitimacy of marriage from the canon and civil laws.

Secondly, they must be *able* to contract. In general all persons are able to contract themselves in marriage, unless they labour

under some particular disabilities and incapacities. What those are, it will be here our business to inquire.

Disabilities.

Now these disabilities are of two sorts: first, such as are canonical, and therefore sufficient by the ecclesiastical laws to avoid the marriage in the spiritual court; but these in our law only make the marriage voidable, and not *ipso facto* void, until sentence of nullity be obtained. Of this nature are pre-contract; consanguinity, or relation by blood; and affinity, or relation by marriage; and some particular corporal infirmities. And these canonical disabilities are either grounded upon the express words of the divine law, or are consequences plainly deducible from thence; it therefore being sinful in the persons who labour under them, to attempt to contract matrimony together, they are properly the object of the ecclesiastical magistrate's coercion; in order to separate the offenders, and inflict penance for the offense, *pro salute animarum*. But such marriages not being void *ab initio*, but voidable only by sentence of separation, they are esteemed valid to all civil purposes, unless such separation is actually made during the life of the parties.

The other sort of disabilities are those which are created or at least enforced, by the municipal laws. And, though some of them may be grounded on natural law, yet they are regarded by the laws of the land, not so much in the light of any moral offense, as on account of the civil inconvenience they draw after them. These civil disabilities make the contract void *ab initio*, and not merely voidable; not that they dissolve a contract already formed, but they render the parties incapable of forming any contract at all; they do not put asunder those who are joined together, but they previously hinder the junction. And, if any persons under these legal disabilities come together, it is a meretricious, and not a matrimonial union.

Prior Marriage.

1. The first of these legal disabilities is a prior marriage, or having another husband or wife living; in which case, besides the penalties consequent upon it as a felony, the second marriage is to all intents and purposes void.

Want of Age.

2. The next legal disability is want of age. This is sufficient to avoid all other contracts, on account of the imbecility of judgment in the parties contracting; *a fortiori* therefore it ought to avoid this, the most important contract of any. Therefore if a boy under fourteen, or a girl under twelve years of age, marries, this marriage is only inchoate and imperfect; and when either of

them comes to the age of consent aforesaid, they may disagree and declare the marriage void, without any divorce or sentence in the spiritual court. This is founded on the civil law. But the canon law pays a greater regard to the constitution, than the age, of the parties; for if they are *habiles ad matrimonium*, it is a good marriage, whatever their age may be. And in our law it is so far a marriage, that, if at the age of consent they agree to continue together, they need not be married again. If the husband be of years of discretion and the wife under twelve, when she comes to years of discretion he may disagree as well as she may: for in contracts the obligation must be mutual; both must be bound, or neither: and so it is, *vice versa*, when the wife is of years of discretion, and the husband under.

Want of Consent of Parents.

3. Another incapacity arises from want of consent of parents or guardians. By the common law, if the parties themselves were of the age of consent, there wanted no other concurrence to make the marriage valid: and this was agreeable to the canon law.

Want of Reason.

4. A fourth incapacity is want of reason; without a competent share of which, as no other, so neither can the matrimonial contract, be valid. It was formerly adjudged, that the issue of an idiot was legitimate, and consequently that his marriage was valid. A strange determination! since consent is absolutely requisite to matrimony, and neither idiots nor lunatics are capable of consenting to anything. And therefore the civil law judged much more sensibly when it made such deprivations of reason a previous impediment; though not a cause of divorce, if they happened after marriage. And modern resolutions have adhered to the reason of the civil law, by determining that the marriage of a lunatic, not being in a lucid interval, was absolutely void.

Parties Must Actually Contract.

Lastly, the parties must not only be willing and able to contract, but actually must contract themselves in due form of law, to make it a good civil marriage. Any contract made *per verba de praesenti*, or in words of the present tense, and in case of cohabitation *per verba de futuro* also, between persons able to contract, was before the late act deemed a valid marriage to many purposes; and the parties might be compelled in the spiritual courts to celebrate it *in facie ecclesiae*. But these verbal contracts are now of no force to compel a future marriage. Neither is any marriage at present valid, that is not celebrated in some parish church or public chapel, unless by dispensation from the Archbishop of Canterbury. It must also be preceded by publication of banns, or by license from

the spiritual judge. Many other formalities are likewise prescribed by the act; the neglect of which, though penal, does not invalidate the marriage. It is held to be also essential to a marriage, that it be performed by a person in orders; though the intervention of a priest to solemnize this contract is merely *juris positivi*, and not *juris naturalis aut divini*; it being said that Pope Innocent the Third was the first who ordained the celebration of marriage in the church; before which it was totally a civil contract. And in the times of the grand rebellion, all marriages were performed by the justices of the peace: and these marriages were declared valid, without any fresh solemnization, by stat. 12 Car. II. c. 33. But as the law now stands, we may upon the whole collect, that no marriage by the temporal law is *ipso facto void*, that is celebrated by a person in orders,—in a parish church or public chapel, or elsewhere, by special dispensation,—in pursuance of banns or license,—between single persons—consenting,—of sound mind,—and of the age of twenty-one years;—or of the age of fourteen in males and twelve in females, with consent of parents or guardians or without it in the case of widowhood. And no marriage is *voidable* by the ecclesiastical law, after the death of either of the parties; nor during their lives, unless for the canonical impediments of precontract, if that indeed still exists; of consanguinity; and of affinity, or corporal imbecility, subsisting previous to their marriage.

Divorce.

II. I am next to consider the manner in which marriage may be dissolved; and this is either by death, or divorce. There are two kinds of divorce, the one total, the other partial; the one *a vinculo matrimonii*, the other merely *a mensa et thoro*.

A Vinculo.

The total divorce, *a vinculo matrimonii* must be for some of the canonical causes of impediment before mentioned, and those existing *before* the marriage, as is always the case in consanguinity; not supervenient, or arising *afterwards*, as may be the case in affinity or corporal imbecility. For in cases of total divorce, the marriage is declared null, as having been absolutely unlawful *ab initio*; and the parties are therefore separated *pro salute animarum*; for which reason, as was before observed, no divorce can be obtained, but during the life of the parties. The issue of such marriage as is thus entirely dissolved, are bastards.

A Mensa et Thoro.

Divorce *a mensa et thoro* is when the marriage is just and lawful *ab initio*, and therefore the law is tender of dissolving it; but, for some supervenient cause, it becomes improper or impossible for

the parties to live together; as in the case of intolerable ill temper, or adultery, in either of the parties. With us in England adultery is only a cause of separation from bed and board; for which the best reason that can be given, is, that if divorces were allowed to depend upon a matter within the power of either of the parties, they would probably be extremely frequent; as was the case when divorces were allowed for canonical disabilities, on the mere confession of the parties, which is now prohibited by the canons. However, divorces *a vinculo matrimonii* for adultery, have of late years been frequently granted by act of parliament.

Alimony.

In case of divorce *a mensa et thoro*, the law allows alimony to the wife: which is that allowance which is made to a woman for her support out of the husband's estate: being settled at the discretion of the ecclesiastical judge, on consideration of all the circumstances of the case. This is sometimes called her *estovers*, for which, if he refuses payment, there is, besides the ordinary process of excommunication, a writ at common law *de estoveriis habendis*, in order to recover it. It is generally proportioned to the rank and quality of the parties. But in case of elopement, and living with an adulterer, the law allows her no alimony.

Legal Consequences.

III. Having thus shown how marriages may be made, or dissolved, I come now, lastly, to speak of the legal consequences of such making, or dissolution.

By marriage the husband and wife are one person in law; that is the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and *cover*, she performs everything; and is therefore called in our law-french a *feme-covert*, *foemina viro co-operta*; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage. I speak not at present of the rights of property, but of such as are merely *personal*. For this reason, a man cannot grant anything to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself; and therefore it is also generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage. A woman indeed may be attorney for her husband; for that implies no separation from, but is rather a representation of, her lord. A husband may also bequeath anything to

his wife by will; for that cannot take effect till the coverture is determined by his death. The husband is bound to provide his wife with necessaries by law, as much as himself; and, if she contracts debts for them, he is obliged to pay them; but for anything besides necessaries he is not chargeable. Also if a wife elopes, and lives with another man, the husband is not chargeable even for necessaries; at least if the person who furnishes them is sufficiently apprised of her elopement. If the wife be indebted before marriage, the husband is bound afterwards to pay the debt; for he has adopted her and her circumstances together. If the wife be injured in her person or her property, she can bring no action for redress without her husband's concurrence, and in his name as well as her own: neither can she be sued without making the husband a defendant. There is indeed one case where the wife shall sue and be sued as a feme sole, viz., where the husband has abjured the realm, or is banished, for then he is dead in law; and, the husband being thus disabled to sue for or defend the wife. it would be most unreasonable if she had no remedy, or could make no defense at all. In criminal prosecutions, it is true, the wife may be indicted and punished separately; for the union is only a civil union. But in trials of any sort they are not allowed to be witnesses for, or against each other: partly because it is impossible their testimony should be indifferent, but principally because of the union of person; and therefore, if they were admitted to be witnesses for each other, they would contradict one maxim of law "*nemo in propria causa testis esse debet*," and if against each other, they would contradict another maxim, "*nemo tenetur seipsum accusare*." But where the offense is directly against the person of the wife, this rule has been usually dispensed with; and therefore, by statute 3 Hen. VII. c. 2, in case a woman be forcibly taken away, and married, she may be witness against such her husband, in order to convict him of felony. For in this case she can with no propriety be reckoned his wife; because a main ingredient, her consent, was wanting to the contract; and also there is another maxim of law, that no man shall take advantage of his own wrong; which the ravisher here would do, if, by forcibly marrying a woman, he could prevent her from being a witness who is perhaps the only witness to that very fact.

In the civil law the husband and the wife are considered as two distinct persons, and may have separate estates, contracts, debts, and injuries: and therefore in our ecclesiastical courts, a woman may sue and be sued without her husband.

But though our law in general considers man and wife as one person, yet there are some instances in which she is separably considered; as inferior to him, and acting by his compulsion. And therefore all deeds executed, and acts done, by her, during her

coverture, are void; except it be a fine or the like matter of record, in which case she must be solely and secretly examined, to learn if her act be voluntary. She cannot by will devise lands to her husband, unless under special circumstances; for at the time of making it she is supposed to be under his coercion. And in some felonies, and other inferior crimes, committed by her, through constraint of her husband, the law excuses her; but this extends not to treason or murder.

The husband also, by the old law, might give his wife moderate correction. For, as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children; for whom the master or parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds, and the husband was prohibited from using any violence to his wife, *aliter quam ad virum, ex causa regiminis et castigationis uxoris suae, licite et rationabiliter pertinet*. In the politer reign of Charles the Second, this power of correction began to be doubted; and a wife may now have security of the peace against her husband; or in return, a husband against his wife. Yet the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege: and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehaviour.

These are the chief legal effects of marriage during the coverture; upon which we may observe, that even the disabilities which the wife lies under are for the most part intended for her protection and benefit: so great a favorite is the female sex of the laws of England.

Chapter XVI.

OF PARENT AND CHILD.

446-460.

The next, and the most universal relation in nature, is immediately derived from the preceding, being that between parent and child.

Children are of two sorts; legitimate and spurious, or bastards, each of which we shall consider in their order; and, first, legitimate children.

I. A legitimate child is he that is born in lawful wedlock, or within a competent time afterwards. *Pater est quem nuptiae demonstrant*, is the rule of the civil law: and this holds with the civilians, whether the nuptials happen before or after the birth of the child. With us in England the rule is narrowed, for the nup-

tials must be precedent to the birth; of which more will be said when we come to consider the case of bastardy. At present, let us inquire into, 1. The legal duties of parents to their legitimate children. 2. Their power over them. 3. The duties of such children to their parents.

The Parent's Duty to His Legitimate Children.

1. And, first, the duties of parents to legitimate children: which principally consist in three particulars; their maintenance, their protection, and their education.

Maintenance.

The duty of parents to provide for the *maintenance* of their children is a principle of natural law; an obligation, says Puffendorf, laid on them not only by nature herself, but by their own proper act, in bringing them into the world.

It is a principle of law that there is an obligation on every man to provide for those descended from his loins; and the manner in which this obligation shall be performed is thus pointed out. The father and mother, grandfather and grandmother, of poor impotent persons, shall maintain them at their own charges, if of sufficient ability, according as the quarter sessions shall direct; and if a parent runs away and leaves his children, the church-wardens and overseers of the parish shall seize his rents, goods and chattels, and dispose of them toward their relief. By the interpretations which the courts of law have made upon these statutes, if a mother or grandmother marries again, and was before such second marriage of sufficient ability to keep the child, the husband shall be charged to maintain it: for this, being a debt of hers when single, shall like others extend to charge the husband. But at her death, the relation being dissolved, the husband is under no further obligation.

No person is bound to provide a maintenance for his issue, unless where the children are impotent and unable to work, either through infancy, disease, or accident, and then is only obliged to find them with necessaries, the penalty on refusal being no more than 20s. a month.

Our law has made no provision to prevent the disinheriting of children by will: leaving every man's property in his own disposal, upon a principle of liberty in this as well as every other action; though perhaps it had not been amiss if the parent had been bound to leave them at least a necessary subsistence. Indeed, among persons of any rank or fortune, a competence is generally provided for younger children, and the bulk of the estate settled upon the eldest, by the marriage-articles. Heirs, also, and children, are favourites of our courts of justice and cannot be disinherited by any dubious or ambiguous words; there being required the utmost certainty of the testator's intentions to take away the right of an heir.

Protection.

From the duty of maintenance we may easily pass to that of *protection*, which is also a natural duty, but rather permitted than enjoined by any municipal laws: nature, in this respect, working so strongly as to need rather a check than a spur. A parent may by our laws maintain and uphold his children in their law-suits, without being guilty of the legal crime of maintaining quarrels. A parent may also justify an assault and battery in defense of the persons of his children: nay, where a man's son was beaten by another boy, and the father went near a mile to find him, and there revenge the son's quarrel by beating the other boy, of which beating he afterwards unfortunately died, it was not held to be murder, but manslaughter merely. Such indulgence does the law show to the frailty of human nature, and the workings of parental affection.

Education.

The last duty of parents to their children is that of giving them an *education* suitable to their station in life: a duty pointed out by reason, and of far the greatest importance of any. Our laws, though their defects in this particular cannot be denied, have in one instance, made a wise provision for breeding up the rising generation: since the poor and laborious part of the community, when past the age of nurture, are taken out of the hands of their parents, by the statutes for apprenticing poor children, and are placed out by the public in such a manner, as may render their abilities, in their several stations, of the greatest advantage to the commonwealth.

The Parent's Power over his Children.

2. The *power* of parents over their children is derived from the former consideration of their duty: this authority being given them, partly to enable the parent more effectually to perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it.

The power of a parent by our English laws is much more moderate; but still sufficient to keep the child in order and obedience. He may lawfully correct his child, being under age, in a reasonable manner; for this is for the benefit of his education. The consent or concurrence of the parent to the marriage of his child under age, was also *directed* by our ancient law to be obtained: but now it is absolutely *necessary*, for without it the contract is void. And this also is another means, which the law has put into the parent's hands, in order the better to discharge his duty; first, of protecting his children from the snares of artful and designing persons; and, next, of settling them properly in life, by preventing the ill consequences of too early and precipitate marriages. A father has no other power over his son's *estate* than as his trustee

or guardian; for though he may receive the profits during the child's minority, yet he must account for them when he comes of age. He may indeed have the benefit of his children's labour while they live with him; and are maintained by him; but this is no more than he is entitled to from his apprentices or servants. The legal power of a father,—for a mother, as such, is entitled to no power, but only to reverence and respect; the power of a father, I say, over the persons of his children ceases at the age of twenty-one; for they are then enfranchised by arriving at years of discretion, or that point which the law has established, as some must necessarily be established, when the empire of the father or other guardian, gives place to the empire of reason. Yet, till that age arrives, this empire of the father continues even after his death; for he may by his will appoint a guardian to his children. He may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child: who is then *in loco parentis*, and has such a portion of the power of parent committed to his charge, viz., that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

Duties of Children to their Parents.

3. The *duties* of children to their parents arise from a principle of natural justice and retribution. For to those who gave us existence we naturally owe subjection and obedience during our minority, and honor and reverence ever after; they who protected the weakness of our infancy are entitled to our protection in the infirmity of their age; they who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by that offspring, in case they stand in need of assistance. Upon this principle proceed all the duties of children to their parents which are enjoined by positive laws. And the Athenian laws carried this principle into practice with a scrupulous kind of nicety: obliging all children to provide for their fathers when fallen into poverty; with an exception to spurious children, to those whose chastity had been prostituted by consent of the father, and to those whom he had not put in any way of gaining a livelihood. The legislature, says baron Montesquieu, considered, that in the first case the father, being uncertain, had rendered the natural obligation precarious; that in the second case, he had sullied the life he had given, and done his children the greatest injuries, in depriving them of their reputation; and that, in the third case, he had rendered their life, so far as in him lay, an insupportable burden, by furnishing them with no means of subsistence.

Our laws agree with those of Athens with regard to the first only of these particulars, the case of spurious issue. In the other case the law does not hold the tie of nature to be dissolved by any

misbehaviour of the parent; and therefore a child is equally justifiable in defending the person, or maintaining the cause or suit, of a bad parent, as a good one; and is equally compellable, if of sufficient ability, to maintain and provide for a wicked and unnatural progenitor as for one who has shown the greatest tenderness and parental piety.

Illegitimate Children.

II. We are next to consider the case of illegitimate children, or bastards; with regard to whom let us inquire, 1. Who are bastards. 2. The legal duties of the parents toward a bastard child. 3. The rights and incapacities attending such bastard children.

Who are Bastards?

1. Who are bastards? A bastard, by our English laws, is one that is not only begotten, but born out of lawful matrimony. The civil and canon laws do not allow a child to remain a bastard, if the parents afterwards intermarry: and herein they differ most materially from our law; which, though not so strict as to require that a child shall be *begotten*, yet makes it an indispensable condition to make it legitimate, that it shall be *born*, after lawful wedlock.

From what has been said it appears, that all children born before matrimony are bastards by our law; and so it is of all children born so long after the death of the husband, that by the usual course of gestation, they could not be begotten by him. But this being a matter of some uncertainty, the law is not exact as to a few days. And this gives occasion to a proceeding at common law, where a widow is suspected to feign herself with child, in order to produce a suppositious heir to the estate; an attempt which the rigor of the Gothic constitutions esteemed equivalent to the most atrocious theft, and therefore punished with death. In this case, with us the heir presumptive may have a writ *de ventre inspiciendo* to examine whether she be with child or not; and, if she be, to keep her under proper restraint till delivered; which is entirely conformable to the practice of the civil law; but, if the widow be, upon due examination, found not pregnant, the presumptive heir shall be admitted to the inheritance though liable to lose it again on the birth of a child within forty weeks from the death of a husband. But, if a man dies, and his widow soon after marries again, and a child is born within such a time as that by the course of nature it might have been the child of either husband; in this case he is said to be more than ordinarily legitimate; for he may, when he arrives to years of discretion, choose which of the fathers he pleases. To prevent this, among other inconveniences, the civil law ordained that no widow should marry *infra annum luctus*, a rule which obtained so early as the reign of Augustus, if not of

Romulus: and the same constitution was probably handed down to our early ancestors from the Romans, during their stay in this island; for we find it established under the Saxon and Danish governments.

As bastards may be born before the coverture or marriage state is begun, or after it is determined, so also children born during wedlock may in some circumstances be bastard. As if the husband be out of the kingdom of England, or, as the law somewhat loosely phrases it, *extra quatuor maria*, for above nine months, so that no access to his wife can be presumed, her issue during that period shall be bastards. But generally, during the coverture, access of the husband shall be presumed, unless the contrary can be shown; which is such a negative as can only be proved by showing him to be elsewhere: for the general rule is *praesumitur pro legitimatione*. In a divorce *a mensa et thoro*, if the wife breeds children, they are bastards; for the law will presume the husband and wife conformable to the sentence of separation, unless access be proved; but in a voluntary separation by agreement, the law will suppose access, unless the negative be shown. So also, if there is an apparent impossibility of procreation on the part of the husband, as if he be only eight years old, or the like, there the issue of the wife shall be bastard. Likewise, in case of divorce in the spiritual court, *a vinculo matrimonii*, all the issue born during the coverture are bastards; because such divorce is always upon some cause that rendered the marriage unlawful and null from the beginning.

Duty of Parents to Bastard Children.

2. Let us next see the duty of parents to their bastard children, by our law; which is principally that of maintenance. For, though bastards are not looked upon as children to any civil purposes, yet the ties of nature, of which maintenance is one, are not so easily dissolved; and they hold indeed as to many other intentions; as, particularly, that a man shall not marry his bastard sister or daughter.

When a woman is delivered, or declares herself with child, of a bastard, and will by oath before a justice of peace charge any person as having got her with child, the justice shall cause such person to be apprehended, and commit him till he gives security, either to maintain the child, or appear at the next quarter sessions to dispute and try the fact. But if the woman dies, or is married before delivery or miscarries, or proves not to have been with child, the person shall be discharged; otherwise the sessions, or two justices out of sessions, upon original application to them, may take order for the keeping of the bastard, by charging the mother or the reputed father with the payment of the money or other sus-

tentation for that purpose. And if such putative father, or lewd mother, run away from the parish, the overseers, by direction of two justices, may seize their rents, goods, and chattels, in order to bring up the said bastard child. Yet such is the humanity of our laws, that no woman can be compulsively questioned concerning the father of her child till one month after her delivery; which indulgence is, however, very frequently a hardship upon parishes, by giving the parents opportunity to escape.

Rights and Incapacities of a Bastard.

I proceed next to the rights and incapacities which appertain to a bastard. The rights are very few, being only such as he can *acquire*; for he can *inherit* nothing, being looked upon as the son of nobody; and sometimes called *filius nullius*, sometimes *filius populi*. Yet he may gain a surname by reputation, though he has none by inheritance. The incapacity of a bastard consists principally in this, that he cannot be heir to any one, neither can he have heirs, but of his own body; for, being *nullius filius*, he is, therefore, of kin to nobody, and has no ancestor from whom any inheritable blood can be derived. A bastard was also, in strictness, incapable of holy orders; and, though that was dispensed with, yet he was utterly disqualified from holding any dignity in the church: but the doctrine now seems obsolete; and in all other respects, there is no distinction between a bastard and another man. And really any other distinction, but that of not inheriting, which civil policy renders necessary, would with regard to an innocent offspring of his parents' crimes be odious, unjust, and cruel to the last degree; and yet the civil law, so boasted of for its equitable decisions, made bastards in some cases incapable even of a gift from their parents. A bastard may, lastly, be made legitimate, and capable of inheriting, by the transcendent power of an act of parliament, and not otherwise.

Chapter XVII.

GUARDIAN AND WARD.

460-467.

The only general private relation, now remaining to be discussed, is that of guardian and ward; which bears a very near resemblance to the last, and is plainly derived out of it: the guardian being only a temporary parent, that is, for so long time as the ward is an infant, or under age. In examining this species of relationship, I shall first consider the different kinds of guardians, how they are appointed, and their power and duty; next the different ages of persons as defined by the law: and lastly, the privileges and disabilities of an infant, or one under age, and subject to guardianship.

The Guardian.

1. The guardian with us performs the office both of the *tutor* and *curator* of the Roman laws, the former of which had the charge of the maintenance and education of the minor, the latter the care of his fortune; or, according to the language of the court of chancery, the *tutor* was the committee of the person, the *curator* the committee of the estate. But this office was frequently united in the civil law; as it is always in our law with regard to minors, though as to lunatics and idiots it is commonly kept distinct.

Kinds of Guardians.

Of the several species of guardians, the first are guardians *by nature*: viz., the father, and, in some cases, the mother of the child. For if an estate be left to an infant, the father is by common law the guardian, and must account to his child for the profits. And, with regard to daughters, it seems by construction of statute 4 and 5 Ph. and Mar. c. 8, that the father might by deed or will assign a guardian to any woman-child under the age of sixteen; and, if none be so assigned, the mother shall in this case be guardian. There are also guardians *for nurture*; which are, of course, the father or mother, till the infant attains the age of fourteen years; and in default of father or mother, the ordinary usually assigns some discreet person to take care of the infant's personal estate, and to provide for his maintenance and education. Next are guardians *in socage* (an appellation which will be fully explained in the second book of these commentaries), who are also called guardians *by the common law*. These take place only when the minor is entitled to some estate in lands, and then by the common law the guardianship devolves upon his next of kin, to whom the inheritance cannot possibly descend; as where the estate descended from his father, in this case his uncle by the mother's side cannot possibly inherit this estate, and therefore shall be the guardian. For the law judges it improper to trust the person of an infant in his hands, who may by possibility become heir to him; that there may be no temptation, nor even suspicion of temptation, for him to abuse his trust. These guardians *in socage*, like those for nurture, continue only till the minor is fourteen years of age; for then in both cases, he is presumed to have discretion, so far as to choose his own guardian. This he may do, unless one be appointed by the father, by virtue of the statute 12 Car. II. c. 24, which, considering the imbecility of judgment in children of the age of fourteen, and the abolition of guardianship *in chivalry* (which lasted till the age of twenty-one, and of which we shall speak hereafter), enacts that any father, under age or of full age, may by deed or will dispose of the custody of his child, either born or unborn, to any person, except a popish recusant, either in possession or reversion,

till such child attains the age of one-and-twenty years. These are called guardians *by statute*, or *testamentary* guardians. There are also special guardians *by custom* of London, and other places; but they are particular exceptions, and do not fall under the general law.

Power and Reciprocal Duty of Guardian and Ward.

The power and reciprocal duty of a guardian and ward are the same, *pro tempore*, as that of a father and child, and therefore I shall not repeat them, but shall only add, that the guardian, when the ward comes of age, is bound to give him an account of all that he has transacted on his behalf, and must answer for all losses by his wilful default or negligence. In order therefore to prevent disagreeable contests with young gentlemen, it has become a practice of many guardians, of large estates especially, to indemnify themselves by applying to the court of chancery, acting under its direction, and accounting annually before the officers of that court. For the lord chancellor is, by right derived from the crown, the general and supreme guardian of all infants, as well as idiots and lunatics; that is, of all such persons as have not discretion enough to manage their own concerns. In case, therefore, any guardian abuses his trust, the court will check and punish him, nay, sometimes proceed to the removal of him, and appoint another in his stead.

The Ward.

2. Let us next consider the ward or person within age, for whose assistance and support these guardians are constituted by law; or who it is, that is said to be within age. The ages of male and female are different for different purposes. A male at *twelve* years old may take the oath of allegiance; at *fourteen* is at years of discretion, and therefore may consent or disagree to marriage, may choose his guardian, and, if his discretion be actually proved, may make his testament of his personal estate; at *seventeen* may be an executor; and at *twenty-one* is at his own disposal, and may alien his lands, goods, and chattels. A female also at *seven* years of age may be betrothed or given in marriage; at *nine* is entitled to dower; at *twelve* is at years of maturity, and therefore may consent or disagree to marriage, and, if proved to have sufficient discretion, may bequeath her personal estate; at *fourteen* is at years of legal discretion, and may choose a guardian; at *seventeen* may be executrix; and at *twenty-one* may dispose of herself and her lands. So that full age in male or female is twenty-one years, which age is completed on the day preceding the anniversary of a person's birth, who till that time is an infant, and so styled in law.

Infants' Privileges and Disabilities.

3. Infants have various privileges, and various disabilities; but their very disabilities are privileges, in order to secure them from

hurting themselves by their own improvident acts. An infant cannot be sued but under the protection, and joining the name, of his guardian; for he is to defend him against all attacks as well by law as otherwise; but he may sue either by his guardian, or *prochein amy*, his next friend who is not his guardian. This *prochein amy* may be any person who will undertake the infant's cause, and it frequently happens, that an infant, by his *prochein amy*, institutes a suit in equity against a fraudulent guardian. In criminal cases, an infant at the age of *fourteen* years may be capitally punished for any capital offense; but under the age of *seven* he cannot.

The period between *seven* and *fourteen* is subject to much uncertainty: for the infant shall, generally speaking, be judged *prima facie innocent*; yet if he was *doli capax*, and could discern between good and evil at the time of the offense committed, he may be convicted and undergo judgment and execution of death, though he hath not attained to years of puberty or discretion. And Sir Matthew Hale gives us two instances, one of a girl of thirteen, who was burned for killing her mistress; another of a boy still younger, that had killed his companion, and hid himself, who was hanged; for it appeared by his hiding that he knew he had done wrong, and could discern between good and evil; and in such cases the maxim of law is, that *malitia supplet aetatem*. So also, in much more modern times, a boy of ten years old, who was guilty of a heinous murder, was held a proper subject for capital punishment by the opinion of all the judges.

With regard to estates and civil property, an infant hath many privileges, which will be better understood when we come to treat more particularly of those matters; but this may be said in general, that an infant shall lose nothing by non-claim, or neglect of demanding his right; nor shall any other *laches* or negligence be imputed to an infant, except in some very particular cases.

It is generally true, that an infant can neither alien his lands, nor do any legal act, nor make a deed, nor indeed any manner of contract that will bind him. But still to all these rules there are some exceptions; part of which were just now mentioned in reckoning up the different capacities which they assume at different ages: and there are others, a few of which it may not be improper to recite, as a general specimen of the whole. And, first, it is true, that infants cannot alien their estates: but infant trustees, or mortgagees, are enabled to convey, under the direction of the court of chancery or exchequer, or other courts of equity, the estates they hold in trust or mortgage, to such person as the court shall appoint. Also it is generally true, that an infant can do no legal act. An infant may also purchase lands, but his purchase is incomplete; for, when he comes to age, he may either agree or disagree to it, as he thinks prudent or proper, without alleging any reason; and so may

his heirs after him, if he dies without having completed his agreement. It is, further, generally true, that an infant, under twenty-one, can make no deed but what is afterwards voidable: yet in some cases he may bind himself apprentice by deed indented or indentures, for seven years; and he may by deed or will appoint a guardian to his children, if he has any. Lastly, it is generally true, that an infant can make no other contract that will bind him; yet he may bind himself to pay for his necessary meat, drink, apparel, physic, and such other necessaries; and likewise for his good teaching and instruction whereby he may profit himself afterwards. And thus much, at present, for the privileges and disabilities of infants.

SYNOPSIS OF CHAPTER XVIII.

Corporations	{	1. Definition and purpose.					
		2. Divisions	{	1. As to numbers composing	{	1. Aggregate.	
						2. Sole.	
				{	2. As to objects	{	1. Spiritual.
			{				1. Civil.
						2. Lay	
				3. How erected and named	{	1. By virtue of king's charter.	
		2. By act of parliament.					
		4. Powers	{	1. Perpetual succession.			
				2. Act as an individual.			
				3. Hold lands.			
				4. Have common seal.			
				5. Make by-laws.			
		5. The duty of.					
		6. How visited.					
		7. How dissolved	{	1. By act of parliament.			
				2. By natural death of all the members.			
				3. By surrender of franchises.			
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Chapter XVIII.
OF CORPORATIONS.

467-486.

We have hitherto considered persons in their natural capacities, and have treated of their rights and duties. But, as all personal rights die with the person; and, as the necessary forms of

investing a series of individuals, one after another, with the same identical rights, would be very inconvenient, if not impracticable; it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality.

These artificial persons are called bodies politic, bodies corporate, or corporations; of which there is a great variety subsisting, for the advancement of religion, of learning, and of commerce; in order to preserve entire and forever those rights and immunities, which, if they were granted only to those individuals of which the body corporate is composed, would upon their death be utterly lost and extinct.

Origin.

The honor of originally inventing these political constitutions entirely belongs to the Romans. They were introduced, as Plutarch says, by Numa; who, finding upon his accession, the city torn to pieces by the two rival factions of Sabines and Romans, thought it a prudent and politic measure to subdivide these two into many smaller ones, by instituting separate societies of every manual trade and profession. They were afterwards much considered by the civil law; in which they were called *universitates*, as forming one whole out of many individuals; or *collegia*, from being gathered together; they were adopted also by the canon law, for the maintenance of ecclesiastical discipline; and from them our spiritual corporations are derived. But our laws have considerably refined and improved upon the invention, according to the usual genius of the English nation.

Classes. Aggregate and Sole.

Before we proceed to treat of the several incidents of corporations, as regarded by the laws of England, let us first take a view of the several sorts of them; and then we shall be better enabled to apprehend their respective qualities.

The first division of corporations is into *aggregate* and *sole*. Corporations aggregate consist of many persons united together into one society, and are kept up by a perpetual succession of members, so as to continue forever; of which kind are the mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church. Corporations sole consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense, the king is a sole corporation; so is a bishop; so are some deans, and preben-

daries, distinct from their several chapters; and so is every parson and vicar.

Ecclesiastical and Lay. Civil and Eleemosynary.

Another division of incorporations, either sole or aggregate, is into *ecclesiastical* and *lay*. Ecclesiastical corporations are where the members that compose it are entirely spiritual persons. These are erected for the furtherance of religion, and perpetuating the rights of the church. Lay corporations are of two sorts, *civil* and *eleemosynary*. The civil are such as are erected for a variety of temporal purposes. The king, for instance, is made a corporation to prevent in general the possibility of an *interregnum* or vacancy of the throne, and to preserve the possessions of the crown entire; for immediately upon the demise of one king, his successor is, as we have formerly seen, in full possession of the regal rights and dignity. Other lay corporations are erected for the good government of a town or particular district, as a mayor and commonalty, bailiff and burgesses, or the like; some for the advancement and regulation of manufactures and commerce; as the trading companies of London, and other towns; and some for the better carrying on of divers special purposes; as church-wardens, for conservation of the goods of the parish. The eleemosynary sort, or such as are constituted for the perpetual distribution of the free alms, or bounty, of the founder of them to such persons as he has directed. Of this kind are all hospitals for the maintenance of the poor, sick, and impotent; and all colleges both *in* our universities and *out* of them: which colleges are founded for two purposes: 1. For the promotion of piety and learning by proper regulations and ordinances. 2. For imparting assistance to the members of these bodies, in order to enable them to prosecute their devotion and studies with greater ease and assiduity. And all these eleemosynary corporations are, strictly speaking, lay and not ecclesiastical, even though composed of ecclesiastical persons, and although they in some things partake of the nature, privileges, and restrictions of ecclesiastical bodies.

Having thus marshaled the several species of corporations, let us next proceed to consider, 1. How corporations in general may be created. 2. What are their powers, capacities, and incapacities. 3. How corporations are visited. And, 4. How they may be dissolved.

How Created.

1. The king's consent is absolutely necessary to the erection of any corporation, either impliedly or expressly given. The king's implied consent is to be found in corporations which exist by force of the *common law*, to which our former kings are supposed to have given their concurrence; common law being nothing else but

custom, arising from the universal agreement of the whole community. Of this sort are the king himself, all bishops, parsons, vicars, church-wardens, and some others; who by common law have ever been held, as far as our books can show us, to have been corporations, *virtute officii*, and this incorporation is so inseparably annexed to their offices, that we cannot frame a complete legal idea of any of these persons, but we must also have an idea of a corporation, capable to transmit his rights to his succesors at the same time. Another method of implication, whereby the king's consent is presumed, is as to all corporations by *prescription*, such as the city of London, and many others, which have existed as corporations, time whereof the memory of man runneth not to the contrary; and therefore are looked upon in law to be well created. For though the members thereof can show no legal charter of incorporation, yet in cases of such high antiquity the law presumes there once was one, and that, by the variety of accidents which a length of time may produce, the charter is lost or destroyed. The methods by which the king's consent is expressly given are either by act of parliament or charter. By act of parliament, of which the royal assent is a necessary ingredient, corporations may undoubtedly be created.

All the other methods, therefore, whereby corporations exist, by common law, by prescription, and by act of parliament, are of the most part reducible to this of the king's letters-patent, or charter of incorporation. The king's creation may be performed by the words "*creamus, erigimus, fundamus, incorporamus,*" or the like.

The parliament, we observed, by its absolute and transcendent authority, may perform this, or any other act whatsoever; and actually did perform it to a great extent, by statute 39 Eliz. c. 5, which incorporated all hospitals and houses of correction founded by charitable persons, without further trouble: and the same has been done in other cases of charitable foundations. But otherwise it has not formerly been usual thus to intrench upon the prerogative of the crown, and the king may prevent it when he pleases. And in the particular instances before mentioned, it was done, as Sir Edward Coke observes, to avoid the charges of incorporation and licenses of mortmain in small benefactions, which in his days were grown so great, that they discouraged many men from undertaking these pious and charitable works.

The king, it is said, may grant to a subject the power of erecting corporations, though the contrary was formerly held: that is he may permit the subject to name the person and powers of the corporation at his pleasure; but it is really the king that erects, and the subject is but the instrument; for though none but the king can make a corporation, yet *qui facit per alium, facit per se*. In this manner the chancellor of the university of Oxford has

power by charter to erect corporations; and has actually often exerted it, in the erection of several matriculated companies, now subsisting, of tradesmen subservient to the students.

Name.

When a corporation is erected, a name must be given to it; and by that name alone it must sue, and be sued, and do all legal acts; though a very minute variation therein is not material. Such name is the very being of its constitution; and, though it is the will of the king that erects the corporation, yet the name is the knot of its combination, without which it could not perform its corporate functions.

Incidents.

II. After a corporation is so formed and named, it acquires many powers, rights, capacities, and incapacities, which we are next to consider. Some of these are necessarily and inseparably incident to every corporation; which incidents, as soon as a corporation is duly erected, are tacitly annexed, of course. As 1. *To have perpetual succession.* This is the very end of its incorporation; for there cannot be a succession forever without an incorporation: and therefore all aggregate corporations have a power necessarily implied of electing members in the room of such as go off. 2. *To sue or be sued, implead or be impleaded, grant or receive, by its corporate name,* and do all other acts as natural persons may. 3. *To purchase lands, and hold them,* for the benefit of themselves and their successors; which two are consequential to the former. 4. *To have a common seal.* For a corporation, being an invisible body, cannot manifest its intentions by any personal act or oral discourse: it therefore acts and speaks only by its common seal. For though the particular members may express their private consent to any acts, by words, or signing their names, yet this does not bind the corporation: it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole. 5. *To make by-laws or private statutes for the better government of the corporations* which are binding upon themselves, unless contrary to the laws of the land, and then they are void. This is also included by law in the very act of incorporation: for as natural reason is given to the natural body for the governing it, so by-laws or statutes are a sort of political reason to govern the body politic. These five powers are inseparably incident to every corporation, at least to every corporation aggregate; for two of them, though they may be practiced, yet are very unnecessary to a corporation *sole*, viz.; to have a corporate seal to testify his sole assent, and to make statutes for the regulation of his own conduct.

Privileges and Disabilities of Aggregate Corporations.

There are also certain privileges and disabilities that attend an aggregate corporation, and are not applicable to such as are sole; the reason of them ceasing, and of course the law. It must always appear by attorney, for it cannot appear in person, being, as Sir Edward Coke says, invisible, and existing only in intendment and consideration of law. It can neither maintain, nor be made defendant to, an action of battery or such like personal injuries; for a corporation can neither beat, nor be beaten, in its body politic. A corporation cannot commit treason, or felony, or other crime, in its corporate capacity; though its members may, in their distinct individual capacities. Neither is it capable of suffering a traitor's or felon's punishment, for it is not liable to corporate penalties, nor to attainder, forfeiture, or corruption of blood. It cannot be executor or administrator, or perform any personal duties; for it cannot take an oath for the due execution of the office. It cannot be seised of lands to the use of another; for such kind of confidence is foreign to the end of its institution. Neither can it be committed to prison; for, its existence being ideal, no man can apprehend or arrest it.

There are also other incidents and powers which belong to some sort of corporations, and not to others. An aggregate corporation may take goods and chattels for the benefit of themselves and their successors, but a sole corporation cannot; for such movable property is liable to be lost or embezzled, and would raise a multitude of disputes between the successor and executor, which the law is careful to avoid. In ecclesiastical and eleemosynary foundations, the king or the founder may give them rules, laws, statutes, and ordinances, which they are bound to observe; but corporations merely lay, constituted for civil purposes, are subject to no particular statutes; but to the common law, and to their own by-laws, not contrary to the laws of the realm. Aggregate corporations also, that have by their constitutions a head, as a dean, warden, master, or the like, cannot do any acts during the vacancy of the headship, except only appointing another; neither are they then capable of receiving a grant, for such corporation is incomplete without a head. But there may be a corporation aggregate constituted without a head. In aggregate corporations, also, the act of the major part is esteemed the act of the whole. Any majority is sufficient to determine the act of the whole body.

We before observed, that it was incident to every corporation to have a capacity to purchase lands for themselves and successors; and this is regularly true at the common law. But they are excepted out of the statute of wills; so that no devise of lands to a

corporation by will is good, except for charitable uses, by statute 43 Eliz. c. 4; which exception is again greatly narrowed by the statute 9 Geo. II. c. 36. And also, by a great variety of statutes, their privilege even of purchasing from any living grantor is much abridged, so that now a corporation, either ecclesiastical or lay, must have a license from the king to purchase, before they can exert that capacity which is vested in them by the common law; nor is even this in all cases sufficient. These statutes are generally called the statutes of *mortmain*; all purchases made by corporate bodies being said to be purchases in *mortmain*, *in mortua manu*; for the reason of which appellation Sir Edward Coke offers many conjectures, but there is one which seems more probable than any that he has given us; viz., that these purchases being usually made by ecclesiastical bodies, the members of which (being professed) were reckoned dead persons in law, land therefore holden by them might with great propriety be said to be held *in mortua manu*.

Duties of Corporations.

The general *duties* of all bodies politic, considered in their corporate capacity, may, like those of natural persons, be reduced to this single one, that of acting up to the end or design, whatever it be, for which they were created by their founder.

How Visited.

III. I proceed therefore next to inquire, how these corporations may be *visited*. For corporations, being composed of individuals, subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And for that reason the law has provided proper persons to visit, inquire into, and correct all irregularities that arise in such corporations, either sole or aggregate, and whether ecclesiastical, civil, or eleemosynary. With regard to all ecclesiastical corporations, the ordinary is their visitor, so constituted by the canon law, and from thence derived to us. The pope formerly, and now the king, as supreme ordinary, is the visitor of the archbishop or metropolitan; the metropolitan has the charge and coercion of all his suffragan bishops, and the bishops in their several dioceses are in ecclesiastical matters the visitors of all deans and chapters, of all parsons and vicars, and of all other spiritual corporations. With respect to all lay corporations, the founder, his heirs or assigns, are the visitors, whether the foundation be civil or eleemosynary; for in a lay corporation the ordinary neither can nor ought to visit.

I know it is generally said, that civil corporations are subject to no visitation, but merely to the common law of the land; and this shall be presently explained. But first, as I have laid it down as a rule that the founder, his heirs or assigns, are the visitors of all lay corporations, let us inquire what is meant by the *founder*. The founder of all corporations, in the strictest and original sense is the king alone, for he only can incorporate a society; and in civil incorporations, such as a mayor and commonalty, etc., where there are no possessions or endowments given to the body, there is no other founder but the king; but in eleemosynary foundations, such as colleges and hospitals, where there is an endowment of lands, the law distinguishes, and makes two species of foundation; the one *fundatio incipiens*, or the incorporation, in which sense the king is the general founder of all colleges and hospitals; the other *fundatio perficiens*, or the dotation of it, in which sense the first gift of the revenues is the foundation, and he who gives them is in law the founder; and it is in this last sense that we generally call a man the founder of a college or hospital. But here the king has his prerogative; for, if the king and a private man join in endowing an eleemosynary foundation the king alone shall be the founder of it. And, in general, the king being the sole founder of all civil corporations, and the endower the perficient founder of all eleemosynary ones, the right of visitation of the former results, according to the rule laid down, to the king; and of the latter to the patron or endower.

The king being thus constituted by law visitor of all civil corporations, the law has also appointed the place wherein he shall exercise this jurisdiction; which is the court of Kings Bench; where and where only, all misbehaviours of this kind of corporations are inquired into and redressed, and all their controversies decided. And this is what I understand to be the meaning of our lawyers when they say that these civil corporations are liable to no visitation; that is, that the law having by immemorial usage appointed them to be visited and inspected by the king their founder, in his majesty's court of King's Bench, according to the rules of the common law, they ought not to be visited elsewhere, or by any other authority.

As to eleemosynary corporations, by the dotation the founder and his heirs are of common right the legal visitors, to see that such property is rightly employed, as might otherwise have descended to the visitor himself; but, if the founder has appointed and assigned any other person to be visitor, then his assignee so

appointed is invested with all the founder's power, in exclusion of his heir. Eleemosynary corporations are chiefly hospitals, or colleges in the universities. This right of lay patrons was indeed abridged by statute 2 Hen. V. c. 1, which ordained, that the ordinary should visit *all* hospitals founded by subjects; though the king's right was reserved, to visit by his commissioners such as were of royal foundation. But the subject's right was in part restored by statute 14 Eliz. c. 5, which directs the bishop to visit such hospitals only where no visitor is appointed by the founders thereof; and all the hospitals founded by virtue of the statute 39 Eliz. c. 5, are to be visited by such persons as shall be nominated by the respective founders. But still, if the founder appoints nobody, the bishop of the diocese must visit.

Colleges in the universities (whatever the common law may now, or might formerly, judge), were certainly considered by the popish clergy, under whose direction they were, as *ecclesiastical*, or at least as *clerical*, corporations; and therefore the right of visitation was claimed by the ordinary of the diocese.

But whatever might be formerly the opinion of the clergy, it is now held as established common law, that colleges are lay corporations, though sometimes totally composed of ecclesiastical persons; and that the right of visitation does not arise from any principles of the canon law, but of necessity was created by the common law. And yet the power and jurisdiction of visitors in colleges was left so much in the dark at common law, that the whole doctrine was very unsettled till the famous case of *Phillips and Bury*. In this the main question was, whether the sentence of the bishop of Exeter, who, as a visitor, had deprived Doctor Bury, the rector of Exeter College, could be examined and redressed by the court of King's Bench. And the three puisne judges were of opinion that it might be reviewed, for that the visitor's jurisdiction could not exclude the common law; and accordingly judgment was given in that court. But the lord chief justice Holt was of a contrary opinion; and held, that by the common law the office of visitor is to judge according to the statutes of the college, and to expel and deprive upon just occasions, and to hear all appeals of course; and that from him, and him only the party grieved ought to have redress; the founder having reposed in him so entire a confidence, that he will administer justice impartially, that his determinations are final, and examinable in no other court whatsoever. And upon this a writ of error being brought into the house of lords, they concurred in Sir John Holt's opinion, and reversed the

judgment of the court of King's Bench. To which leading case all subsequent determinations have been conformable. But where the visitor is under a temporary disability, there the court of King's Bench will interpose to prevent a defect of justice. Also it is said, that if a founder of an eleemosynary foundation appoints a visitor, and limits his jurisdiction by rules and statutes, if the visitor in his sentence exceeds those rules, an action lies against him; but it is otherwise where he mistakes in a thing within his power.

How Dissolved.

IV. We come now, in the last place, to consider how corporations may be dissolved. Any particular member may be disfranchised, or lose his place in the corporation, by acting contrary to the laws of the society, or the laws of the land; or he may resign it by his own voluntary act. But the body politic may also itself be dissolved in several ways, which dissolution is the civil death of the corporation; and in this case their lands and tenements shall revert to the person or his heirs, who granted them to the corporation; for the law doth annex a condition to every such grant, that, if the corporation be dissolved, the grantor shall have the lands again, because the cause of the grant faileth. The grant is, indeed, only during the life of the corporation; which *may* endure forever; but when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life. The debts of a corporation, either to or from it, are totally extinguished by its dissolution; so that the members thereof cannot recover, or be charged with them, in their natural capacities.

A corporation may be dissolved, 1. By act of parliament, which is boundless in its operations. 2. By the natural death of all its members, in case of an aggregate corporation. 3. By surrender of its franchises into the hands of the king, which is a kind of suicide. 4. By forfeiture of its charter, through negligence or abuse of its franchises; in which case the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the incorporation is void. And the regular course is to bring an information in nature of a writ of *quo warranto*, to inquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings.

THE END OF BOOK THE FIRST.

SYNOPSIS OF BOOK II.

- 1. Their several kinds; viz. { 1. Corporeal, 2. Incorporeal
 - 2. The tenures by which they may be holden; viz. { 1. Ancient, 2. Modern.
 - 1. Quantity of interest, viz. { 1. Freehold. { 1. Of inheritance, 2. Not of inheritance.
 - 2. Less than freehold.
 - 3. On condition.
 - 3. Estates therein with respect to
 - 1. Possession.
 - 2. Remainder.
 - 3. Reversion.
 - 4. The number and connections of the tenants who may hold in
 - 1. Severalty.
 - 2. Joint-tenancy.
 - 3. Coparcenary.
 - 4. Common.
1. Things real; in which are considered
 - 1. Descent. { 1. Escheat.
 - 2. Purchase; which includes
 - 1. Occupancy.
 - 2. Prescription.
 - 3. Forfeiture.
 - 4. Alienation by common assurances which are
 - 2. Title to them; which may be gained or lost by
 - 1. Deed or matter *in pais*; where in of its
 - 1. General nature.
 - 2. Several species.
 - 2. Matter of record.
 - 3. Special custom.
 - 4. Devise.
2. Things personal, or chattels; in which are considered
 - 1. Their distribution.
 - 1. Property therein.
 - 2. Title to them, which may be gained or lost by
 - 1. Occupancy.
 - 2. Prerogative.
 - 3. Forfeiture.
 - 4. Custom.
 - 5. Succession.
 - 6. Marriage.
 - 7. Judgment.
 - 8. Grant.
 - 9. Contract.
 - 10. Bankruptcy.
 - 11. Testament.
 - 12. Administration.

The rights of things. Which consist in dominion over

BOOK THE SECOND. OF THE RIGHTS OF THINGS.

Chapter I. OF PROPERTY IN GENERAL.

1-16.

Object of the Book.

The former book of these commentaries having treated at large of the *jura personarum*, or such rights and duties as are annexed to the *persons* of men, the objects of our inquiry in this second book will be the *jura rerum*, or those rights which a man may acquire in and to such external things as are unconnected with his person. These are what the writers in natural law style the rights of dominion or property, concerning the nature and original of which I shall first premise a few observations, before I proceed to distribute and consider its several objects.

Origin of Right of Property.

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property: or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are very few that will give themselves the trouble to consider the original and foundation of this right.

The chapter treats of the nature and origin of the rights of property. The only true and solid foundation of man's dominion over external things is the gift of the Creator to him in the beginning. At first all was in common and every one took from the public stock to his own use such things as his immediate necessities required. This community of goods was ever applicable to the substance of things but not to their use. Use gave transient property, the right of property lasting only so long as the act of possession.

With the increase of the race, the conception of more permanent dominion became necessary, and property was soon established in every man's house and home-stall. Movables were first appropriated before the soil itself, then came property in flocks and herds, hence arose the right to certain tracts for pasture, to certain wells, etc.

The earth becoming more populous agriculture grew up, and with it fixed rights in soil. Necessity begat property, and to insure property recourse was had to civil society. Mutual convenience introduced commercial traffic and the transfer of property by sale, grant or conveyance. The right of inheritance or descent seems to have been allowed much earlier than the right of devising by testament.

Origin of Wills.

While property continued only for life, testaments were useless and unknown; and when it became inheritable, the inheritance was long indefeasible, and the children or heirs at law were incapable of exclusion by will; till at length it was found, that so strict a rule of inheritance made heirs disobedient and headstrong, defrauded creditors of their just debts, and prevented many provident fathers from dividing or charging their estates as the exigence of their families required. This introduced pretty generally the right of disposing of one's property, or a part of it, by *testament*; that is, by written or oral instructions properly *witnessed* and authenticated, according to the *pleasure* of the deceased, which we therefore emphatically style his *will*. This was established in some countries much later than in others. With us in England, till modern times, a man could only dispose of one-third of his movables from his wife and children; and, in general, no will was permitted of lands till the reign of Henry VIII.; and then only for a certain portion; for it was not till after the Restoration that the power of devising real property became so universal as at present.

Wills, therefore, and testaments, rights of inheritance and successions, are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them. In personal estates the father may succeed to his children; in landed property he never can be their immediate heir, by any the remotest possibility; in general only the eldest son, in some places only the youngest, in others all the sons together, have a right to succeed to the inheritance; in real estates males are preferred to females, and the eldest male will usually exclude the rest; in the division of personal estates, the females of equal degree are admitted together with the males, and no right of primogeniture is allowed.

Property Remaining in Common.

There are some few things, which notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such wherein nothing but an usufructuary property is capable of being had; and therefore they still belong to the first occupant, during the time he holds possession

of them, and no longer. Such (among others) are the elements of light, air, and water, which a man may occupy by means of his windows, his gardens, his mills, and other conveniences; such also are the generality of those animals which are said to be *ferae naturae*, or of a wild and untamable disposition; which any man may seize upon and keep for his own use and pleasure. All these things so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards.

Again: there are other things in which a permanent property *may* subsist, not only as to the temporary use, but also the solid substance; and which yet would be frequently found without a proprietor, had not the wisdom of the law provided a remedy to obviate this inconvenience. Such are forests and other waste grounds, which were omitted to be appropriated in the general distribution of lands; such also are wrecks, estrays, and that species of wild animals which the arbitrary constitutions of positive law have distinguished from the rest by the well-known appellation of game. With regard to these and some others, as disturbances and quarrels would frequently arise among individuals, contending about the acquisition of this species of property by first occupancy, the law has therefore wisely cut up the root of dissension, by vesting the things themselves in the sovereign of the state, or else in his representatives appointed and authorized by him, being usually the lords of manors. And thus the legislature of England has universally promoted the grand ends of civil society, the peace and security of individuals, by steadily pursuing that wise and orderly maxim, of assigning to every thing capable of ownership a legal and determinate owner.

Chapter II.

OF REAL PROPERTY; AND, FIRST, OF CORPOREAL HEREDITAMENTS.

16-19.

The objects of dominion or property are *things*, as contradistinguished from *persons*: and things are by the law of England distributed into two kinds; things *real* and things *personal*. Things *real* are such as are permanent, fixed and immovable, which cannot be carried out of their place; as lands and tene-

ments; things *personal* are goods, money, and all other movables; which may attend the owner's person wherever he thinks proper to go.

In treating of things *real*, let us consider, *first*, their several sorts or kinds; *secondly*, the *tenures* by which they may be holden; *thirdly*, the *estates* which may be had in them; and, *fourthly*, the *title* to them, and the *manner* of *acquiring* and *losing* it.

Lands, Tenements and Hereditaments.

First, with regard to their several sorts or kinds, things real are usually said to consist in lands, tenements or hereditaments. *Land* comprehends all things of a permanent, substantial nature; being a word of a very extensive signification, as will presently appear more at large. *Tenement* is a word of still greater extent, and though in its vulgar acceptation it is only applied to houses and other buildings, yet, in its original, proper and legal sense, it signifies everything that may be *holden*, provided it be of a permanent nature; whether it be of a substantial and sensible, or of an unsubstantial ideal kind. Thus *liberum tenementum*, frank-tenement, or freehold, is applicable not only to lands and other solid objects, but also to offices, rents, commons, and the like; and, as lands and houses are tenements, so is an advowson a tenement; and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are all of them, legally speaking, tenements. But an *hereditament*, says Sir Edward Coke, is by much the largest and most comprehensive expression; for it includes not only lands and tenements, but whatsoever may be *inherited*, be it corporeal or incorporeal, real, personal, or mixed. Thus an heirloom, or implement of furniture which by custom descends to the heir together with a house, is neither land, nor tenement, but a mere movable; yet being inheritable is comprised under the general word hereditament; and so a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament.

Hereditaments—Corporeal and Incorporeal.

Hereditaments then, to use the largest expression, are of two kinds, corporeal and incorporeal. Corporeal consist of such as affect the senses; such as may be seen and handled by the body; incorporeal are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation.

Land—Its Meaning in Law.

Corporeal hereditaments consist wholly of substantial and permanent objects; all of which may be comprehended under the

general denomination of land only. For *land*, says Sir Edward Coke, comprehendeth, in its legal signification, any ground, soil, or earth whatsoever; as arable meadows, pastures, woods, moors, waters, marshes, furzes, and heath. It legally includeth also all castles, houses, and other buildings; for they consist, saith he, of two things; *land* which is the foundation, and *structure* thereupon; so that if I convey the land or ground, the structure or building passeth therewith. It is observable that *water* is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law; and therefore I cannot bring an action to recover possession of a pool or other piece of water by the name of *water* only; either by calculating its capacity, as, for so many cubical yards; or by superficial measure, for twenty acres of water; or by general description, as for a pond, a water course, or rivulet; but I must bring my action for the land that lies at the bottom, and must call it twenty acres of *land covered with water*. For water is a movable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein; wherefore, if a body of water runs out of my pond into another man's I have no right to reclaim it. But the land which that water covers is permanent, fixed, and immovable; and therefore in this I may have a certain substantial property; of which the law will take notice, and not of the other.

Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad coelum*, is the maxim of the law, upwards; therefore no man may erect any building, or the like, to overhang another's land; and downwards, whatever is in a direct line, between the surface of any land and the center of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries. So that the word "land" includes not only the face of the earth, but everything under it, or over it. And therefore if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular names of the things are equally sufficient to pass them; except in the instance of water; by a grant of which, nothing passes but a right of fishing; but the capital distinction is this, that by the name of a castle, messuage, toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of; but by the name of land, which is *nomen generalissimum*, everything terrestrial will pass.

SYNOPSIS OF CHAPTER III.

Incorporeal Hereditaments	1. Advowsons	1. Appendant.
		2. In gross.
	2. Tithes.	
	3. Commons	1. Of pasture.
		2. Of piscary.
		3. Of turbary.
		4. Of estovers.
	4. Ways.	
	5. Offices.	
	6. Dignities.	
7. Franchises.		
8. Corodies.		
9. Annuities.		
10. Rents	1. Rent service.	
	2. Rent charge.	
	3. Rent seck.	

Chapter III.

OF INCORPOREAL HEREDITAMENTS.

19-44.

Definition and Divisions.

An incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within, the same. It is not the thing corporate itself, which may consist in lands, houses, jewels, or the like; but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels.

In short, corporeal hereditaments are the substance which may be always seen, always handled; incorporeal hereditaments are but a sort of accidents, which inhere in and are supported by that substance, and may belong or not belong to it without any visible alteration therein. Their existence is merely in idea and abstracted contemplation, though their effects and profits may be frequently objects of our bodily senses. And, indeed, if we would fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced and the thing or hereditament which produces them.

Incorporeal hereditaments are principally of ten sorts; advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities, and rents.

Advowsons.

I. Advowson is the right of presentation to a church, or ecclesiastical benefice. Advowson, *advocatio*, signifies the taking into protection; and therefore is synonymous with patronage, and he who has the right of advowson is called the patron of the church. For, when lords of manors first built churches on their own demesnes, and appointed the tithes of those manors to be paid to the officiating ministers, which before were given to the clergy in common (from whence, as was formerly mentioned, arose the division of parishes), the lord, who thus built a church, and endowed it with glebe or land, had of common right a power annexed of nominating such minister as he pleased (provided he were canonically qualified) to officiate in that church, of which he was the founder, endower, maintainer, or, in one word, the patron.

This instance of an advowson will completely illustrate the nature of an incorporeal hereditament. It is not itself the bodily possession of the church and its appendages; but it is a right to give some other man a title to such bodily possessions.

Advowsons are either advowsons *appendant*, or advowsons *in gross*. Lords of manors being originally the only founders, and of course the only patrons, of churches, the right of patronage or presentation, so long as it continues annexed to the possession of the manor, as some have done from the foundation of the church to this day, is called an advowson appendant; and it will pass, or be conveyed, together with the manor, as incident and appendant thereto, by a grant of the manor only, without adding any other words. But where the property of the advowson has been once separated from the property of the manor by legal conveyance, it is called an advowson in gross, or at large, and never can be appendant any more; but it is for the future annexed to the person of its owner, and not to his manor or lands.

Advowsons are also either *presentative*, *collative*, or *donative*; an advowson *presentative* is where the patron hath a right of presentation to the bishop or ordinary, and moreover to demand of him to institute his clerk, if he finds him canonically qualified; and this is the most usual advowson. An advowson *collative* is where the bishop and patron are one and the same person; in which case the bishop cannot present to himself; but he does, by the one act of collation, or conferring the benefice, the whole that is done in common cases, by both presentation and institution. An advowson *donative* is when the king, or any subject by his license, doth found a church or chapel, and ordains that it shall be merely in

the gift or disposal of the patron; subject to his visitation only, and not to that of the ordinary; and vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction.

Tithes.

II. A second species of incorporeal hereditaments is that of tithes; which are defined to be the tenth part of the increase, yearly arising and renewing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants; the first species being usually called *predial*, as of corn, grass, hops, and wood; the second *mixed*, as of wool, milk, pigs, etc., consisting of natural products, but nurtured and preserved in part by the care of man; and of these the tenth must be paid in gross; the third *personal*, as of manual occupations, trades, fisheries, and the like; and of these only the tenth part of the clear gains and profits is due.

The author proceeds to describe the things for which tithes are to be paid, the origin of the right of tithes, in whom the right at present subsists, and who may be discharged either totally or in part from paying them.

Common.

III. Common, or right of common, appears from its very definition to be an incorporeal hereditament; being a profit which a man hath in the land of another; as to feed his beasts, to catch fish, to dig turf, to cut wood or the like. And hence common is chiefly of four sorts; common of pasture, of piscary, of turbary, and of estovers.

I. Common of *pasture* is a right of feeding one's beasts on another's land; for in those waste grounds, which are usually called commons, the property of the soil is generally in the lord of the manor; as in common fields it is in the particular tenants. This kind of common is either appendant, appurtenant, because of vicinage, or in gross.

Common *appendant* is a right, belonging to the owners or occupiers of arable land, to put commonable beasts upon the lord's waste, and upon the lands of other persons within the same manor. Commonable beasts are either beasts of the plough, or such as manure the ground. Common *appurtenant* ariseth from no connection of tenure, nor from any absolute necessity; but may be annexed to lands in other lordships, or extend to other beasts, besides such as are generally commonable; as hogs, goats, or the like, which neither plow nor manure the ground. This can only be claimed by immemorial usage and prescription, which the law esteems sufficient proof of a special grant or agreement for this purpose. Common *because of vicinage*, or neighbourhood, is

where the inhabitants of two townships, which lie contiguous to each other, have usually intercommoned with one another; the beasts of the one straying mutually into the other's fields, without any molestation from either. Common *in gross*, or at large, is such as is neither appendant nor appurtenant to land, but is annexed to a man's person; being granted to him and his heirs by deed; or it may be claimed by prescriptive right, as by a parson of a church, or the like corporation sole. This is a separate inheritance, entirely distinct from any landed property, and may be vested in one who has not a foot of ground in the manor.

The interest of the lord and commoner, in the common, are looked upon in law as mutual. They may both bring actions for damage done, either against strangers, or each other; the lord for the public injury, and each commoner for his private damage.

2, 3. Common of *piscary* is a liberty of fishing in another man's water; as common of *turbary* is a liberty of digging turf upon another's ground. There is also a common in digging for coals, minerals, stones, and the like.

4. Common of *estovers* or *estouviers*, that is necessities (from *estoffer*, to furnish) is a liberty of taking necessary wood, for the use of furniture of a house or farm, from off another's estate. The Saxon word *bote* is used by us as synonymous to the French *estovers*; and therefore housebote is a sufficient allowance of wood, to repair, or to burn in, the house; which latter is sometimes called fire-bote; plough-bote and cart-bote are wood to be employed in making and repairing all instruments of husbandry; and hay-bote, or hedge-bote, is wood for repairing of hays, hedges, or fences. These botes or estovers must be reasonable ones; and such any tenant or lessee may take off the land let or demised to him, without waiting for any leave, assignment, or appointment of the lessor, unless he be restrained by special covenant to the contrary.

Ways.

IV. A fourth species of incorporeal hereditament is that of *ways*, or the right of going over another man's ground. This may be grounded on special permission; as when the owner of the land *grants* to another the liberty of passing over his grounds, to go to church, to market or the like, in which case the gift or grant is particular and confined to the grantee alone; it dies with the person; and, if the grantee leaves the country, he cannot assign over his right to another; nor can he justify taking another person in his company. A way may also be by *prescription*; as if all the inhabitants of such a hamlet, or all the owners and occupiers of such

a farm, have immemorially used to cross such a ground for such a particular purpose; for this immemorial usage supposes an original grant whereby a right of way thus appurtenant to land or houses may clearly be created. A right of way may also arise by act and operation of law; for, if a man grants me a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives me a way to come to it; and I may cross his land for that purpose without trespass. For when the law doth give anything to one, it giveth impliedly whatsoever is necessary for enjoying the same. By the law of the twelve tables at Rome, where a man had the right of way over another's land, and the road was out of repair, he who had the right of way might go over any part of the land he pleased; which was the established rule in public as well as private ways, and the law of England, in both cases, seems to correspond with Roman.

Offices.

V. Offices, which are a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, are also incorporeal hereditaments; whether public, as those of magistrates, or private, as of bailiffs, receivers, and the like. For a man may have an estate in them, either to him and his heirs, or for life, or for a term of years, or during pleasure only.

Dignities.

VI. Dignities bear a near relation to offices.

Franchises.

VII. Franchises are a seventh species. Franchise and liberty are used as synonymous terms; and their definition is a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject. Being therefore derived from the crown, they must arise from the king's grant; or in some cases may be held by prescription, which, as has been frequently said, presupposes a grant. The kinds of them are various and almost infinite.

To be a county palatine is a franchise, vested in a number of persons. It is likewise a franchise for a number of persons to be incorporated, and subsist as a body politic; with a power to maintain perpetual succession, and do other corporate acts: and each individual member of such corporation is also said to have a franchise or freedom. Other franchises are, to have a fair or market; with the right of taking toll, either there or at any other public places, as at bridges, wharfs, or the like; which tolls must have a reasonable cause of commencement (as in consideration of repairs, or the like), else the franchise is illegal and void; or, to have a

forest chase, park, warren, or fishery, endowed with privileges of royalty.

Corodies.

VIII. Corodies are a right of sustenance, or to receive certain allotments of victual and provision for one's maintenance. In lieu of which (especially when due from ecclesiastical persons) a pension or sum of money is sometimes substituted. And these may be reckoned another species of incorporeal hereditaments; though not chargeable on or issuing from, any corporeal inheritance but only charged on the person of the owner in respect of such his inheritance. To these may be added,

Annuities.

IX. Annuities are much of the same nature; only that these arise from temporal, as the former from spiritual persons. An annuity is a thing very distinct from a rent-charge; with which it is frequently confounded: a rent-charge being a burden imposed upon, and issuing out of, *lands*, whereas an annuity is a yearly sum chargeable only upon the *person* of the grantor. Therefore if a man by deed grant to another the sum of 20*l.* *per annum* without expressing out of what lands it shall issue, no land at all shall be chargeable with it; but it is a mere personal annuity; which is of so little account in law, that if granted to an eleemosynary corporation, it is not within the statutes of mortmain; and yet a man may have a real estate in it, though his security is merely personal.

Rents.

X. Rents are the last species of incorporeal hereditaments. The word rent or render, *reditus*, signifies a compensation or return, it being in the nature of an acknowledgment given for the possession of some corporeal inheritance. It is defined to be a certain profit issuing yearly out of lands and tenements corporeal. It must be a *profit*; yet there is no occasion for it to be, as it usually is a sum of money; for spurs, capons, horses, corn and other matters may be rendered, and frequently are rendered by way of rent. It may also consist in services or manual operations; as to plow so many acres of ground, to attend the king or the lord to the wars, and the like; which services, in the eye of the law, are profits. This profit must also be *certain*; or that which may be reduced to a certainty by either party. It must also issue *yearly*, though there is no occasion for it to issue every successive year; but it may be reserved every second, third or fourth year; yet, as it is to be produced out of the profits of lands and tenements, as a recompense for being permitted to hold or enjoy them, it ought to be reserved yearly, because those profits do annually arise and are annually renewed. It must *issue out* of the thing granted, and not be part of the land or thing itself; wherein it dif-

fers from an exception in the grant, which is always of part of the thing granted. It must, lastly issue out of *lands and tenements corporeal*; that is, from some inheritance whereunto the owner or grantee of the rent may have recourse to distrein. Therefore a rent cannot be reserved out of an advowson, a common, an office, a franchise, or the like. But a grant of such annuity or sum may operate as a personal contract and oblige the grantor to pay the money reserved, or subject him to an action of debt; though it doth not affect the inheritance, and is no legal rent in contemplation of law.

Rent Service.

There are at common law three manner of rents: rent-service, rent-charge, and rent-seck. *Rent-service* is so called because it hath some corporal service incident to it, as at the least fealty or the feudal oath of fidelity. For, if a tenant holds his land by fealty, and ten shillings rent, or by the service of plowing the lord's land, and five shillings rent, these pecuniary rents, being connected with personal service, are therefore called rent-service. And for these, in case they be behind or arrere, at the day appointed, the lord may distrein of common right, without reserving any special power of distress; provided he hath in himself the reversion, or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee is expired. A *rent-charge* is where the owner of the rent hath no future interest, or reversion expectant in the land; as where a man by deed maketh over to others his *whole* estate in fee-simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be arrere, or behind, it shall be lawful to distrein for the same. In this case the land is liable to the distress, not of common right, but by virtue of the clause in the deed; and therefore it is called *rent-charge*, because in this manner the land is charged with a distress for the payment of it. *Rent-seck, reditus siccus*, or barren rent, is in effect, nothing more than a rent reserved by deed, but without any clause of distress.

There are also other species of rents, which are reducible to these three. Rents of *assize* are the certain established *rents* of the freeholders and ancient copyholders of a manor, which cannot be departed from or varied. Those of the freeholders are frequently called *chief-rents, reditus capitales*; and both sorts are indifferently denominated *quit rents, quieti reditus*, because thereby the tenant goes quit and free of all other services.

When these payments were reserved in silver or white money, they were anciently called *white-rents, blanch-farms, reditus albi*, in contradistinction to rents reserved in work, grain, or baser money, which were called *reditus nigri, or black mail*. *Rack-rent* is only a rent of the full value of the tenement, or near it. A *fee-*

farm rent is a rent charge issuing out of an estate in fee, of at least one-fourth of the value of the lands, at the time of its reservation; for a grant of lands, reserving so considerable a rent, is indeed only letting lands to farm in fee-simple instead of the usual methods for life or years.

These are the general divisions of rents; but the difference between them (in respect to the remedy for recovering them) is now totally abolished; and all persons may have the like remedy by distress for rent-seck, rents of assize, and chief rents, as in case of rents reserved upon lease.

Rent is regularly due and payable upon the land from whence it issues, if no particular place is mentioned in the reservation: but in case of the king, the payment must be either to his officers at the exchequer, or to his receiver in the country. And strictly the rent is demandable and payable before the time of sunset of the day whereon it is reserved; though perhaps not absolutely due till midnight.

Chapter IV.

OF THE FEODAL SYSTEM.

44-59.

It is impossible to understand, with any degree of accuracy, either the civil constitution of this kingdom, or the laws which regulate its landed property, without some general acquaintance with the nature and doctrine of feuds, or the feudal law, a system so universally received throughout Europe upwards of twelve centuries ago, that Sir Henry Spelman does not scruple to call it the law of nations in our western world.

Its Origin.

The constitution of feuds had its original from the military policy of the northern or Celtic nations, the Goths, the Huns, the Franks, the Vandals, and the Lombards, who, all migrating from the same *officina gentium*, as Craig very justly entitled it, poured themselves in vast quantities into all the regions of Europe, at the declension of the Roman empire. It was brought by them from their own countries, and continued in their respective colonies, as the most likely means to secure their new acquisitions; and to that end, large districts or parcels of land were allotted by the conquering general to the superior officers of the army, and by them dealt out again in smaller parcels or allotments to the inferior officers and most deserving soldiers. These allotments were called *feoda*, feuds, fiefs, or fees; which last appellation in the northern language signifies a conditional stipend or reward. Rewards or stipends they evidently were; and the condition annexed to them was that the possessor should do service faithfully, both at home

and in the wars, to him by whom they were given; for which purpose he took the *juramentum fidelitatis*, or oath of fealty: and in case of the breach of this condition and oath, by not performing the stipulated service, or by deserting the lord in battle, the lands were again to revert to him who granted them.

Allotments, thus acquired, naturally engaged such as accepted them to defend them; and, as they all sprang from the same right of conquest, no part could subsist independent of the whole; wherefore all givers as well as receivers were mutually bound to defend each other's possessions. But, as that could not effectually be done in a tumultuous irregular way, government and to that purpose, subordination, was necessary. Every receiver of lands, or feudatory, was therefore bound, when called upon by his benefactor, or immediate lord of his feud or fee, to do all in his power to defend him. Such benefactor or lord was likewise subordinate to, and under the command of, his immediate benefactor or superior; and so upwards to the prince or general himself: and the several lords were also reciprocally bound, in their respective gradations, to protect the possessions they had given. Thus feudal connection was established, a proper military subjection was naturally introduced, and an army of feudatories was always ready enlisted, and mutually prepared to muster, not only in defense of each man's own several property, but also defense of the whole. and of every part of this their newly acquired country; the produce of which constitution was soon sufficiently visible in the strength and spirit with which they maintained their conquests.

Its Growth on the Continent.

Scarce had these northern conquerors established themselves in their new dominions, when the wisdom of their constitutions, as well as their personal valour, alarmed all the princes of Europe, that is, of those countries which had formerly been Roman provinces, but had revolted, or were deserted by their old masters, in the general wreck of the empire. Wherefore most, if not all, of them thought it necessary to enter into the same or a similar plan of policy. For whereas, before, the possessions of their subjects were perfectly *allodial* (that is, wholly independent, and held of no superior at all), now they parcelled out their royal territories, or persuaded their subjects to surrender up and retake their own landed property, under the like feudal obligations of military fealty. And thus, in the compass of a very few years, the feudal constitution, or the doctrine of tenure, extended itself over all the western world. Which alteration of landed property, in so very material a point, necessarily drew after it an alteration of laws and customs: so that the feudal laws soon drove out the Roman, which had hitherto so universally obtained but now became for many centuries lost and forgotten.

The System in England.

But this feudal policy, which was thus by degrees established over all the continent of Europe, seems not to have been received in this part of our island, at least not universally, and as a part of the national constitution, till the reign of William the Norman.

Its establishment under the Normans was gradual. It grew up as the best way to put the country on a military footing.

The new policy was not imposed by King William, but seems to have been nationally and freely adopted by the general assembly of the whole realm. In the same year with the completion of the great survey called domesday-book all the principal landholders submitted their lands to the yoke of military tenure, became the king's vassals, and did homage and fealty to his person.

The sons of William the Conqueror kept up with a high hand all the rigors of the feudal system; but their successor, Henry I., promised to restore the laws of King Edward the Confessor—the ancient Saxon system, but he still reserved the fiction of feudal tenure, and afterwards the grievances of the system were revived until the reign of King John, when the barons arose in arms and wrested from him the great charter.

Having given this short history of their rise and progress, we will next consider the nature, doctrine, and principal laws of feuds; wherein we shall evidently trace the groundwork of many parts of our public polity, and also the original of such of our own tenures as were either abolished in the last century, or still remain in force.

The Fundamental Maxim.

The grand and fundamental maxim of all feudal tenure is this: that all lands were originally granted out by the sovereign, and are therefore holden either mediately, or immediately, of the crown. The grantor was called the proprietor or *lord*: being he who retained the dominion or ultimate property of the feud or fee; and the grantee, who had only the use and possession, according to the terms of the grant, was styled the feudatory, or *vassal*, which was only another name for the tenant, or holder of the lands; though on account of the prejudices which we have justly conceived against the doctrines that were afterwards *grafted* on this system, we now use the word *vassal* opprobriously, as synonymous to slave or bondman. The manner of the grant was by words of gratuitous and pure donation, *dedi et concessi*; which are still the operative words in our modern infeodations or deeds of feoffment. This was perfected by the ceremony of corporal investiture, or open and notorious delivery of possession in the presence of the other vassals, which perpetuated among them the era of the new acquisition, at a time when the art of writing was very little known: and therefore the evidence of property was reposed in the memory of the neighborhood; who, in case of a disputed title, were afterwards called upon to decide the difference, not only

according to external proofs, adduced by the parties litigant, but also by the internal testimony of their own private knowledge.

Besides an oath of *fealty*, or profession of faith to the lord, which was the parent of our oath of allegiance, the vassal or tenant upon investiture did usually *homage* to his lord; openly and humbly kneeling, being ungirt, uncovered, and holding up his hands both together between those of the lord, who sate before him; and there professing that "he did become his *man*, from that day forth of life and limb and earthly honor;" and then he received a kiss from his lord. Which ceremony was denominated *homagium*, or *manhood*, by the feudists, from the stated form of words, *devenio vester homo*.

The Service of the Tenant.

When the tenant had thus professed himself to be the man of his superior or lord, the next consideration was concerning the *service* which, as such, he was bound to render, in recompense for the land he held. This, in pure, proper and original feuds, was only twofold; to follow, or do *suit* to, the lord in his courts in time of peace; and in his armies or warlike retinue, when necessity called him to the field. The lord was, in early times, the legislator and judge over all his feudatories: and therefore the vassals of the inferior lords were bound by their fealty to attend their domestic court barons (which were instituted in every manor or barony for doing speedy and effectual justice to all the tenants), in order as well to answer such complaints as might be alleged against themselves as to form a jury or homage for the trial of their fellow-tenants: and upon this account, in all the feudal institutions both here and on the continent, they are distinguished by the appellation of the peers of the court; *pares curiis*, or *pares curiae*. In like manner the barons themselves, or lords of inferior districts were denominated peers of the king's court, and were bound to attend him upon summons, to hear causes of greater consequence in the king's presence and under the direction of his grand justiciary; till in many countries the power of that officer was broken and distributed into other courts of judicature, the peers of the king's court still reserving to themselves (in almost every feudal government) the right of appeal from those subordinate courts in the last resort. The military branch of service consisted in attending the lord to the wars, if called upon, with such a retinue, and for such a number of days, as were stipulated at the first donation, in proportion to the quantity of the land.

The Qualities of the Feud.

At the first introduction of feuds, as they were gratuitous, so also they were precarious, and held at the *will* of the lord, who was then the sole judge whether his vassal performed his services

faithfully. Then they became certain for one or more *years*. But, when the general migration was pretty well over, and a peaceable possession of the new acquired settlements had introduced new customs and manners, when the fertility of the soil had encouraged the study of husbandry, and an affection for the spots they had cultivated began naturally to arise in the tillers; a more permanent degree of property was introduced, and feuds began now to be granted for the *life* of the feudatory. But still feuds were not yet *hereditary*; though frequently granted, by the favor of the lord, to the children of the former possessor; till in process of time it became unusual, and was therefore thought hard, to reject the heir, if he were capable to perform the services: and therefore infants, women, and professed monks, who were incapable of bearing arms, were also incapable of succeeding to a genuine feud. But the heir, when admitted to the feud which his ancestor possessed, used generally to pay a fine or acknowledgment to the lord, in horses, arms, money, and the like, for such renewal of the feud: which was called a relief, because it raised up and re-established the inheritance, or, in the words of the feudal writers, "*incertam et caducam hereditatem relevabat.*" This relief was afterwards, when feuds became absolutely hereditary, continued on the death of the tenant, though the original foundation of it had ceased.

For in process of time feuds came by degrees to be universally extended beyond the life of the first vassal, to his *sons*, or perhaps to such one of them as the lord should name; and in this case the form of the donation was strictly observed: for if a feud was given to a man and his *sons*, all his sons succeeded him in equal portions; and as they died off, their shares reverted to their lord, and did not descend to their children, or even to their surviving brothers, as not being specified in the donation. But when such a feud was given to a man and his *heirs*, in general terms, then a more extended rule of succession took place; and when the feudatory died, his male descendants *in infinitum* were admitted to the succession. When any such descendant, who thus had succeeded, died, his male descendants were also admitted in the first place; and, in defect of them, such of his male collateral kindred as were of the blood or lineage of the first feudatory, but no others. For this was an unalterable maxim in feudal succession, that "none was capable of inheriting a feud, but such as was of the blood of, that is, lineally descended from, the first feudatory." And the descent being thus confined to males, originally extended to all the males alike; all the sons, without any distinction of primogeniture, succeeding to equal portions of the father's feud. But this being found upon many accounts inconvenient (particularly by dividing the services and thereby weakening the strength of the feudal union), and *honorary* feuds (or titles of nobility) being

now introduced, which were not of a divisible nature, but could only be inherited by the eldest son; in imitation of these, *military* feuds (or those we are now describing) began also in most countries to descend, according to the same rule of primogeniture, to the eldest son, in exclusion of all the rest.

Other qualities of feuds were, that the feudatory could not aliene or dispose of his feud; neither could he exchange, nor yet mortgage, nor even devise it by will, without the consent of the lord. For the reason of conferring the feud being the personal abilities of the feudatory to serve in war, it was not fit he should be at liberty to transfer this gift, either from himself, or from his posterity who were presumed to inherit his valour, to others who might prove less able. And, as the feudal obligation was looked upon as reciprocal, the feudatory being entitled to the lord's protection, in return for his own fealty and service; therefore the lord could no more transfer his seignory or protection without consent of his vassal, than the vassal could his feud without consent of his lord: it being equally unreasonable, that the lord should extend his protection to a person to whom he had exceptions, and that the vassal should owe subjection to a superior not of his own choosing.

Inferior Feuds.

These were the principal, and very simple qualities, of the genuine or original feuds; which were all of a military nature, and in the hands of military persons; though the feudatories, being under frequent incapacities of cultivating and manuring their own lands, soon found it necessary to commit part of them to inferior tenants: obliging them to such returns in service, corn, cattle, or money, as might enable the chief feudatories to attend their military duties without distraction; which returns, or *reditus*, were the original rents, and by these means the feudal polity was greatly extended; these inferior feudatories (who held what are called in the Scots law "rerefiefs") being under similar obligations of fealty, to do suit of court, to answer the stipulated renders or rent service, and to promote the welfare of their immediate superiors or lords. But this at the same time demolished the ancient simplicity of feuds; and an inroad being once made upon their constitution, it subjected them, in a course of time, to great varieties and innovations. Feuds began to be bought and sold, and deviations were made from the old fundamental rules of tenure and succession; which were held no longer sacred, when the feuds themselves no longer continued to be purely military. Hence these tenures began now to be divided into *feoda propria et impropria*, proper and improper feuds; under the former of which divisions were comprehended such, and such only, of which we have before spoken; and under that of improper or derivative feuds were comprised all

such as do not fall within the other descriptions; such, for instance, as were originally bartered and sold to the feudatory for a price; such as were held upon base or less honourable services; or upon a rent, in lieu of military service; such as were in themselves alienable, without mutual license; and such as might descend indifferently either to males or females. But where a difference was not expressed in the creation, such new created feuds did in all respects follow the nature of an original, genuine, and proper feud.

From this one foundation, in different countries in Europe, very different superstructures have been raised; what effect it has produced on the landed property of England will appear in the following chapters.

Chapter V.

OF THE ANCIENT ENGLISH TENURES.

59-78.

In this chapter we shall take a short view of the ancient tenures of our English estates, or the manner in which lands, tenements, and hereditaments might have been holden, as the same stood in force, till the middle of the last century.

Almost all the real property of this kingdom, is by the policy of our laws, supposed to be granted by, dependent upon, and *holden* of, some superior lord, by and in consideration of certain services to be rendered to the lord by the tenant or possessor of this property. The thing holden is therefore styled a *tenement*, the possessors thereof *tenants*, and the manner of their possession a *tenure*. Thus all the land in the kingdom is supposed to be holden, mediately or immediately, of the king, who is styled the lord *paramount*, or above all. Such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king, and thus partaking of a middle nature, were called *mesne*, or middle lords.

All tenures being thus derived, or supposed to be derived, from the king, those that held immediately under him, in right of his crown and dignity, were called his tenants *in capite*, or in chief.

Species of Lay Tenures.

I. There seems to have subsisted among our ancestors four principal species of lay tenures, to which all others may be reduced: the grand criteria of which were the nature of the several services or renders, that were due to the lords from their tenants. The services in respect of their quality, were either *free* or *base* services; in respect of their quantity and the time of exacting them, were either *certain* or *uncertain*. *Free* services were such as

were not unbecoming the character of a soldier or a freeman to perform; as to serve under his lord in the wars, to pay a sum of money, and the like. *Base* services were such as were only fit for peasants or persons of a servile rank; as to plough the lord's land, to make hedges, to carry out his dung or other mean employments. The *certain* services, whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretense; as, to pay a stated annual rent, or to plough such a field for three days. The *uncertain* depended upon unknown contingencies; as, to do military service in person, or pay an assessment in lieu of it, when called upon; or to wind a horn whenever the Scots invaded the realm; which are free services: or to do whatever the lord should command; which is a base or villein service.

From the various combinations of these services have arisen the four kinds of lay tenure which subsisted in England till the middle of the last century; and three of which subsist to this day. Of these Bracton (who wrote under Henry the Third) seems to give the clearest and most compendious account, of any author ancient or modern; of which the following is the outline or abstract. "Tenements are of two kinds, *frank tenement* and *villenage*. And of frank-tenements, some are held freely in consideration of homage and *knight-service*; others in *free-socage* with the service of fealty only." And again, "of villenages some are pure, and others privileged. He that holds in *pure villenage* shall do whatsoever is commanded him, and always be bound to an uncertain service. The other kind of villenage is called *villein-socage*; and these villein-socmen do villein services, but such as are certain and determined." Of which the sense seems to be as follows: first, where the service was *free* but *uncertain*, as military service with homage, that tenure was called the tenure in chivalry, *per servitium militare*, or by *knight service*. Secondly, where the service was not only *free*, but also certain, as by fealty only, by rent and fealty, etc., that tenure was called *liberum socagium*, or free-socage. These were the only *free* holdings or tenements; the others were *villenuous* or servile, as thirdly, where the service was *base* in its nature, and uncertain as to time and quantity, the tenure was *purum villenagium*, absolute or pure villenage. Lastly where the service was *base* in its nature, but reduced to a *certainty*, this was still villenage, but distinguished from the other by the name of privileged villenage, *villenagium privilegiatum*; or it might be still called socage (from the certainty of its services), but degraded by their *baseness* into the inferior title of *villanum socagium*, villein-socage.

Knight-Service.

I. The first, most universal, and esteemed the most honourable species of tenure, was that by knight-service. To make a ten-

ure by knight-service, a determinate quantity of land was necessary, which was called a knight's fee, *feodum militare*. And he who held this proportion of land (or a whole fee) by knight-service, was bound to attend his lord to the wars for forty days in every year, if called upon; which attendance was his *reditus* or return, his rent or service for the land he claimed to hold.

This tenure of knight-service had all the marks of a strict and regular feud: it was granted by words of pure donation *dedi et concessi*. It also drew after it these seven fruits and consequences, as inseparably incident to the tenure in chivalry; viz., aids, relief, primer seisin, wardship, marriage, fines for alienation, and escheat: all which I shall endeavor to explain, and to show to be of feodal original.

Aids.

1. Aids were originally mere benevolences granted by the tenant to his lord in times of difficulty and distress; but in process of time they grew to be considered as a matter of right, and not of discretion. These aids were principally three; first, to ransom the lord's person, if taken prisoner; secondly, to make the lord's eldest son a knight; thirdly, to marry the lord's eldest daughter, by giving her a suitable portion.

Relief.

2. Relief, *relevium*, was before mentioned as incident to every feodal tenure, by way of fine or composition with the lord for taking up the estate, which was lapsed or fallen in by the death of the last tenant.

Primer Seisin.

3. Primer *seisin* was a feodal burthen, only incident to the king's tenants in *capite*, and not to those who held of inferior or mesne lords. It was a right which the king had, when any of his tenants in *capite* died seised of a knight's fee, to receive of the heir (provided he were of full age) one whole year's profits of the lands if they were in immediate possession; and half a year's profits if the lands were in reversion expectant on an estate for life.

Wardship.

4. These payments were only due if the heir was of full age; but if he was under the age of twenty-one, being a male, or fourteen, being a female, the lord was entitled to the *wardship* of the heir, and was called the guardian in chivalry. This wardship consisted in having the custody of the body and lands of such heir, without any account of the profits, till the age of twenty-one in males, and sixteen in females.

The wardship of the body was a consequence of the wardship

of the land; for he who enjoyed the infant's estate was the properest person to educate and maintain him in his infancy.

When the male heir arrived to the age of twenty-one, or the heir-female that of sixteen, they might sue out their livery or *ousterlemain*; that is, the delivery of their lands out of their guardian's hands. For this they were obliged to pay a fine, namely, half a year's profit of the land; though this seems expressly contrary to *magna charta*.

Marriage.

5. But, before they came of age, there was still another piece of authority, which the guardian was at liberty to exercise over his infant wards; I mean the right of *marriage* (*maritagium*, as contradistinguished from *matrimonium*), which in its feudal sense signifies the power which the lord or the guardian in chivalry had of disposing of his infant ward in matrimony. And, if the infants married themselves without the guardian's consent, they forfeited double the value of the marriage. This seems to have been one of the greatest hardships of our ancient tenures.

Fines.

6. Another attendant or consequence of tenure by knight-service was that of *finés* due to the lord for every *alienation*, whenever the tenant had occasion to make over his land to another. And as the feudal obligation was considered as reciprocal, the lord also could not alienate his seignory without the consent of his tenant, which consent of his was called an *attornment*. This restraint upon the lords soon wore away; that upon the tenants continued longer.

Escheat.

7. The last consequence of tenure in chivalry was *escheat*; which is the determination of the tenure, or dissolution of the mutual bond between the lord and tenant, from the extinction of the blood of the latter by either natural or civil means; if he died without heirs of his blood, or if his blood was corrupted and stained by commission of treason or felony, whereby every inheritable quality was entirely blotted out and abolished. In such cases the lands escheated, or fell back to the lord of the fee.

These were the principal qualities, fruits, and consequences of tenure by knight-service; a tenure by which the greatest part of the lands in this kingdom were holden, and that principally of the king *in capite*, till the middle of the last century.

Grand Serjeanty and Cornage.

There were also some other species of knight's service, so called. Such was the tenure by *grand serjeanty*, whereby the tenant was bound, instead of serving the king *generally* in his wars to do some special honorary service to the king in person; as to

carry his banner, his sword, or the like: or to be his butler, champion, or other officer, at his coronation. Tenure by *cornage*, which was to wind a horn when the Scots or other enemies entered the land, in order to warn the king's subjects.

Escuage.

These services, both of chivalry and grand serjeanty, were all personal, and uncertain as to their quantity or duration. But the personal attendance in knight-service growing troublesome and inconvenient in many respects, the tenants found means of compounding for it; by first sending others in their stead, and in process of time making a pecuniary satisfaction to the lords in lieu of it. This pecuniary satisfaction at last came to be levied by assessments, at so much for every knight's fee; and therefore this kind of tenure was called *scutagium* in Latin; *scutum* being then a well-known denomination for money: and, in like manner, it was called, in our Norman French, *escuage*.

Abolition of Military Tenures.

A slavery so complicated, and so extensive as this, called aloud for a remedy in a nation that boasted of its freedom. Palliatives were from time to time applied by successive acts of parliament, which assuaged some temporary grievances. Till at length the humanity of King James I. consented, in consideration of a proper equivalent, to abolish them all; though the plan proceeded not to effect. At length the military tenures, with all their heavy appendages, were destroyed at one blow by the statute 12 Car. II. c. 24, which enacts, "that the court of wards and liveries, and all wardships, liveries, primer seisins, and ousterlemains, values and forfeitures of marriages, by reason of any tenure of the king or others, be totally taken away. And that all fines for alienation, tenures by homage, knight service, and escuage, and also aids for marrying the daughter or knighting the son, and all tenures of the king *in capite*, be likewise taken away. And that all sorts of tenures held of the king or others, be turned into free and common socage; save only tenures in frankalmoign, copyhold, and the honorary services (without the slavish part) of grand serjeanty." A statute, which was a greater acquisition to the civil property of this kingdom than even *magna charta* itself.

Chapter VI.

OF THE MODERN ENGLISH TENURES.

78-103.

By the statute 12 Car. II., the tenures of socage and frankalmoign, the honorary services of grand serjeanty, and the tenure by copy of court-roll, were reserved; nay, all tenures in general, except frankalmoign, grand serjeanty, and copyhold, were reduced

to one general species of tenure, then well known and subsisting, called *free and common socage*.

Free Socage consisted of free and honourable services; but such as were liquidated and reduced to an absolute certainty. And this tenure not only subsists to this day, but has in a manner absorbed and swallowed up (since the statute of Charles the Second) almost every other species of tenure. And to this we are next to proceed.

Socage.

II. Socage, in its most general and extensive signification, seems to denote a tenure by any certain and determinate service.

But socage, as was hinted in the last chapter, is of two sorts: *free-socage*, where the services are not only certain, but honourable; and *villain-socage*, where the services, though certain, are of a baser nature. It was the *certainty* that denominated it a socage tenure; and nothing sure could be a greater liberty or privilege, than to have the service ascertained, and not left to the arbitrary calls of the lord, as the tenures of chivalry.

It seems probable that the socage tenures were the relics of Saxon liberty, retained by such persons as had neither forfeited them to the king, nor been obliged to change their tenure for the more honourable, as it was called, but at the same time, more burthensome, tenure of knight-service. This is peculiarly remarkable in the tenure which prevails in Kent, called *gavelkind*, which is generally acknowledged to be a species of socage tenure; the preservation whereof inviolate from the innovations of the Norman conqueror is a fact universally known. And those who thus preserved their liberties were said to hold in *free and common socage*.

As therefore the grand criterion and distinguishing mark of this species of tenure are the having its renders or services ascertained, it will include under it all other methods of holding free lands by certain and invariable rents and duties: and, in particular, *petit serjeanty*, tenure in *burgage*, and *gavelkind*.

Petit Serjeanty.

We may remember that by the statute 12 Car. II. grand serjeanty is not itself totally abolished, but only the slavish appendages belonging to it: for the honorary services (such as carrying the king's sword or banner, officiating as his butler, carver, etc., at the coronation) are still reserved. Now, *petit serjeanty* bears a great resemblance to grand serjeanty; for as the one is a personal service, so the other is a rent or render, both tending to some purpose relative to the king's person. *Petit serjeanty*, as defined by Littleton, consists in holding lands of the king by the service of rendering to him annually some small implement of war, as a bow, a sword, a lance, an arrow, or the like.

Tenure in Burgage.

Tenure in *burgage* is described by Glanvil, and is expressly said by Littleton, to be but tenure in socage: and it is where the king or other person is lord of an ancient borough, in which the tenements are held by a rent certain.

Gavelkind.

It is universally known what struggles the Kentish men made to preserve their ancient liberties, and with how much success those struggles were attended. And as it is principally here that we meet with the custom of gavelkind (though it was and is to be found in some other parts of the kingdom) we may fairly conclude that this was a part of those liberties; agreeably to Mr. Sheldon's opinion, that gavelkind before the Norman conquest was the general custom of the realm. The distinguished properties of this tenure are various. Some of the principal are these: 1. The tenant is of age sufficient to aliene his estate by feoffment at the age of fifteen. 2. The estate does not escheat in case of an attainder and execution for felony; their maxim being "the father to the bough, the son to the plough." 3. In most places he had a power of devising lands by will, before the statute for that purpose was made. 4. The lands descend not to the eldest, youngest, or any one son only, but to all the sons together; which was indeed anciently the most usual course of descent all over England, though in particular places particular customs prevailed.

Incidents of Socage Tenure.

The tokens of the feudal original of these several species of tenure in free socage will evidently appear from a short comparison of the incidents and consequences of socage tenure with those of tenure in chivalry; remarking their agreement or difference as we go along.

1. In the first place, then, both were held of superior lords.
2. Both were subject to the feudal return, render, rent, or service of some sort or other which arose from a supposition of an original grant from the lord to the tenant.
3. Both were from their constitution, universally subject (over and above all other renders) to the oath of fealty, or mutual bond of obligation between the lord and tenant.
4. The tenure in socage was subject, of common right, to aids for knighting the son and marrying the eldest daughter.
5. Relief is due upon socage tenure, as well as upon tenure in chivalry: but the manner of taking it is very different. The relief on a knight's fee was 5*l.*, or one-quarter of the supposed value of the land; but a socage relief is one year's rent or render, payable by the tenant to the lord, be the same either great or small.
6. Primer seisin was incident to the king's socage tenants in

capite, as well as to those by knight-service. But tenancy *in capite* as well as primer seisins are, among the other feudal burthenis, entirely abolished by the statute.

7. Wardship is also incident to tenure in socage; but of a nature very different from that incident to knight-service. For if the inheritance descend to an infant under fourteen, the wardship of him does not, nor never did, belong to the lord of the fee; but his nearest relation (to whom the inheritance cannot descend) shall be his guardian in socage, and have the custody of his land and body till he arrives at the age of fourteen. The guardian must be such a one to whom the inheritance by no possibility can descend. At fourteen this wardship in socage ceases; and the heir may oust the guardian and call him to account for the rents and profits: for at this age the law supposes him capable of choosing a guardian for himself.

8. Marriage, or the *valor maritagii*, was not in socage tenure any perquisite or advantage to the guardian, but rather the reverse. For, if the guardian married his ward under the age of fourteen, he was bound to account to the ward for the value of the marriage, even though he took nothing for it, unless he married him to advantage.

9. Fines for alienation were, I apprehend, due for lands holden of the king *in capite* by socage tenure, as well as in case of tenure by knight-service.

10. Escheats are equally incident to tenure in socage, as they were to tenure by knight-service; except only in gavelkind lands, which are subject to no escheats for felony though they are to escheats for want of heirs.

Thus much for the two grand species of tenure, under which almost all the free lands of the kingdom were holden till the Restoration in 1660, when the former was abolished and sunk into the latter; so that the lands of both sorts are now holden by *one universal tenure of free and common socage*.

Villenage.

The other grand division of tenure, mentioned by Bracton, as cited in the preceding chapter, is that of *villenage* as contradistinguished from *liberum tenementum*, or frank tenure. And this (we may remember) he subdivided into two classes, *pure* and *privileged* villenage, from whence have arisen two other species of our modern tenures.

III. From the tenure of pure villenage has sprung our present *copyhold* tenures, or tenure by the copy of court-roll at the will of the lord: in order to obtain a clear idea of which, it will be previously necessary to take a short view of the original and nature of manors.

Manors are in substance as ancient as the Saxon constitution.

A manor, *manerium*, a *manendo*, because the usual residence of the owner, seems to have been a district of ground held by lords or great personages; who kept in their own hands so much land as was necessary for the use of their families, which were called *terrae dominicales*, or *demesne*, lands, being occupied by the lord, or *dominus manerii*, and his servants. The other, or *tenemental*, lands they distributed among their tenants; which, from the different modes of tenure, were distinguished by two different names. First, *book-land*, or charter-land, which was held by deed under certain rents and free services, and in effect differed nothing from free socage lands: and from hence have arisen most of the freehold tenants who hold of particular manors, and owe suit and service to the same. The other species were called *folk-land*, which was held by assurance in writing, but distributed among the common folk or people at the pleasure of the lord, and resumed at his discretion; being, indeed, land held in villenage, which we shall presently describe more at large. The residue of the manor, being uncultivated, was termed the lord's waste, and served for public roads, and for common or pasture to the lord and his tenants. Manors were formerly called baronies, as they are still lordships: and each lord or baron was empowered to hold a domestic court, called the court-baron, for redressing misdemeanours and nuisances within the manor, and for settling disputes of property among the tenants. This court is an inseparable ingredient of every manor; and if the number of suitors should so fail as not to leave sufficient to make a jury or homage, that is, two tenants at least, the manor itself is lost.

Now, with regard to the folk-land, or estates held in villenage, this was a species of tenure neither strictly feudal, Norman nor Saxon; but mixed and compounded of them all; and which also, on account of the heriots that usually attend it, may seem to have somewhat Danish in its composition. Under the Saxon government there were, as Sir William Temple speaks, a sort of people in a condition of downright servitude, used and employed in the most servile works, and belonging, both they, their children, and effects, to the lord of the soil, like the rest of the cattle or stock upon it. These seem to have been those who held what was called the folk-land, from which they were removable at the lord's pleasure. On the arrival of the Normans here, it seems not improbable that they who were strangers to any other than a feudal state, might give some sparks of enfranchisement to such wretched persons as fell to their share, by admitting them, as well as others, to the oath of fealty; which conferred a right of protection, and raised the tenant to a kind of estate superior to downright slavery, but inferior to every other condition. This they called villenage, and the tenants villeins, either from the word *villis*, or else, as Sir

Edward Coke tells us, *a villa*; because they lived chiefly in villages, and were employed in rustic works of the most sordid kind.

The villeins, belonging principally to the lords of manors, were either villeins *regardant*, that is, annexed to the manor or land: or else they were *in gross*, or at large, that is, annexed to the person of the lord and transferable by deed from one owner to another. They could not leave their lord without his permission, but if they ran away, or were purloined from him, might be claimed and recovered by action, like beasts or other chattels. They held indeed small portions of land by way of sustaining themselves and families; but it was at the mere will of the lord, who might dispossess them whenever he pleased; and it was upon villein services, that is, to carry out dung, to hedge and ditch the lord's demesnes, and any other the meanest offices; and their services were not only base, but uncertain both as to their time and quantity. A villein could acquire no property either in lands or goods: but if he purchased either, the lord might enter upon them, oust the villein, and seize them to his own use, unless he contrived to dispose of them again before the lord had seized them; for the lord had then lost his opportunity.

In many places also a fine was payable to the lord, if the villein presumed to marry his daughter to any one without leave from the lord: and by the common law, the lord might also bring an action against the husband for damages in thus purloining his property. For the children of villeins were also in the same state of bondage with their parents. The law, however, protected the persons of villeins, as the king's subjects, against atrocious injuries of the lord; for he might not kill or maim his villein; though he might beat him with impunity, since the villein had no action or remedy at law against his lord, but in case of the murder of his ancestor, or the maim of his own person. Neifes, indeed, had also an appeal of rape in case the lord violated them by force.

Villeins might be enfranchised by manumission, which is either express or implied: express, as where a man granted to the villein a deed of manumission: implied, as where a man bound himself in a bond to his villein for a sum of money, granted him an annuity by a deed, or gave him an estate in fee, for life or years; for this was dealing with his villein on the footing of a freeman; it was in some of the instances giving him an action against his lord, and in others vesting in him an ownership entirely inconsistent with his former state of bondage. So, also, if the lord brought an action against his villein, this enfranchised him, for as the lord might have a short remedy against his villein, by seizing his goods (which was more than equivalent to any damages he could recover), the law, which is always ready to catch at anything in favor of liberty, presumed that, by bringing this action,

he meant to set his villein on the same footing with himself, and therefore held it an implied manumission. But, in case the lord indicted him for felony, it was otherwise; for the lord could not inflict a capital punishment on his villein, without calling in the assistance of the law.

Copyhold Estates.

Villeins, by these and many other means, in process of time gained considerable ground on their lords; and in particular strengthened the tenure of their estates to that degree, that they came to have in them an interest in many places full as good, in others' better than their lords. For the good nature and benevolence of many lords of manors having, time out of mind, permitted their villeins and their children to enjoy their possessions without interruption, in a regular course of descent, the common law, of which custom is the life, now gave them title to prescribe against their lords; and on performance of the same services, to hold their lands in spite of any determination of the lord's will. For though in general they are still said to hold their estates at the will of the lord, yet it is such a will as is agreeable to the custom of the manor; which customs are preserved and evidenced by the rolls of the several courts-baron in which they are entered or kept on foot by the constant immemorial usage of the several manors in which the lands lie. And, as such tenants had nothing to show for their estates but these customs and admissions in pursuance of them, entered on those rolls, or the copies of such entries witnessed by the steward, they now began to be called *tenants by copy of court-roll*, and their tenure itself a *copyhold*.

Thus copyhold tenures, as Sir Edward Coke observes, although very meanly descended, yet come of an ancient house; for, from what has been premised, it appears, that copyholders are in truth no other but villeins, who, by a long series of immemorial encroachments on the lord, have at last established a customary right to those estates, which before were held absolutely at the lord's will.

As a further consequence of what has been premised, we may collect these two main principles, which are held to be the supporters of the copyhold tenure, and without which it cannot exist: 1. That the lands be parcel of, and situate within, that manor under which it is held. 2. That they have been demised, or demisable, by copy of court-roll immemorially. For immemorial custom is the life of all tenures by copy; so that no new copyhold can, strictly speaking, be granted at this day.

In some manors, where the custom hath been to permit the heir to succeed the ancestor in his tenure, the estates are styled copyholds of inheritance; in others, where the lords have been more vigilant to maintain their rights, they remain copyholds for life only.

Incidents of Copyhold Tenure—Heriots, Wardships, Fines.

The fruits and appendages of a copyhold tenure, that it hath in common with free tenures, are fealty, services (as well in rents as otherwise), reliefs, and escheats. The two latter belong only to copyholds of inheritance; the former to those for life also. But besides these, copyholds have also heriots, wardships, and fines. Heriots, which I think are agreed to be a Danish custom, and of which we shall say more hereafter, are a render of the best beast or other good (as the custom may be) to the lord on the death of the tenant. This is plainly a relic of villein tenure; there being originally less hardship in it, when all the goods and chattels belonged to the lord, and he might have seized them even in the villein's lifetime. These are incident to both species of copyhold; but wardship and fines to those of inheritance only. Wardship, in copyhold estates, partakes both of that in chivalry and that in socage. Like that in chivalry, the lord is the legal guardian; who usually assigns some relation of the infant tenant to act in his stead; and he, like the guardian in socage, is accountable to his ward for the profits. Of fines, some are in the nature of primer seisins, due on the death of each tenant, others are mere fines for the alienation of the lands; in some manors only one of these sorts can be demanded, in some both, and in others neither. They are sometimes arbitrary and at the will of the lord, sometimes fixed by custom; but even when arbitrary, the courts of law, in favor of the liberty of copyholds, have tied them down to be *reasonable* in their extent; otherwise they might amount to a disherison of the estate.

Privileged Villenage—Villein Socage.

IV. There is yet a fourth species of tenure, described by Bracton under the name sometimes of *privileged* villeinage, and sometimes of *villein-socage*. This, he tells us is such as has been held of the kings of England from the conquest downward; that they cannot aliene or transfer their tenements by grant or feoffment, any more than pure villeins can; but must surrender them to the lord or his steward, to be again granted out and held in villeinage. And from these circumstances we may collect, that what he here describes is no other than an exalted species of copyhold, subsisting at this day, viz., the tenure in *ancient demesne*; to which, as partaking of the baseness of villeinage in the nature of its services, and the freedom of socage in their certainty, he has therefore given a name compounded out of both, and calls it *villanum socagium*.

Ancient demesne consists of those lands or manors which, though now perhaps granted out to private subjects, were actually in the hands of the crown in the time of Edward the Confessor, or William the Conqueror; and so appear to have been by the great

survey in the exchequer called domesday-book. The tenants of these lands, under the crown, were not all of the same order or degree. Some of them, as Britton testifies, continued for a long time pure and absolute villeins, dependent on the will of the lord; and those who have succeeded them in their tenures now differ from common copyholders in only a few points. Others were in a great measure enfranchised by the royal favour, being only bound in respect of their lands to perform some of the better sort of villein services, but those determinate and certain; as, to plough the king's land for so many days, to supply his court with such a quantity of provisions, or other stated services; all of which are now changed into pecuniary rents: and in consideration hereof they had many immunities and privileges granted to them; as to try the right of their property in a peculiar court of their own, called a court of ancient demesne, by a peculiar process denominated a writ of *right close*: not to pay toll or taxes; not to contribute to the expenses of knights of the shire; not to be put on juries, and the like.

These tenants, therefore, though their tenure be absolutely copyhold, yet have an *interest* equivalent to a freehold: for notwithstanding their services were of a base and villeinous original, yet the tenants were esteemed in all other respects to be highly privileged villeins; and especially for that their services were fixed and determinate, and that they could not be compelled (like pure villeins) to relinquish these tenements at the lord's will, or to hold them against their own.

Lands holden by this tenure are therefore a species of copyhold, and as such preserved and exempted from the operation of the statute of Charles II. Yet they differ from common copyholds, principally in the privileges before mentioned: as also they differ from freeholders by one special mark and tincture of villenage, noted by Bracton, and remaining to this day, viz., that they cannot be conveyed from man to man by the general common law conveyances of feoffment, and the rest; but must pass by surrender, to the lord or his steward, in the manner of common copyholds; yet with this distinction, that in the surrender of these lands in ancient demesne, it is not used to say "*to hold at the will of the lord*" in their copies, but only "*to hold according to the custom of the manor.*"

Thus have we taken a compendious view of the principal and fundamental points of the doctrine of tenures, both ancient and modern, in which we cannot but remark the mutual connection and dependence that all of them have upon each other. And upon the whole it appears, that whatever changes and alterations these tenures have in process of time undergone, from the Saxon era to 12 Car. II., all lay tenures are now in effect reduced to two species:

free tenure in common socage, and *base* tenure by copy of court-roll.

I mentioned *lay* tenures only; because there is still behind one other species of tenure, reserved by the statute of Charles II., which is of a *spiritual* nature, and called the tenure in frankalmoign.

Tenure in Frankalmoign.

V. Tenure in *frankalmoign, in libera eleemosyna*, or free alms, is that whereby a religious corporation, aggregate or sole holdeth lands of the donor to them and their successors forever. The service which they were bound to render for these lands was not certainly defined; but only in general to pray for the soul of the donor and his heirs, dead or alive; and therefore they did no fealty (which is incident to all other services but this), because this divine service was of a higher and more exalted nature. This is the tenure by which almost all the ancient monasteries and religious houses held their lands, and by which the parochial clergy, and very many ecclesiastical and eleemosynary foundations hold them at this day.

Chapter VII.

OF FREEHOLD ESTATES IN INHERITANCE.

102-119.

Definition and Divisions.

The next objects of our disquisitions are the nature and properties of *estates*. An *estate* in lands, tenements, and hereditaments, signifies such *interest* as the tenant has therein: so that if a man grants all *his estate* in Dale to A and his heirs, everything that he can possibly grant shall pass thereby. It is called in Latin *status*; it signifying the condition or circumstance in which the owner stands with regard to his property. And to ascertain this with proper precision and accuracy, estates may be considered in a threefold view:—*first*, with regard to the *quantity of interest* which the tenant has in the tenement: *secondly*, with regard to the *time* at which that quantity of interest is to be enjoyed: and, *thirdly*, with regard to the *number and connections* of the tenants.

First, with regard to the *quantity of interest* which the tenant has in the tenement, this is measured by its duration and extent. And this occasions the primary division of estates into such as are *freehold*, and such as are *less than freehold*.

Estates of Freeholds.

An estate of freehold, *liberum tenementum*, or frank tenement, is defined by Britton to be “the *possession* of the soil by a freeman.” Such estate, therefore, and no other, as requires actual possession of the land, is legally speaking, *freehold*: which actual possession can, by the course of the common law, be only given

by the ceremony called livery of seisin, which is the same as the feodal investiture. It is such an estate in lands as is conveyed by livery of seisin, or in tenements of any incorporeal nature, by what is equivalent thereto. As, therefore, estates of inheritance and estates for life could not by common law be conveyed without livery of seisin, these are properly estates of freehold; and, as no other estates are conveyed with the same solemnity, therefore no others are properly freehold estates.

Estates of freehold (thus understood) are either estates of *inheritance*, or estates *not of inheritance*. The former are again divided into inheritances *absolute* or fee simple; and inheritances *limited*, one species of which we usually call fee-tail.

Fee Simple.

I. Tenant in fee-simple (or, as he is frequently styled, tenant in fee) is he that hath lands, tenements, or hereditaments, to hold to him and his heirs forever: generally, absolutely, and simply; without mentioning *what* heirs, but referring that to his own pleasure, or to the disposition of the law. The true meaning of the word fee (*feodum*) is the same with that of feud or fief, and in its original sense it is taken in contradistinction to *allodium*; which latter the writers on this subject define to be every man's own land, which he possesseth merely in his own right, without owing any rent or service to any superior. This is property in its highest degree; and the owner thereof hath *absolutum et directum dominium*, and therefore said to be seised thereof absolutely *in dominico suo*, in his own demesne. But *feodum* or fee, is that which is held of some superior, on condition of rendering him service; in which superior the ultimate property of the land resides. And therefore Sir Henry Spelman defines a feud or fee to be the right which the vassal or tenant hath in lands, to *use* the same, and take the profits thereof to him and his heirs, rendering to the lord his due services; the mere allodial *property* of the soil always remaining in the lord. This allodial property no subject in England has; it being a received, and now undeniable, principle in the law, that all the lands in England are holden mediately or immediately of the king. The king therefore, only hath *absolutum et directum dominium*; but all subject's lands are in the nature of *feodum* or fee; whether derived to them by descent from their ancestors, or purchased for a valuable consideration; for they cannot come to any man by either of those ways, unless accompanied with those feudal clogs which were laid upon the first feudatory when it was originally granted. A subject therefore hath only the usufruct, and not the absolute, property of the soil; or as Sir Edward Coke expresses it, he hath *dominium utile*, but not *dominium directum*. And hence it is that, in the most solemn acts of law, we express

the strongest and highest estate that any subject can have by these words:—"he is seised thereof *in his demesne, as of fee.*" It is a man's demesne, *dominicum*, or property, since it belongs to him and his heirs forever: yet this *dominicum*, property, or demesne, is strictly not absolute or allodial, but qualified or feudal: it is his demesne, *as of fee*; that is, it is not purely and simply his own, since it is held of a superior lord, in whom the ultimate property resides.

This is the primary sense and acceptation of the word *fee*. But (as Sir Martin Wright very justly observes) the doctrine, "that all lands are holden," having been for so many ages a fixed and undeniable axiom, our English lawyers do very rarely (of late years especially) use the word *fee* in this its primary original sense, in contradistinction to *allodium* or absolute property, with which they have no concern; but generally use it to express the continuance or quantity of estate. A *fee* therefore, in general, signifies an estate of inheritance; being the highest and most extensive interest that a man can have in a feud: and when the term is used simply, without any other adjunct, or has the adjunct of *simple* annexed to it (as a *fee*, or *fee-simple*), it is used in contradistinction to a *fee-conditional* at the common law, or a *fee-tail* by the statute; importing an absolute inheritance, clear of any condition, limitation, or restrictions to particular heirs, but descendible to the heirs general, whether male or female, lineal or collateral. And in no other sense than this is the king said to be seised in *fee*, he being the feudatory of no man.

Taking therefore *fee* for the future, unless where otherwise explained, in this its secondary sense, as a state of inheritance, it is applicable to, and may be had in, any kind of hereditaments either corporeal or incorporeal. But there is this distinction between the two species of hereditaments: that of a corporeal inheritance a man shall be said to be seised *in his demesne, as of fee*; of an incorporeal one, he shall only be said to be seised *as of fee*, and not in his demesne. For, as incorporeal hereditaments are in their nature collateral to, and issue out of, lands and houses, their owner hath no property, *dominicum*, or demesne, in the *thing* itself, but hath only something derived out of it.

The *fee-simple* or inheritance of lands and tenements is generally vested and resides in some person or other; though divers inferior estates may be carved out of it. As if one grants a lease for twenty-one years, or for one or two lives, the *fee-simple* remains vested in him and his heirs; and after the determination of those years or lives, the land reverts to the grantor or his heirs, who shall hold it again in *fee-simple*. Yet sometimes the *fee* may be in *abeyance*, that is (as the word signifies), in expectation, remembrance, and contemplation in law; there being no person in

esse in whom it can vest and abide: though the law considers it as always potentially existing, and ready to vest whenever a proper owner appears. Thus in a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly neither granted to John nor Richard, nor can it vest in the heirs of Richard till his death, *nam nemo est haeres viventis*; it remains therefore in waiting, or abeyance, during the life of Richard.

The Word "Heirs" Necessary.

The word "heirs" is necessary in the grant or donation, in order to make a fee, or inheritance. For if land be given to a man forever, or to him and his assigns forever, this vests in him but an estate for life.

Exceptions.

1. It does not extend to devises by will; in which, as they were introduced at the time when the feudal rigour was apace wearing out, a more liberal construction is allowed; and therefore by devise to a man forever, or to one and his assigns forever, or to one in fee-simple, the devisee hath an estate of inheritance; for the intention of the devisor is sufficiently plain from the words of perpetuity annexed, though he hath omitted the legal words of inheritance. But if the devise be to a man and his assigns, without annexing words of perpetuity, there the devisee shall take only an estate for life; for it does not appear that the devisor intended any more. 2. Neither does this rule extend to fines or recoveries considered as a species of conveyance; for thereby an estate in fee passes by act and operation of law without the word "heirs," as it does also, for particular reason, by certain other methods of conveyance, which have relation to a former grant or estate, wherein the word "heirs" was expressed. 3. In creations of nobility by writ, the peer so created hath an inheritance in his title, without expressing the word "heirs;" for heirship is implied in the creation, unless it be otherwise specially provided; but in creations by patent, which are *stricti juris*, the word "heirs" must be inserted, otherwise there is no inheritance. 4. In grants of lands to sole corporations and their successors, the word "successors" supplies the place of "heirs;" for as heirs take from the ancestor, so doth the successor from the predecessor. But in a grant of lands to a corporation aggregate, the word "successor" is not necessary, though usually inserted: for, albeit such simple grant be strictly only an estate for life, yet, as that corporation never dies, such estate for life is perpetual, or equivalent to a fee-simple, and therefore the law allows it to be one. 5. Lastly, in the case of the king, a fee-simple will vest in him, without the word "heirs" or "successors" in the grant; partly from prerogative royal, and partly from a reason similar to the last, because the king in judgment of law never dies. But the general rule is, that the word "heirs" is necessary to create an estate of inheritance.

Limited Fees.

II. We are next to consider limited fees, or such estates of inheritance as are clogged and confined with conditions, or qualifications, of any sort. And these we may divide into two sorts: 1, *Qualified* or *base* fees; and, 2, *Fees conditional*, so called at the common law; and afterwards *fees-tail*, in consequence of the statute *de donis*.

Base Fees.

1. A base, or qualified fee, is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. As in the case of a grant to A and his heirs, *tenants of the manor of Dale*; in this instance, whenever the heirs of A cease to be tenants of that manor, the grant is entirely defeated. This estate is a fee because by possibility it may endure forever in a man and his heirs; yet as that duration depends upon the concurrence of collateral circumstances, which qualify and debase the purity of the donation, it is therefore a qualified or base fee.

Conditional Fees.

2. A conditional fee, at the common law, was a fee restrained to some particular heirs, exclusive of others; as to the heirs *of a man's body*, by which only his lineal descendants were admitted, in exclusion of collateral heirs; or to the heirs *male of his body*, in exclusion both of collaterals, and lineal females also. It was called a conditional fee, by reason of the condition expressed or implied in the donation of it, that if the donee died without such particular heirs, the land should revert to the donor. For this was a condition annexed by law to all grants whatsoever; that on failure of the heirs specified in the grant, the grant should be at an end, and the land return to its ancient proprietor.

Now, with regard to the condition annexed to these fees by the common law, our ancestors held that such a gift (to a man and the heirs of his body) was a gift upon condition that it should revert to the donor if the donee had no heirs of his body; but, if he had, it should then remain to the donee. They therefore called it a fee-simple, on condition that he had issue. Now, we must observe that when any condition is performed, it is thenceforth entirely gone; and the thing to which it was before annexed becomes absolute, and wholly unconditional. So that, as soon as the grantee had any issue born, his estate was supposed to become absolute, by the performance of the condition; at least, for these three purposes: 1. To enable the tenant to aliene the land, and thereby to bar not only his own issue, but also the donor of his interest in the reversion. 2. To subject him to forfeit it for treason; which he could not do, till issue born, longer than for his

own life; lest thereby the inheritance of the issue, and reversion of the donor, might have been defeated. 3. To empower him to charge the land with rents, commons, and certain other encumbrances, so as to bind his issue. And this was thought the more reasonable, because by the birth of issue, the possibility of the donor's reversion was rendered more distant and precarious: and *his* interest seems to have been the only one which the law, as it then stood, was solicitous to protect; without much regard to the right of succession intended to be vested in the issue. However, if the tenant did not in fact aliene the land, the course of descent was not altered by this performance of the condition; for if the issue had afterwards died, and then the tenant, or original grantee, had died, without making any alienation, the land by the terms of the donation, could descend to none but the heirs *of his body*, and therefore in default of them, must have reverted to the donor. For which reason, in order to subject the lands to the ordinary course of descent, the donees of these conditional fee-simples took care to aliene as soon as they had performed the condition by having issue; and afterwards repurchased the lands, which gave them a fee-simple absolute, that would descend to the heirs in general, according to the course of the common law.

The nobility, who were willing to perpetuate their possessions in their own families, to put a stop to this practice, procured the statute of Westminster the second (commonly called the statute *de donis conditionalibus*) to be made; which paid a greater regard to the private will and intentions of the donor, than to the propriety of such intentions, or any public considerations whatsoever. This statute revived in some sort the ancient feudal restraints which were originally laid on alienations, by enacting, that from thenceforth the will of the donor be observed; and that the tenements so given (to a man and the heirs of his body) should at all events go to the issue, if there were any; or, if none, should revert to the donor.

Estates-Tail.

Upon the construction of this act of parliament, the judges determined that the donee had no longer a conditional fee-simple, which became absolute and at his own disposal the instant any issue was born; but they divided the estate into two parts, leaving in the donee a new kind of particular estate, which they denominated a *fee-tail*; and investing in the donor the ultimate fee-simple of the land, expectant on the failure of the issue; which expectant estate is what we now call a reversion.

Having thus shown the *original* of estates-tail, I now proceed to consider *what things* may, or may not, be entailed under the statute *de donis*. *Tenements* is the only word used in the statute; and this Sir Edward Coke expounds to comprehend all

corporeal hereditaments whatsoever; and also all incorporeal hereditaments which savour of the realty, that is, which issue out of corporeal ones, or which concern or are annexed to, or may be exercised within the same; as rents, estovers, commons, and the like. Also offices and dignities, which concern lands, or have relation to fixed and certain places, may be entailed. But mere personal chattels, which savour not at all of the realty, cannot be entailed. Neither can an office, which merely relates to such personal chattels; nor an annuity, which charges only the person, and not the lands, of the grantor. But in these last, if granted to a man and the heirs of his body, the grantee hath still a fee conditional at common law, as before the statute; and by his alienation (after issue born) may bar the heir or reversioner. An estate to a man and his heirs for another's life cannot be entailed: for this is strictly no estate of inheritance (as will appear hereafter), and therefore not within the statute *de donis*. Neither can a copyhold estate be entailed by virtue of the statute; for that would tend to encroach upon and restrain the will of the lord; but, by the *special custom* of the manor, a copyhold may be limited to the heirs of the body; for here the custom ascertains and interprets the lord's will.

Estates-Tail. General and Special.

Next, as to the several *species* of estates-tail, and how they are respectively created. Estates-tail are either *general* or *special*. Tail-general is where lands and tenements are given to one, and the *heirs of his body begotten*; which is called tail-general, because, how often soever such donee in tail be married, his issue in general by all and every such marriage is, in successive order, capable of inheriting the estate-tail *per formam doni*. Tenant in tail-special is where the gift is restrained to certain heirs of the donee's body, and does not go to all of them in general. And this may happen several ways. I shall instance in only one; as where lands and tenements are given to a man and the *heirs of his body, on Mary his now wife to be begotten*: here no issue can inherit but such special issue as is engendered between them two; not such as the husband may have by another wife; and therefore it is called special tail. And here we may observe, that the words of inheritance (to him and his *heirs*) give him an estate in fee; but they being *heirs to be by him begotten*, this makes it a fee-tail; and the person being also limited, on whom such heirs shall be begotten (*viz., Mary his present wife*), this makes it a fee-tail special.

Estates in general and special tail, are further diversified by the distinction of sexes in such entails; for both of them may either be in tail *male* or tail *female*. As if lands be given to a man and his *heirs male of his body begotten*, this is an estate in tail male general; but if to a man and the *heirs female of his body on*

his present wife begotten, this is an estate in tail female special. And, in case of an entail male, the heirs female shall never inherit, nor any derived from them; nor *e converso*, the heirs male in case of a gift in tail female.

Words of Procreation Necessary.

As the word *heirs* is necessary to create a fee, so in further limitation of the strictness of the feodal donation the word *body*, or some other words of procreation, are necessary to make it a fee-tail, and ascertain to what heirs in particular the fee is limited. If therefore, either the words of inheritance, or words of procreation, be omitted, albeit the others are inserted in the grant, this will not make an estate-tail. As, if the grant be to a man and his *issue of his body*, to a man and his *seed*, to a man and his *children*, or *offspring*; all these are only estates for life, there wanting the words of inheritance, his heirs. So, on the other hand, a gift to a man, and his *heirs male*, or *female*, is an estate in fee-simple, and not in fee-tail: for there are no words to ascertain the body out of which they shall issue. Indeed, in last wills and testaments, wherein greater indulgence is allowed, an estate-tail may be created by a devise to a man and his *seed*, or to a man and his *heirs male*; or by other irregular modes of expression.

Frankmarriage.

There is still another species of entailed estates, now indeed grown out of use, yet still capable of subsisting in law; which are estates in *libero maritaggio*, or *frankmarriage*. These are defined to be, where tenements are given by one man to another together with a wife, who is the daughter or cousin of the donor to hold in frankmarriage. Now, by such gift, though nothing but the word *frankmarriage* is expressed, the donees shall have the tenements to them and the heirs of their two bodies begotten, that is, they are tenants in special tail. For this one word, *frankmarriage*, does *ex vi termini* not only create an inheritance, like the word *frankalmoin*, but likewise limits that inheritance; supplying not only words of descent, but of procreation also. Such donees in frankmarriage are liable to no service but fealty; for a rent reserved thereon is void; until the fourth degree of consanguinity be past between the issues of the donor and donee.

Incidents to a Tenancy in Tail.

The *incidents* to a tenancy in tail, under the statute Westm. 2, are chiefly these: 1. That a tenant in tail may commit *waste* on the estate-tail, by felling timber, pulling down houses, or the like, without being impeached, or called to account for the same. 2. That the wife of the tenant in tail shall have her *dower*, or thirds, of the estate-tail. 3. That the husband of a female tenant in tail may be tenant by the *curtesy* of the estate-tail. 4. That an estate-

tail may be *barred*, or destroyed by a fine by a common recovery, or by lineal warranty descending with assets to the heir. All of which will hereafter be explained at large.

Grievances Arising from these Estates.

Thus much for the nature of estates-tail: the establishment of which family law (as it is properly styled by Pigott) occasioned infinite difficulties and disputes. Children grew disobedient when they knew they could not be set aside: farmers were ousted of their leases made by tenants in tail; for, if such leases had been valid, then under colour of long leases the issue might have been virtually disinherited: creditors were defrauded of their debts; for if a tenant in tail could have charged his estate with their payment, he might also have defeated his issue, by mortgaging it for as much as it was worth: innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought; of suits in consequence of which our ancient books are full; and treasons were encouraged, as estates-tail were not liable to forfeiture longer than for the tenant's life. So that they were justly branded as the source of new contentions, and mischiefs unknown to the common law; and almost universally considered as the common grievance of the realm. But as the nobility were always fond of this statute, because it preserved their family estates from forfeiture, there was little hope of procuring a repeal by the legislature, and therefore, by the contrivance of an active and politic prince, a method was devised to evade it.

The Remedy—Common Recoveries.

About two hundred years intervened between the making of the statute *de donis*, and the application of common recoveries to this intent, in the twelfth year of Edward IV.; which were then openly declared by the judges to be a sufficient bar of an estate-tail. What common recoveries are, both in their nature and consequences, and why they are allowed to be a bar to the estate-tail, must be reserved to a subsequent inquiry. At present I shall only say, that they are fictitious proceedings, introduced by a kind of *pie fraud*, to elude the statute *de donis*, which was found so intolerably mischievous, and which yet one branch of the legislature would not then consent to repeal: and that these recoveries, however clandestinely introduced, are now become by long use and acquiescence a most common assurance of lands; and are looked upon as the legal mode of conveyance, by which tenant in tail may dispose of his lands and tenements; so that no court will suffer them to be shaken or reflected on, and even acts of parliament have by a sidewind countenanced and established them.

Other Limitations.

This expedient having greatly abridged estates-tail with re-

gard to their duration, others were soon invented to strip them of other privileges. The next that was attacked was the freedom from forfeitures for treason. For, notwithstanding the large advances made by recoveries, in the compass of about threescore years, towards unfettering these inheritances, and thereby subjecting the lands to forfeiture, the rapacious prince then reigning, finding them frequently resettled in a similar manner to suit the convenience of families, had address enough to procure a statute whereby all estates of inheritance (under which general words estates-tail were covertly included) are declared to be forfeited to the king upon any conviction of high treason.

The next attack which they suffered in order of time was by the statute 32 Hen. VIII. c. 28, whereby certain leases made by tenants in tail, which do not tend to the prejudice of the issue, were allowed to be good in law, and to bind the issue in tail. But they receive a more violent blow, in the same session of parliament by the construction put upon the statute of fines by the statute 32 Hen. VIII. c. 36, which declares a fine duly levied by tenant in tail to be a complete bar to him and his heirs; and all other persons claiming under such entail.

Lastly, by a statute of the succeeding year, all estates-tail are rendered liable to be charged for payment of debts due to the king by record or special contract; as since, by the bankrupt law, they are also subjected to be sold for the debts contracted by a bankrupt. And by the construction put on the statute 43 Eliz. c. 4, an appointment by tenant in tail of the lands entailed, to a charitable use, is good without fine or recovery.

Estates-tail, being thus by degrees unfettered, are now reduced again to almost the same state, even before issue born, as conditional fees were in at common law, after the condition was performed, by the birth of issue. For, first, the tenant in tail is now enabled to aliene his lands and tenements, by fine, by recovery, or by certain other means; and thereby to defeat the interest as well of his own issue, though unborn, as also of the reversioner, except in the case of the crown; secondly, he is now liable to forfeit them for high treason: and lastly, he may charge them with reasonable leases, and also with such of his debts as are due to the crown on specialties, or have been contracted with his fellow-subjects in a course of extensive commerce.

Chapter VIII.

OF FREEHOLDS, NOT OF INHERITANCE.

119-140.

We are next to discourse of such estates of freehold as are not of inheritance, but *for life* only. And of these estates for life, some are *conventional*, or expressly created by the act of the

parties; others merely *legal* or created by construction and operation of law. We will consider them both in their order.

Estates for Life.

I. Estates for life, expressly created by deed or grant (which alone are properly conventional), are where a lease is made of lands or tenements to a man, to hold for the term of his own life, or for that of any other person, or for more lives than one: in any of which cases he is styled tenant for life; only when he holds the estate by the life of another, he is usually called tenant *pur autre vie*. These estates for life are, like inheritances of feudal nature; and were for some time the highest estate that any man could have in a feud, which (as we have before seen) was not in its original hereditary. They are given or conferred by the same feudal rights and solemnities, the same investiture or livery of seisin, as fees themselves are; and they are held by fealty, if demanded, and such conventional rents and services as the lord or lessor, and his tenant or lessee, have agreed on.

Estates for life may be created, not only by the express words before mentioned, but also by a general grant, without defining or limiting any specific estate. As, if one grants to A B the manor of Dale, this makes him tenant for life. For though, as there are no words of inheritance or *heirs* mentioned in the grant, it cannot be construed to be a fee, it shall however be construed to be as large an estate as the words of the donation will bear, and therefore an estate for life. Also such a grant at large, or a grant for a term of life generally, shall be construed to be an estate for the life of the grantee; in case the grantor hath authority to make such grant: for an estate for a man's own life is more beneficial and of a higher nature than for any other life: and the rule of law is, that all grants are to be taken most strongly against the grantor, unless in the case of the king.

Such estates for life will, generally speaking, endure as long as the life for which they are granted: but there are some estates for life, which may determine upon future contingencies, before the life, for which they are created, expires. As, if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these, and similar cases, whenever the contingency happens when the widow marries or when the grantee obtains a benefice, the respective estates are absolutely determined and gone. Yet while they subsist, they are reckoned estates for life; because, the time for which they will endure being uncertain, they may by possibility last for life if the contingencies upon which they are to determine do not sooner happen. And moreover in case an estate be granted to a man for his life, generally, it may also determine by his *civil* death: as if he enters into a monastery, whereby he is dead in law: for which reason in convey-

ances the grant is usually made "for the term of a man's *natural* life;" which can only determine by his *natural* death.

Incidents to an Estate for Life.

The *incidents* to an estate for life are principally the following; which are applicable not only to that species of tenants for life, which are expressly created by deed; but also to those which are created by act and operation of law.

Estovers.

1. Every tenant for life, unless restrained by covenant or agreement, may of common right take upon the land demised to him reasonable *estovers* or *botes*. For he hath a right to the full enjoyment and use of the land, and all its profits, during his estate therein. But he is not permitted to cut down timber, or to do other waste upon the premises: for the destruction of such things as are not the temporary profits of the tenement is not necessary for the tenant's complete enjoyment of his estate; but tends to the permanent and lasting loss of the person entitled to the inheritance.

Emblements.

2. Tenant for life, or his representatives, shall not be prejudiced by any sudden determination of his estate, because such a determination is contingent and uncertain. Therefore if a tenant for his own life sows the lands, and dies before harvest, his executors, shall have the *emblements*, or profits of the crop; for the estate was determined by the *act of God*, and it is a maxim in the law, that *actus Dei nemini facit injuriam*. The representatives, therefore, of the tenant for life shall have the emblements to compensate for the labour and expense of tilling, manuring, and sowing the lands; and also for the encouragement of husbandry, which being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give it. Wherefore by the feudal law, if a tenant for life died between the beginning of September and the end of February, the lord who was entitled to the reversion was also entitled to the profits of the whole year: but if he died between the beginning of March and the end of August, the heirs of the tenant received the whole. From hence our law of emblements seems to have been derived, but with very considerable improvements. So it is also, if a man be tenant for the life of another, and *cestui que vie*, or he on whose life the land is held, dies after the corn is sown, the tenant *pur auter vie* shall have the emblements. The same is also the rule, if a life estate be determined by the *act of law*. Therefore if a lease be made to husband and wife during coverture (which gives them a determinable estate for life), and the husband sows the land, and afterwards they are divorced *a vinculo matrimonii*,

the husband shall have the emblements in this case; for the sentence of divorce is the act of law. But if an estate for life be determined by the tenant's *own act* (as by forfeiture for waste committed; or if a tenant during widowhood thinks proper to marry), in these and similar cases, the tenants having thus determined the estate by their own acts, shall not be entitled to take the emblements. The doctrine of emblements extends not only to corn sown, but to roots planted, or other annual artificial profit, but it is otherwise of fruit-trees, grass and the like; which are not planted annually at the expense and labour of the tenant, but are either a permanent or natural profit of the earth. For when a man plants a tree, he cannot be presumed to plant it in contemplation of any present profit; but merely with a prospect of its being useful to himself in future, and to future successions of tenants.

Incidents Relating to Under-Tenants.

3. A third incident to estates for life relates to the under-tenants or lessees. For they have the same, nay, greater indulgences than their lessors, the original tenants for life. The same; for the law of estovers and emblements with regard to the tenant for life, is also law with regard to his under-tenant, who represents him and stands in his place: and greater; for in those cases where tenant for life shall not have the emblements, because the estate determines by his own act, the exception shall not reach his lessee, who is a third person. As in the case of a woman who holds *duranta viduitate*; her taking husband is her own act, and therefore deprives her of the emblements; but if she leases her estate to an under-tenant who sows the land, and she then marries, this her act shall not deprive the tenant of his emblements, who is a stranger and could not prevent her. The lessees of tenants for life had also at the common law another most unreasonable advantage; for at the death of their lessors, the tenants for life, these under-tenants might if they pleased quit the premises, and pay no rent to anybody for the occupation of the land since the last quarter-day, or other day assigned for payment of rent. To remedy which it is now enacted that the executors or administrators of tenant for life, on whose death any lease determined, shall recover of the lessee a ratable proportion of rent from the last day of payment to the death of such lessor.

Tenancy in Tail after Possibility of Issue Extinct.

II. The next estate for life is of the legal kind, as contradistinguished from conventional, viz., that of a tenant *in tail after possibility of issue extinct*. This happens where one is tenant in special tail; and a person, from whose body the issue was to spring, dies without issue; or, having left issue, that issue becomes extinct: in either of these cases the surviving tenant in special tail

becomes tenant in tail after possibility of issue extinct. As where one has an estate to him and his heirs on the body of his present wife to be begotten, and the wife dies without issue; in this case the man has an estate tail, which cannot possibly descend to any one; and therefore the law makes use of this long periphrasis, as absolutely necessary to give an adequate idea of his estate. For if it had called him barely *tenant in fee-tail special*, that would not have distinguished him from others; and besides, he has no longer an estate of inheritance or fee, for he can have no heirs capable of taking *per formam doni*. Had it called him *tenant in tail without issue*, this had only related to the present fact, and would not have excluded the possibility of future issue. Had he been styled *tenant in tail without possibility of issue*, this would exclude time past as well as present, and he might under this description never have had any possibility of issue. No definition therefore could so exactly mark him out, as this of *tenant in tail after possibility of issue extinct*, which (with a precision peculiar to our own law) not only takes in the possibility of issue in tail, which he once had, but also states that this possibility is now extinguished and gone.

This estate must be created by the act of God, that is, by the death of that person out of whose body the issue was to spring; for no limitation, conveyance, or other human act can make it. For, if land be given to a man and his wife and the heirs of their two bodies begotten, and they are divorced, *a vinculo matrimonii*, they shall neither of them have this estate, but be barely tenants for life, notwithstanding the inheritance once vested in them. A possibility of issue is always supposed to exist, in law, unless extinguished by the death of the parties; even though the donees be each of them an hundred years old.

This estate is of an amphibious nature, partaking partly of an estate-tail, and partly of an estate for life. The tenant is, in truth, only tenant for life, but with many of the privileges of a tenant in tail; as not to be punishable for waste, etc.; or, he is tenant in tail, with many of the restrictions of a tenant for life; as to forfeit his estate if he alienes it in fee-simple; whereas such alienation by tenant in tail, though voidable by the issue is no forfeiture of the estate to the reversioner; who is not concerned in interest, till all possibility of issue be extinct. But, in general, the law looks upon this estate as equivalent to an estate for life only; and, as such, will permit this tenant to exchange his estate with a tenant for life, which exchange can only be made, as we shall see hereafter, of estates that are equal in their nature.

Tenancy by the Curtesy.

III. *Tenant by the curtesy of England* is where a man marries a woman seised of an estate of inheritance that is, of lands and tenements in fee-simple or fee-tail, and has by her issue, born

alive, which was capable of inheriting her estate. In this case, he shall, on the death of his wife, hold the lands for his life, as tenant by the curtesy of England.

As soon as any child was born, the father began to have a permanent interest in the lands, he became one of the *pares curiis*, did homage to the lord, and was called tenant by the curtesy initiate, and this estate being once vested in him by the birth of the child, was not suffered to determine by the subsequent death or coming of age of the infant.

Four Requisites.

There are four requisites necessary to make a tenancy by the curtesy; marriage, seisin of the wife, issue, and death of the wife. 1. The marriage must be canonical and legal. 2. The seisin of the wife must be an actual seisin, or possession of the lands; not a bare right to possess, which is a seisin in law, but an actual possession, which is a seisin in deed. And therefore a man shall not be tenant by the curtesy of a remainder or reversion. But of some incorporeal hereditaments a man may be a tenant by the curtesy, though there have been no actual seisin of the wife: as in case of an advowson, where the church has not become void in the lifetime of the wife: which a man may hold by the curtesy, because it is impossible ever to have actual seisin of it, and *impotentia excusat legem*. If the wife be an idiot, the husband shall not be tenant by the curtesy of her lands: for the king by prerogative is entitled to them, the instant she herself has any title: and since she could never be rightfully seised of the lands, and the husband's title depends entirely upon her seisin, the husband can have no title as tenant by the curtesy. 3. The issue must be born alive. The issue also must be born during the life of the mother, for if the mother dies in labour, and the Cæsarean operation be performed, the husband in this case shall not be tenant by the curtesy; because, at the instant of the mother's death, he was clearly not entitled, as having had no issue born, but the land descended to the child while he was yet in his mother's womb; and the estate, being once so vested, shall not afterwards be taken from him. In gavelkind lands, a husband may be tenant by the curtesy, without having any issue. But in general there must be issue born: and such issue as is also capable of inheriting the mother's estate. Therefore if a woman be tenant in tail *male*, and hath only a *daughter born*, the husband is not thereby entitled to be tenant by the curtesy; because such issue female can never inherit the estate in tail *male*. And this seems to be the principal reason why the husband cannot be tenant by the curtesy of any lands of which the wife was not actually seised; because, in order to entitle himself to such estate, he must have begotten issue that may be heir to the wife; but no one, by the standing rule of law, can be heir

to the ancestor of any land, whereof the ancestor was not actually seised; and therefore as the husband hath never begotten any issue that can be heir to those lands, he shall not be tenant of them by the curtesy. The time when the issue was born is immaterial, providing it were during the coverture; for, whether it were before or after the wife's seisin of the lands, whether it be living or dead at the time of the seisin, or at the time of the wife's decease, the husband shall be tenant by the curtesy. The husband by the birth of the child becomes (as was before observed) tenant by the curtesy *initiate* and may do many acts to charge the lands, but his estate is not *consummate* till the death of the wife; which is the fourth and last requisite to make a complete tenant by the curtesy.

Tenancy in Dower.

IV. Tenant in *dower* is where the husband of a woman is seised of an estate of inheritance, and dies: in this case, the wife shall have the third part of all the lands and tenements whereof he was seised at any time during the coverture, to hold to herself for the term of her natural life.

In treating of this estate, let us, first consider *who* may be endowed; secondly of *what* she may be endowed; thirdly, the manner *how* she shall be endowed; and fourthly, her dower may be *barred* or prevented.

Who May be Endowed.

1. Who may be endowed. She must be the actual wife of the party at the time of his decease. If she be divorced *a vinculo matrimonii*, she shall not be endowed; for *ubi nullum matrimonium, ibi nulla dos*. But a divorce *a mensa et thoro* only doth not destroy the dower; no, not even for adultery itself by the common law. Yet now by the statute West, 2, if a woman voluntarily leaves (which the law calls eloping from) her husband, and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled to her. It was formerly held, that the wife of an idiot might be endowed, though the husband of an idiot could not be tenant by the curtesy; but as it seems to be at present agreed, upon principles of sound sense and reason, that an idiot cannot marry, being incapable of consenting to any contract, this doctrine cannot now take place. An alien also cannot be endowed, unless she be queen-consort; for no alien is capable of holding lands.

Of What the Wife May be Endowed.

We are next to inquire of what a wife may be endowed. And she is now by law entitled to be endowed of all lands and tenements, of which her husband was seised in fee-simple or fee-tail, at any time during the coverture; and of which any issue, which she might have had, might by possibility have been heir.

Therefore, if a man seised in fee-simple hath a son by his first wife, and after marries a second wife, she shall be endowed of his lands; for her issue might by possibility have been heir on the death of the son by the former wife. But if there be a donee in special tail who holds lands to him and the heirs of his body begotten on Jane his wife; though Jane may be endowed of these lands, yet if Jane dies, and he marries a second wife, that second wife shall never be endowed of the lands entailed; for no issue that she could have, could by any possibility inherit them. A seisin in law of the husband will be as effectual as a seisin in deed, in order to render the wife dowable; for it is not in the wife's power to bring the husband's title to an actual seisin, as it is in the husband's power to do with regard to the wife's lands, which is one reason why he shall not be tenant by the curtesy, but of such lands whereof the wife, or he himself in her right, was actually seised in deed. The seisin of the husband for a *transitory instant only*, when the same act which gives him the estate conveys it also out of him again (as where by a fine, land is granted to a man, and he immediately renders it back by the same fine), such a seisin will not entitle the wife to dower: for the land was merely *in transitu*, and never rested in the husband, the grant and render being one continued act. But, if the land abides in him for the interval of but a single *moment*, it seems that the wife shall be endowed thereof. And, in short, a widow may be endowed of all her husband's lands, tenements, and hereditaments, corporeal, or incorporeal, under the restrictions before mentioned; unless there be some special reason to the contrary. Thus a woman shall not be endowed of a castle built for the defense of the realm: nor of a common without stint; for, as the heir would then have one portion of this common, and the widow another, and both without stint, the common would be doubly stocked. Copyhold estates are also not liable to dower, being only estates at the lord's will; unless by the special custom of the manor, in which case it is usually called the widow's free bench. But where dower is allowable, it matters not though the husband aliene the lands during the coverture; for he alienes them liable to dower.

Manner of Endowment.

3. Next, as to the manner in which a woman is to be endowed. There are now subsisting four species of dower: 1. Dower by the *common law*; or that which is before described. 2. Dower by particular *custom*; as that the wife should have half the husband's lands, or in some places the whole, and in some only a quarter. 3. Dower *ad ostium ecclesiae*: which is where tenant in fee-simple of full age, openly at the church door, where all marriages were formerly celebrated, after affiance made and troth plighted between them, doth endow the wife with the whole or

such quantity as he shall please, of his lands; at the same time specifying and ascertaining the same: on which the wife, after her husband's death, may enter without further ceremony. 4. Dower *ex assensu patris*; which is only a species of dower *ad ostium ecclesiae*, made when the husband's father is alive, and the son by his consent, expressly given, endows his wife with parcel of his father's lands. In either of these cases, they must (to prevent frauds) be made in *facie ecclesiae et ad ostium ecclesiae*.

Endowment by the Common Law.

I proceed to consider the method of endowment, or assigning dower by the common law, which is now the only usual species. It was provided, first by the charter of Henry I., and afterwards by *Magna Charta*, that the widow shall pay nothing for her marriage, nor shall be distrained to marry afresh, if she chooses to live without a husband, but shall not, however, marry against the consent of the lord; and further that nothing shall be taken for assignment of the widow's dower, but that she shall remain in her husband's capital mansion-house for forty days after his death, during which time her dower shall be assigned. These forty days are called the widow's quarantine, a term made use of in law to signify the number of forty days, whether applied to this occasion or any other. The particular lands to be held in dower must be assigned by the heir of the husband or his guardian, not only for the sake of notoriety, but also to entitle the lord of the fee to demand his services of the heir, in respect of the lands so holden. For the heir by this entry becomes tenant thereof to the lord, and the widow is immediate tenant to the heir by a kind of subinfeudation, or under-tenancy, completed by this investiture or assignment, which tenure may still be created, notwithstanding the statute of *quia emptores*, because the heir parts not with the fee-simple, but only with an estate for life. If the heir or his guardian do not assign her dower within the term of quarantine, or do assign it unfairly, she has her remedy at law, and the sheriff is appointed to assign it. Or if the heir (being under age) or his guardian assign more than she ought to have, it may be afterwards remedied by a writ of *admeasurement* of dower. If the thing of which she is endowed be divisible, her dower must be set out by metes and bounds; but if it be indivisible, she must be endowed specially, as of the third presentation to a church, the third toll-dish of a mill, the third part of the profits of an office, the third sheaf of tithe, and the like.

How Dower May be Barred.

4. How dower may be *barred* or prevented. A widow may be barred of her dower not only by elopement, divorce, being an alien,

the treason of her husband, and other disabilities before mentioned, but also by detaining the title-deeds or evidences of the estate from the heir, until she restores them; and, by the statute of Gloucester, if a dowager alienes the land assigned for her dower, she forfeits it *ipso facto*, and the heir may recover it by action. A woman also may be barred of her dower, by levying a fine, or suffering a recovery of the lands, during her coverture. But the most usual method of barring dowers is by jointures, as regulated by the statute 27 Hen. VIII. c. 10.

Jointure.

A jointure, which, strictly speaking, signifies a joint estate, limited to both husband and wife, but in common acceptation extends also to a sole estate, limited to the wife only, is thus defined by Sir Edward Coke: "a competent livelihood of freehold for the wife, of lands and tenements, to take effect, in profit or possession, presently after the death of the husband, for the life of the wife at least." But then these four requisites must be punctually observed: 1. The jointure must take effect immediately on the death of the husband. 2. It must be for her own life at least, and not *pur autre vie*, or for any term of years, or other smaller estate. 3. It must be made to herself, and no other in trust for her. 4. It must be made, and so in the deed particularly expressed to be, in satisfaction of her whole dower, and not of any particular part of it. If the jointure be made to her after marriage, she has her election after her husband's death, as in dower *ad ostium ecclesiae*, and may either accept it or refuse it and betake herself to her dower at common law; for she was not capable of consenting to it during coverture. And if, by any fraud or accident, a jointure made before marriage proves to be on a bad title, and the jointress is evicted, or turned out of possession, she shall then, (by the provisions of the same statute) have her dower *pro tanto* at the common law.

A widow may enter at once, without any formal process, on her jointure land as she also might have done on dower *ad ostium ecclesiae*, which a jointure in many points resembles. And the resemblance was still greater while that species of dower continued in its primitive state; whereas no small trouble, and a very tedious method of proceeding, is necessary to compel a legal assignment of dower. And what is more, though dower be forfeited by the treason of the husband, yet lands settled in jointure remain unimpeached to the widow.

Chapter IX. OF ESTATES LESS THAN FREEHOLD.

139-152.

Of estates that are less than freehold, there are three sorts: 1. Estates for years; 2. Estates at will; 3. Estates by sufferance.

Estate for Years.

1. An estate for *years* is a contract for the possession of lands or tenements for some determinate period; and it takes place where a man letteth them to another for the term of a certain number of years, agreed upon between the lessor and the lessee, and the lessee enters thereon. If the lease be but for half a year, or a quarter, or any less time, this lessee is respected as a tenant for years, and is styled so in some legal proceedings; a year being the shortest term which the law in this case takes notice of. And this may not improperly lead us into a short digression concerning the division and calculation of time by the English law.

The space of a year is a determinate and well-known period, consisting commonly of 365 days; for though in bissextile, or leap-years, it consists properly of 366, yet by the statute 21 Hen. III., the increasing day in the leap-year, together with the preceding day, shall be accounted for one day only.

That of a month is more ambiguous, there being in common use two ways of calculating months, either as lunar—consisting of twenty-eight days, the supposed revolution of the moon, thirteen of which make a year—or as calendar months of unequal lengths, according to the Julian division in our common almanacs, commencing at the calends of each month, whereof in a year there are only twelve. A month in law is a lunar month, or twenty-eight days, unless otherwise expressed. Therefore a lease for “twelve months” is only for forty-eight weeks; but if it be for “a twelve-month” in the singular number it is good for the whole year.

In the space of a day all the twenty-four hours are usually reckoned; the law generally rejecting all fractions of a day, in order to avoid disputes. Therefore if I am bound to pay money on any certain day, I discharge the obligation if I pay it before twelve o'clock at night, after which the following day commences.

Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years. And therefore this estate is frequently called a term, *terminus*, because its duration or continuance is bounded, limited, and determined: for every such estate must have a certain beginning and certain end. But *id certum est, quod certum reddi potest*: therefore if a man make a lease to another for so many years, as J. S. shall name, it is a good lease for years: for though it is at present uncertain,

yet when J. S. hath named the years, it is then reduced to a certainty. If no day of commencement is named in the creation of this estate, it begins from the making or delivery of the lease. A lease for so many years as J. S. shall live, is void from the beginning: for it is neither certain, nor can ever be reduced to a certainty, during the continuance of the lease. And the same doctrine holds, if a parson make a lease of his glebe for so many years as he shall continue parson of Dale; for this is still more uncertain. But a lease for twenty or more years, if J. S. shall so long live, or if he should so long continue parson, is good: for there is a certain period fixed, beyond which it cannot last; though it may determine sooner, on the death of J. S., or his ceasing to be parson there.

We have before remarked, and endeavored to assign the reason of, the inferiority in which the law places an estate for years, when compared with an estate for life, or an inheritance: observing, that an estate for life, even if it be *pur auter vie*, is a freehold; but that an estate for a thousand years is only a chattel, and reckoned part of the personal estate. Hence it follows, that a lease for years may be made to commence in *futuro*, though a lease for life cannot. As, if I grant lands to Titus to hold from Michaelmas next for twenty years, this is good; but to hold from Michaelmas next for the term of his natural life, is void. For no estate nor freehold can commence in *futuro*; because it cannot be created at common law without livery of seisin, or corporal possession of the land, and corporal possession cannot be given of an estate now, which is not to commence now, but hereafter. And, because no livery of seisin is necessary to a lease for years, such lessee is not said to be *seised*, or to have true legal seisin of the lands. Nor indeed does the bare lease vest any estate in the lessee: but only gives him a right of entry on the tenement, which right is called his *interest in the term*, or *interesse termini*, but when he has actually so entered, and thereby accepted the grant, the estate is then and not before, vested in him, and he is *possessed*, not properly of the land, but of the term of years; the possession or seisin of the *land* remaining still in him who hath the freehold. Thus the word *term* does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease; and therefore the *term* may expire, during the continuance of the *time*; as by surrender, forfeiture, and the like. For which reason, if I grant a lease to A for the term of three years, and, after the expiration of the said *term*, to B for six years, and A surrenders or forfeits his lease at the end of *one* year, B's interest shall immediately take effect; but if the remainder had been to B from and after the expiration of the said *three years*, or from and after the expiration of said *time*, in this case B's interest will not commence till the time is fully elapsed, whatever may become of A's term.

Incidents to Term for Years.

Tenant for term of years hath incident to, and inseparable from his estate, unless by special agreement, the same estovers which we formerly observed that tenant for life was entitled to; that is to say, house-bote, fire-bote, plough-bote, and hay-bote; terms which have been already explained.

With regard to emblements, or the profits of lands sowed by tenant for years, there is this difference between him, and tenant for life: that where the term of tenant for years depends upon a certainty, as if he holds from midsummer for ten years, and in the last year he sows a crop of corn and it is not ripe and cut before midsummer the end of his term, the landlord shall have it; for the tenant knew the expiration of his term, and therefore it was his own folly to sow what he never could reap the profits of. But where the lease for years depends upon an uncertainty: as, upon the death of a lessor, being himself only tenant for life, or being a husband seised in right of his wife; or if the term of years be determinable upon a life or lives; in all these cases the estate for years not being certainly to expire at a time foreknown, but merely by the act of God, the tenant or his executors shall have the emblements in the same manner that a tenant for life or his executors shall be entitled thereto. Not so, if it determine by the act of the party himself: as, if tenant for years does anything that amounts to a forfeiture: in which case the emblements shall go to the lessor and not to the lessee, who hath determined his estate by his own default.

Estates at Will.

II. The second species of estate not freehold are estates at *will*. An estate at will is where lands and tenements are let by one man to another, to have and to hold at the will of the lessor; and the tenant by force of this lease obtains possession. Such tenant hath no certain indefeasible estate, nothing that can be assigned by him to any other; because the lessor may determine his will, and put him out whenever he pleases. But every estate at will, is at the will of both parties, landlord and tenant; so that either of them may determine his will and quit his connection with the other at his own pleasure. Yet this must be understood with some restriction. For if the tenant at will sows his land, and the landlord, before the corn is ripe or before it is reaped, puts him out, yet the tenant shall have the emblements, and free ingress, egress, and regress, to cut and carry away the profits. And this for the same reason upon which all cases of emblements turn; viz., the point of uncertainty; since the tenant could not possibly know when his landlord would determine his will, and therefore could make no provision against it; and having sown the land which is for the good of the public upon a reasonable presumption,

the law will not suffer him to be a loser by it. But it is otherwise, and upon reason equally good, where the tenant himself determines the will; for in this case the landlord shall have the profits of the land.

What act does, or does not, amount to a determination of the will on either side, has formerly been matter of great debate in our courts. But it is now, I think, settled, that (besides the express determination of the lessor's will, by declaring that the lessee shall hold no longer; which must either be made upon the land or notice must be given to the lessee) the exertion of any act of ownership by the lessor, as entering upon the premises and cutting timber, taking a distress for rent and impounding it thereon, or making a feoffment, or lease for years of the land to commence immediately; any act of desertion by the lessee, as assigning his estate to another, or committing waste, which is an act inconsistent with such a tenure; or, which is *instar omnium* the death or outlawry of either lessor or lessee puts an end to or determines the estate at will.

The lessee, after the determination of the lessor's will, shall have reasonable ingress and egress to fetch away his goods and utensils; and if rent be payable quarterly or half-yearly, and the lessee determines the will, the rent shall be paid to the end of the current quarter or half-year. Courts of law have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will, but have rather held them to be tenancies from year to year so long as both parties please, especially where an annual rent is reserved, in which case they will not suffer either party to determine the tenancy even at the end of the year, without reasonable notice to the other, which is generally understood to be six months.

Copyhold Estates.

There is one species of estates at will that deserves a more particular regard than any other; and that is, an estate held by copy of court-roll: or, as we usually call it, a *copyhold* estate. This, as was before observed, was in its original and foundation nothing better than a mere estate at will. But the kindness and indulgence of successive lords of manors having permitted these estates to be enjoyed by the tenants and their heirs, according to particular customs established in their respective districts; therefore, though they still are held at the will of the lord, and so are in general expressed in the court-rolls to be, yet that will is qualified, restrained and limited, to be exerted according to the custom of the manor. This custom, being suffered to grow up by the lord, is looked upon as the evidence and interpreter of his will: his will is no longer arbitrary and precarious; but fixed and ascertained by the custom to be the same, and no other, that has time

out of mind been exercised and declared by his ancestors. A copyhold tenant is therefore now full as properly a tenant by the custom as a tenant at will; the custom having arisen from a series of uniform wills.

Estates at Sufferance.

III. An estate at *sufferance* is where one comes into possession of land by lawful title but keeps it afterwards without any title at all. As if a man takes a lease for a year, and after a year is expired continues to hold the premises without any fresh leave from the owner of the estate. Or, if a man maketh a lease at will and dies, the estate at will is thereby determined: but if the tenant continueth possession, he is tenant at sufferance. But no man can be tenant at sufferance against the king, to whom no *laches*, or neglect in not entering and ousting the tenant, is ever imputed by law: but his tenant, so holding over, is considered as an absolute intruder. But in the case of a subject this estate may be destroyed whenever the true owner shall make an actual entry on the lands and oust the tenant: for, before entry, he cannot maintain an action of trespass against the tenant by sufferance, as he might against a stranger: and the reason is, because the tenant being once in by a lawful title, the law (which presumes no wrong in any man) will suppose him to continue upon a title equally lawful; unless the owner of the land by some public and avowed act, such as entry is, will declare his continuance to be tortious, or, in common language, wrongful.

Thus stands the law with regard to tenants by sufferance, and landlords are obliged in these cases to make formal entries upon their lands, and recover possession by the legal process of ejectment: and at the utmost, by the common law, the tenant was bound to account for the profits of the land so by him detained.

Chapter X.

OF ESTATES UPON CONDITION.

152-162.

Definitions and Divisions.

Besides the several divisions of estates, in point of interest, which we have considered in the three preceding chapters, there is also another species still remaining, which is called an estate *upon condition*; being such whose existence depends upon the happening or not happening of some uncertain event, whereby the estate may be either originally created, or enlarged, or finally defeated. And these conditional estates I have chosen to reserve till last, because they are indeed more properly qualifications of other estates, than a distinct species of themselves; seeing that any quantity of

interest, a fee, a freehold, or a term of years, may depend upon these provisional restrictions. Estates, then, upon condition thus understood are of two sorts: 1. Estates upon condition *implied*; 2. Estates upon condition *expressed*: under which last may be included, 3. Estates held *in vadio, gage, or pledge*; 4. Estates by *statute merchant, or statute staple*; 5. Estates held by *elegit*.

Conditions Implied in Law.

I. Estates upon condition implied in law, are where a grant of an estate has a condition annexed to it inseparably, from its essence and constitution, although no conditions be expressed in words. As if a grant be made to a man of an office, generally, without adding other words; the law tacitly annexes hereto a secret condition, that the grantee shall duly execute his office, on breach of which condition it is lawful for the grantor or his heirs, to oust him, and grant it to another person. For an office, either public or private, may be forfeited by *mis-user* or *non-user*, both of which are breaches of this implied condition. 1. By *mis-user*, or abuse; as if a judge takes a bribe, or a park-keeper kills deer without authority. 2. By *non-user*, or neglect: which in public offices, that concern the administration of justice, or the commonwealth, is of itself a direct and immediate cause of forfeiture; but non-user of a private office is no cause of forfeiture, unless some special damage is proved to be occasioned thereby. For in the one case delay must necessarily be occasioned in the affairs of the public, which require a constant attention; but private offices not requiring so regular and unremitted a service, the temporary neglect of them is not necessarily productive of mischief; upon which account some special loss must be proved, in order to vacate these. Franchises also, being regal privileges in the hands of a subject, are held to be granted on the same condition of making a proper use of them; and therefore they may be lost and forfeited, like offices, either by abuse or by neglect.

Upon the same principle proceed all the forfeitures which are given by law of life estates and others, for any acts done by the tenant himself, that are incompatible with the estate which he holds. As if tenants for life or years enfeoff a stranger in fee-simple: this is, by the common law, a forfeiture of their several estates; being a breach of the condition which the law annexes thereto, viz., that they shall not attempt to create a greater estate than they themselves are entitled to. So if any tenants for years, for life, or in fee, commit a felony: the king or other lord of the fee is entitled to have their tenements, because their estate is determined by the breach of the condition, "that they shall not commit felony," which the law tacitly annexes to every feodal donation.

Condition Expressed.

II. An estate on condition expressed in the grant itself is where an estate is granted, either in *fee-simple* or *otherwise*, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or defeated, upon performance or breach of such qualification or condition. These conditions are therefore either *precedent*, or *subsequent*. Precedent are such as must happen or be performed before the estate can vest or be enlarged; subsequent are such, by the failure or non-performance of which an estate already vested may be defeated. Thus, if an estate for life be limited to A upon his marriage with B, the marriage is a precedent condition, and till that happens no estate is vested in A. Or, if a man grant to his lessee for years that upon payment of a hundred marks within the term he shall have the fee, this also is a condition precedent and the fee-simple passeth not till the hundred marks be paid. But if a man grant an estate in fee-simple, reserving to himself and his heirs a certain rent; and that if such rent be not paid at the time limited, it shall be lawful for him and his heirs to re-enter, and avoid the estate: in this case the grantee and his heirs have an estate upon condition subsequent, which is defeasible if the condition be not strictly performed. To this class may also be referred all base fees, and fee-simples conditional at the common law. Thus an estate to a man and his heirs, *tenants of the manor of Dale*, is an estate on condition that he and his heirs continue tenants of that manor. And so if a personal annuity be granted at this day to a man and the heirs of his body, as this is no tenement within the statute of Westminster the Second, it remains, as at common law, a fee-simple on condition that the grantee has heirs of his body. Upon the same principle depend all the determinable estates of freehold, which we mentioned in the eighth chapter: as *durante viduitate*, *etc.*; these are estates upon condition that the grantees do not marry, and the like. And, on the breach of any of these subsequent conditions, by the failure of these contingencies; by the grantee's not continuing tenant of the manor of Dale, by not having heirs of his body, or by not continuing sole; the estates which were respectively vested in each grantee are wholly determined and void.

Condition in Deed and a Limitation.

A distinction is however made between a *condition in deed* and a *limitation*, which Littleton denominates also a *condition in law*. For when an estate is so expressly confined and limited by the words of its creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominates a *limitation*: as when land is granted to a man *so long as* he is parson of Dale, or *while* he continues unmarried,

or *until* out of the rents and profits he shall have made 500*l.*, and the like. In such case the estate determines as soon as the contingency happens (when he ceases to be parson, marries a wife, or has received the 500*l.*), and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. But when an estate is, strictly speaking, upon *condition in deed* (as if granted expressly *upon condition* to be void upon the payment of 40*l.* by the grantor, or *so that* the grantee continues unmarried, or *provided* he goes to York, etc.), the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs or assigns take advantage of the breach of the condition, and make either an entry or a claim in order to avoid the estate. Yet, though strict words of condition be used in the creation of the estate, if on breach of the condition the estate be limited over to a third person, and does not immediately revert to the grantor or his representatives (as if an estate be granted by A to B, on condition that within two years B intermarry with C, and on failure thereof then to D and his heirs), this the law construes to be a limitation and not a condition: because if it were a condition, then, upon the breach thereof, only A or his representatives could avoid the estate by entry, and so D's remainder might be defeated by their neglecting to enter; but when it is a limitation the estate of B determines, and that of D commences, and he may enter on the lands the instant that the failure happens. So also, if a man by his will devises land to his heir at law on condition that he pays a sum of money, and for non-payment devises it over, this shall be considered as a limitation; otherwise no advantage could be taken of the non-payment, for none but the heir himself could have entered for a breach of condition.

In all these instances, of limitations or conditions subsequent, it is to be observed, that so long as the condition, either express or implied, either in deed or in law, remains unbroken the grantee may have an estate of freehold, provided the estate upon which such condition is annexed be in itself of a freehold nature; as if the original grant express either an estate of inheritance, or for life; or no estate at all, which is constructively an estate for life. For, the breach of these conditions being contingent and uncertain, this uncertainty preserves the freehold; because the estate is capable to last forever, or at least for the life of the tenant, supposing the condition to remain unbroken. But where the estate is at the utmost a chattel interest, which must determine at a time certain, and may determine sooner (as a grant for ninety-nine years, provided A, B, and C, or the survivor of them, shall so long live), this still continues a mere chattel, and is not, by such its uncertainty, ranked among estates of freehold.

These express conditions, if they be *impossible* at the time of their creation, or afterwards become impossible by the act of God or the act of the feoffer himself, or if they be *contrary to law*, or *repugnant* to the nature of the estate, are void. In any of which cases, if they be conditions *subsequent*, that is, to be performed after the estate is vested, the estate shall become absolute in the tenant. As, if a feoffment be made to a man in fee-simple, on condition that unless he goes to Rome in twenty-four hours; or unless he marries with Jane S. by such a day (within which time the woman dies, or the feoffer marries her himself); or unless he kills another; or in case he alienes in fee; that then and in any of such cases, the estate shall be vacated and determine; here the condition is void, and the estate made absolute in the feoffee. For he hath by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal or repugnant. But if the condition be *precedent*, or to be performed before the estate vests, as a grant to a man, that if he kills another or goes to Rome in a day, he shall have an estate in fee; here, the void condition being precedent the estate which depends thereon is also void, and the grantee shall take nothing by the grant: for he hath no estate until the condition be performed.

There are some estates defeasible upon condition subsequent, that require a more peculiar notice. Such are

Estates in Pledge—Mortgage.

III. Estates held *in vadio*, in *gage*, or pledge; which are of two kinds, *vivum vadium*, or living pledge; and *mortuum vadium*, dead pledge, or *mortgage*.

Vivum vadium, or living pledge, is when a man borrows a sum (suppose 200*l.*) of another; and grants him an estate, as of 20*l.* *per annum*, to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be void as soon as such sum is raised. And in this case the land or pledge is said to be living; it subsists, and survives the debt; and immediately on the discharge of that, results back to the borrower. But *mortuum vadium*, a dead pledge, or *mortgage* (which is much more common than the other) is where a man borrows of another a specific sum (*e. g.* 200*l.*) and grants him an estate in fee, on condition that if he, the mortgagor, shall repay the mortgagee the said sum of 200*l.* on a certain day mentioned in the deed, that then the mortgagor may re-enter on the estate so granted in pledge; or, as is now the more usual way, that then the mortgagee shall reconvey the estate to the mortgagor: in this case, the land, which is so put in pledge, is by law, in case of non-payment at the time limited, forever dead and gone from the mortgagor; and the mortgagee's estate in the lands is then no longer conditional, but abso-

lute. But, so long as it continues conditional, that is, between the time of lending the money, and the time allotted for payment, the mortgagee is called tenant in mortgage.

As soon as the estate is created, the mortgagee may immediately enter on the lands; but is liable to be dispossessed, upon performance of the condition by payment of the mortgage money at the day limited. And therefore the usual way is to agree that the mortgagor shall hold the land till the day assigned for payment; when, in case of failure, whereby the estate becomes absolute, the mortgagee may enter upon it and take possession, without any possibility *at law* of being afterwards evicted by the mortgagor, to whom the land is now forever dead.

Equity of Redemption.

But here again the courts of equity interpose; and, though a mortgage be thus forfeited, and the estate absolutely vested in the mortgagee at the common law, yet they will consider the real value of the tenements compared with the sum borrowed. And, if the estate be of greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time to recall or redeem his estate; paying to the mortgagee his principal, interest and expenses: for otherwise, in strictness of law, an estate worth 1000*l.* might be forfeited for non-payment of 100*l.* or a less sum. This reasonable advantage allowed to mortgagors, is called the *equity of redemption*: and this enables a mortgagor to call on the mortgagee, who has possession of his estate, to deliver it back and account for the rents and profits received, on payment of his whole debt and interest; thereby turning the *mortuum* into a kind of *vivum vadium*. But, on the other hand, the mortgagee may either compel the sale of the estate, in order to get the whole of his money immediately; or else call upon the mortgagor to redeem his estate presently, or in default thereof, to be forever *foreclosed* from redeeming the same; that is, to lose his equity of redemption without possibility of recall.

Statute Merchant and Statute Staple.

IV. A fourth species of estates, defeasible on condition subsequent, are those held by *statute merchant*, and *statute staple*; which are very nearly related to the *vivum vadium* before mentioned, or estate held till the profits thereof shall discharge a debt liquidated or ascertained. For both the statute merchant and statute staple are securities for money: the one entered into before the chief magistrate of some trading town, pursuant to the statute 13 Edw. I., *de mercatoribus*, and thence called a statute merchant; the other pursuant to the statute 27 Edw. III. c. 9, before the mayor of the staple, that is to say, the grand mart for the principal commodities or manufactures of the kingdom,

formerly held by act of parliament in certain trading towns, from whence this security is called a statute staple. They are both, I say, securities for debts acknowledged to be due; and originally permitted only among traders for the benefit of commeree; whereby not only the body of the debtor may be imprisoned, and his goods seized in satisfaction of the debt, but also his lands may be delivered to the creditor, till out of the rents and profits of them the debt may be satisfied; and, during such time as the creditor so holds the lands, he is tenant by statute merchant or statute staple.

Estate by Elegit.

V. Another similar conditional estate, created by operation of law, for security and satisfaction of debts, is called an estate by *elegit*. What an *elegit* is, and why so called, will be explained in the third part of these commentaries. At present I need only mention that it is the name of a writ, founded on the statute of Westm. 2, by which, after a plaintiff has obtained judgment for his debt at law, the sheriff gives him possession of one-half of the defendant's lands and tenements to be occupied and enjoyed until his debt and damages are fully paid; and during the time he so holds them, he is called tenant by *elegit*.

Chapter XI.

ESTATES IN POSSESSION, REMAINDER, AND REVERSION.

162-179.

Divisions.

Hitherto we have considered estates solely with regard to their duration, or the *quantity of interest* which the owners have therein. We are now to consider them in another view: with regard to the *time of their enjoyment*, when the actual pendency of the profits (that is, the taking, perception, or receipt of the rents and other advantages arising therefrom) begins. Estates therefore with respect to this consideration, may either be in *possession*, or in *expectancy*: of expectancies there are two sorts; one created by the act of the parties, called *remainder*; the other by act of law, and called a *reversion*.

Estates in Possession.

I. Of estates in *possession* (which are sometimes called estates *executed*, whereby a present interest passes to and resides in the tenant, not depending on any subsequent circumstance or contingency, as in the case of estates *executory*); there is little or nothing peculiar to be observed. All the estates we have hitherto spoken of are of this kind.

Estates in Remainder.

II. An estate in *remainder* may be defined to be, an estate limited to take effect and be enjoyed after another estate is determined. As if a man seised in fee-simple granteth lands to A for twenty years, and, after the determination of the said term, then to B and his heirs forever; here A is a tenant for years, remainder to B in fee. In the first place an estate for years is created or carved out of the fee, and given to A; and the residue or remainder of it given to B. But both these interests are in fact only one estate; the present term of years and the remainder afterwards, when added together, being equal only to one estate in fee. They are indeed different *parts*, but they constitute only one *whole*; they are carved out of one and the same inheritance: they are both created, and may both subsist, together; the one in possession, the other in expectancy. So if land be granted to A for twenty years, and after the determination of the said term to B for life; and after the determination of B's estate for life, it be limited to C and his heirs forever: this makes A tenant for years, with the remainder to B for life, remainder over to C in fee. Now here the estate of inheritance undergoes a division into three portions: there is first A's estate for years carved out of it; and after that B's estate for life; and then the whole that remains is limited to C and his heirs. And here also the first estate, and both the remainders, for life and in fee, are one estate only; being nothing but parts or portions of one entire inheritance; and if there were a hundred remainders, it would still be the same thing: upon a principle grounded in mathematical truth, that all the parts are equal, and no more than equal, to the whole. And hence also it is easy to collect, that no remainder can be limited after the grant of an estate in fee-simple: because a fee-simple is the highest and largest estate that a subject is capable of enjoying; and he that is tenant in fee hath in him the *whole* of the estate: a remainder therefore, which is only a portion, or residuary *part*, of the estate, cannot be reserved after the whole is disposed of. A particular estate, with all the remainders expectant thereon, is only one fee-simple.

Thus much being premised, we shall be the better enabled to comprehend the rules that are laid down by law to be observed in the creation of remainders, and the reasons upon which those rules are founded.

Rules in Creation of Remainders.

1. And, first, there must necessarily be some particular estate precedent to the estate in remainder. As, an estate for years to A, remainder to B for life; or, an estate for life to A, remainder to B in tail. This precedent estate is called the *particular* estate, as being only a small part, or *particular*, of the inheritance; the residue or remainder of which is granted over to another.

An estate created to commence at a distant period of time, without any intervening estate, is therefore properly no remainder; it is the whole of the gift, and not a residuary part. And such future estates can only be made of chattel interests, which were considered in the light of mere contracts by the ancient law, to be executed either now or hereafter, as the contracting parties should agree; but an estate of freehold must be created to commence immediately. For it is an ancient rule of the common law, that an estate of freehold cannot be created to commence *in futuro*; but it ought to take effect presently either in possession or remainder; because at common law no freehold in lands could pass without livery of seisin; which must operate either immediately, or not at all. It would therefore be contradictory, if an estate, which is not to commence till hereafter, could be granted by a conveyance which imports an immediate possession. Therefore, though a lease to A for seven years, to commence from next Michaelmas, is good; yet a conveyance to B of lands, to hold to him and his heirs forever from the end of three years next ensuing, is void. So that when it is intended to grant an estate of freehold, whereof the enjoyment shall be deferred till a future time, it is necessary to create a previous particular estate, which may subsist till that period of time is completed; and for the grantor to deliver immediate possession of the land to the tenant of this particular estate, which is construed to be giving possession to him in remainder, since his estate and that of the particular tenant are one and the same estate in law. As, where one leases to A for three years, with remainder to B in fee, and makes livery of seisin to A; here by the livery the freehold is immediately created, and vested in B, during the continuance of A's term of years. The whole estate passes at once from the grantor to the grantees, and the remainderman is seised of his remainder at the same time that the termor is possessed of his term. The enjoyment of it must indeed be deferred till hereafter; but it is to all intents and purposes an estate commencing *in praesenti*, though to be occupied and enjoyed *in futuro*.

As no remainder can be created without such a precedent particular estate, therefore the particular estate is said to *support* the remainder. But a lease at will is not held to be such a particular estate as will support a remainder over. For an estate at will is of a nature so slender and precarious, that it is not looked upon as a portion of the inheritance; and a portion must first be taken out of it, in order to constitute a remainder. Besides, if it be a freehold remainder, livery of seisin must be given at the time of its creation; and the entry of the grantor to do this determines the estate at will in the very instant in which it is made: or if the remainder be a chattel interest, though perhaps the deed of creation

might operate as a *future contract*, if the tenant for years be a party to it, yet it is void by way of *remainder*: for it is a separate independent contract, distinct from the precedent estate at will; and every remainder must be part of one and the same estate, out of which the preceding particular estate is taken. - And hence it is generally true, that if the particular estate is void in its creation, or by any means is defeated afterwards, the remainder supported thereby shall be defeated also: as where the particular estate is an estate for the life of a person not *in esse*; or an estate for life upon condition, on breach of which condition the grantor enters and avoids the estate; in either of these cases the remainder over is void.

2. A second rule to be observed is this: that the remainder must commence or pass out of the grantor at the time of the creation of the particular estate. As where there is an estate to A for life, with remainder to B in fee: here B's remainder in fee passes from the grantor at the same time that seisin is delivered to A of his life estate in possession. And it is this which induces the necessity at common law of livery of seisin being made on the particular estate, whenever a *freehold* remainder is created. For, if it be limited even on an estate for years, it is necessary that the lessee for years should have livery of seisin, in order to convey the freehold from and out of the grantor, otherwise the remainder is void. Not that the livery is necessary to strengthen the estate for years; but, as livery of the land is requisite to convey the freehold, and yet cannot be given to him in remainder without infringing the possession of the lessee for years, therefore the law allows such livery, made to the tenant of the particular estate, to relate and inure to him in remainder, as both are but one estate in law.

3. A third rule respecting remainders is this: that the remainder must vest in the grantee during the continuance of the particular estate, or *eo instanti* that it determines. As, if A be tenant for life, remainder to B in tail; here B's remainder is vested in him, at the creation of the particular estate to A for life: or if A and B be tenants for their joint lives, remainder to the survivor in fee; here, though during their joint lives, the remainder is vested in neither, yet on the death of either of them the remainder vests instantly in the survivor: wherefore both these are good remainders. But, if an estate be limited to A for life, remainder to the eldest son of B in tail, and A dies before B hath any son; here the remainder will be void, for it did not vest in any one during the continuance, nor at the determination, of the particular estate; and even supposing that B should afterwards have a son, he shall not take by this remainder; for, as it did not vest at or before the end of the particular estate, it never can vest at all, but is gone forever. And this depends upon the principle before laid down,

that the precedent particular estate, and the remainder are one estate in law; they must therefore subsist and be *in esse* at one and the same instant of time, either during the continuance of the first estate, or at the very instant when that determines, so that no other estate can possibly come between them. For there can be no intervening estate between the particular estate, and the remainder supported thereby: the thing supported must fall to the ground, if once its support be severed from it.

Vested and Contingent Remainders.

It is upon these rules, but principally the last, that the doctrine of *contingent* remainders depends. For remainders are either *vested* or *contingent*. *Vested* remainders (or remainders *executed*, whereby a present interest passes to the party, though to be enjoyed *in futuro*) are where the estate is invariably fixed, to remain to a determinate person, after the particular estate is spent. As if A be tenant for twenty years, remainder to B in fee; here B's is a vested remainder, which nothing can defeat, or set aside.

Contingent Remainders.

Contingent or *executory* remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect, either to a dubious or uncertain *person*, or upon a dubious or uncertain *event*; so that the particular estate may chance to be determined, and the remainder never take effect.

First, they may be limited to a dubious and uncertain *person*. As if A be tenant for life, with remainder to B's eldest son (then unborn) in tail; this is a contingent remainder, for it is uncertain whether B will have a son or no; but the instant that a son is born, the remainder is no longer contingent, but vested. Though, if A had died before the contingency happened, that is, before B's son was born, the remainder would have been absolutely gone; for the particular estate was determined before the remainder could vest. Nay, by the strict rule of law, if A were tenant for life, remainder to his eldest son in tail, and A died without issue born, but leaving his wife *enceinte*, or big with child, and after his death a posthumous son was born, the son could not take the land by virtue of this remainder; for this particular estate determined before there was any person *in esse*, in whom the remainder could vest. But to remedy this hardship, it is enacted by statutes 10 and 11 W. III. c. 16, that posthumous children shall be capable of taking in remainder, in the same manner as if they had been born in their father's lifetime; that is, the remainder is allowed to vest in them, while yet in their mother's womb.

This species of contingent remainders to a person not in being, must, however, be limited to some one, that may, by common possibility, or *potentia propinqua*, be *in esse* at or before the par-

ticular estate determines. As if an estate be made to A for life, remainder to the heirs of B; now, if A dies before B, the remainder is at an end; for during B's life he has no heir, *nemo est haeres viventis*; but if B dies first the remainder then immediately vests in his heir, who will be entitled to the land on the death of A. This is a good contingent remainder, for the possibility of B's dying before A is *potentia propinqua*, and therefore allowed in law. But a remainder to the right heirs of B (if there be no such person as B *in esse*) is void. For here there must be two contingencies happen: first, that such a person as B shall be born; and, secondly, that he shall also die during the continuance of the particular estate, which make it *potentia remotissima*, a most improbable possibility. A remainder to a man's eldest son who hath none (we have seen) is good, for by common possibility he may have one; but if it be limited in particular to his son John, or Richard, it is bad if he have no son of that name; for it is too remote a possibility that he should not only have a son, but a son of a particular name. A limitation of a remainder to a bastard before it is born, is not good: for though the law allows the possibility of having bastards, it presumes it to be a very remote and improbable contingency. Thus may a remainder be contingent, on account of the uncertainty of the *person* who is to take it.

A remainder may also be contingent, where the person to whom it is limited is fixed and certain, but the *event* upon which it is to take effect is vague and uncertain. As, where land is given to A for life, and in case B survives him, then with remainder to B in fee; here B is a certain person, but the remainder to him is a contingent remainder, depending upon a dubious event, the uncertainty of his surviving A. During the joint lives of A and B it is contingent; and if B dies first, it never can vest in his heirs, but is forever gone; but if A dies first, the remainder to B becomes vested.

Contingent remainders of either kind, if they amount to a freehold, cannot be limited on an estate for *years*, or any other particular estate, *less* than a freehold. Thus if land be granted to A for ten years, with remainder in fee to the right heirs of B, this remainder is void; but if granted to A *for life*, with a like remainder, it is good. For, unless the freehold passes out of the grantor at the time when the remainder is created, such freehold remainder is void: it cannot pass out of him, without vesting somewhere; and in the case of a contingent remainder it must vest in the particular tenant, else it can vest nowhere; unless, therefore, the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and consequently the remainder is void.

Contingent remainders may be *defeated* by destroying or determining the particular estate upon which they depend, before

the contingency happens whereby they become vested. Therefore when there is tenant for life, with divers remainders in contingency, he may, not only by his death, but by alienation, surrender, or other methods, destroy and determine his own life-estate before any of those remainders vest: the consequence of which is, that he utterly defeats them all. As, if there be tenant for life, with remainder to his eldest son unborn in tail, and the tenant for life, before any son is born, surrenders his life estate, he by that means defeats the remainder in tail to his son; for his son not being *in esse*, when the particular estate determined, the remainder could not then vest: and, as it could not vest then, by the rules before laid down, it never can vest at all. In these cases, therefore, it is necessary to have trustees appointed to preserve the contingent remainders; in whom there is vested an estate in remainder for the life of the tenant for life, to commence when his estate determines. If therefore his estate for life determines otherwise than by his death, the estate of the trustees, for the residue of his natural life, will then take effect, and become a particular estate in possession, sufficient to support the remainders depending in contingency.

Executory Devise.

An executory devise of lands is such a disposition of them by will, that thereby no estate vests at the death of the devisor, but only on some future contingency. It differs from a remainder in three very material points: 1. That it needs not any particular estate to support it. 2. That by it a fee-simple, or other less estate, may be limited after a fee-simple. 3. That by this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same.

1. The first case happens when a man devises a future estate to arise upon a contingency, and, till that contingency happens, does not dispose of the fee-simple, but leaves it to descend to his heirs at law. As if one devises land to a feme-sole and her heirs, upon her day of marriage: here is in effect a contingent remainder, without any particular estate to support it; a freehold commencing *in futuro*. This limitation, though it would be void in a deed, yet is good in a will, by way of executory devise. For, since by a devise a freehold may pass without corporal tradition or livery of seisin (as it must do, if it passes at all), therefore it may commence *in futuro*; because the principal reason why it cannot commence *in futuro* in other cases, is the necessity of actual seisin, which always operates *in praesenti*. And since it may thus commence *in futuro*, there is no need of a particular estate to support it; the only use of which is to make the remainder, by its unity with the particular estate, a present interest. And hence also it follows, that such an executory devise, not being a present interest, cannot be barred by a recovery, suffered before it commences.

2. By executory devise, a fee, or other less estate, may be limited after a fee. And this happens where a deviser devises his whole estate in fee, but limits a remainder thereon to commence on a future contingency. As if a man devises land to A and his heirs; but if he dies before the age of twenty-one, then to B and his heirs; this remainder, though void in deed, is good by way of executory devise. But, in both these species of executory devises, the contingencies ought to be such as may happen within a reasonable time; as within one or more life or lives in being, or within a moderate term of years, for courts of justice will not indulge even wills so as to create a perpetuity, which the law abhors, because by perpetuities (or the settlement of an interest, which shall go in the succession prescribed, without any power of alienation) estates are made incapable of answering those ends of social commerce, and providing for the sudden contingencies of private life, for which property was at first established. The utmost length that has been hitherto allowed for the contingency of an executory devise of either kind to happen in, is that of a life or lives in being, and one and twenty years afterwards. And when lands are devised to such unborn son of a feme-covert, as shall first attain the age of twenty-one, and his heirs, the utmost length of time that can happen before the estate can vest, is the life of the mother and the subsequent infancy of her son; and this hath been decreed to be a good executory devise.

3. By executory devise, a term of years may be given to one man for his life, and afterwards limited over in remainder to another, which could not be done by deed; for by law the first grant of it, to a man for life, was a total disposition of the whole term, a life-estate being esteemed of a higher and larger nature than any term of years. And, at first, the courts were tender, even in the case of a will, of restraining the devisee for life from aliening the term; but only held, that in case he died without exerting that act of ownership, the remainder over should then take place; for the restraint of the power of alienation, especially in very long terms, was introducing a species of perpetuity. But, soon afterwards, it was held that the devisee for life hath no power of aliening the term, so as to bar the remainderman; yet, in order to prevent the danger of perpetuities, it was settled, that though such remainders may be limited to as many persons successively as the deviser thinks proper, yet they must all be *in esse* during the life of the first devisee; for then all the candles are lighted and are consuming together; and the ultimate remainder is in reality only to that remainderman who happens to survive the rest; and it was also settled, that such remainder may not be limited to take effect, unless upon such contingency as must happen (if at all) during the life of the first devisee.

Thus much for such estates in expectancy, as are created by the express words of the parties themselves; the most intricate title in the law. There is yet another species, which is created by the act and operation of the law itself, and this is called a reversion.

Estates in Reversion.

III. An estate in *reversion* is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. Sir Edward Coke describes a reversion to be the returning of land to the grantor or his heirs after the grant is over. As, if there be a gift in tail, the reversion of the fee is, without any special reservation, vested in the donor by act of law; and so also the reversion, after an estate for life, years, or at will, continues in the lessor. For the fee-simple of all lands must abide somewhere; and if he, who was before possessed of the whole, carves out of it any smaller estate, and grants it away, whatever is not so granted remains in him. A reversion is never therefore created by deed, or writing, but arises from construction of law; a remainder can never be limited, unless by either deed or devise. But both are equally transferable, when actually vested; being both estates *in praesenti*, though taking effect *in futuro*.

The doctrine of reversions is plainly derived from the feudal constitution. For when a feud was granted to a man for life, or to him and his issue male, rendering either rent or other services; then, on his death or the failure of issue male, the feud was determined, and resulted back to the lord or proprietor, to be again disposed of at his pleasure. And hence the usual *incidents* to reversions are said to be *fealty* and *rent*. When no rent is reserved on the particular estate, fealty however results of course as an incident quite inseparable, and may be demanded as a badge of tenure, or acknowledgment of superiority; being frequently the only evidence that the lands are holden at all. Where rent is reserved, it is also incident, though not inseparably so, to the reversion. The rent may be granted away, reserving the reversion; and the reversion may be granted away, reserving the rent, by *special* words; but by a *general* grant of the reversion, the rent will pass with it, as incident thereunto: though by the grant of the rent generally, the reversion will not pass. The incident passes by the grant of the principal, but not *e converso*: for the maxim of law is, "*accessorium non ducit, sed sequitur, suum principale.*"

Merger.

Before we conclude the doctrine of remainders and reversions, it may be proper to observe, that whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated; or, in the

law phrase, is said to be *merged*, that is, sunk or drowned in the greater. Thus if there be tenant for years, and the reversion in fee simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more. But they must come to one and the same person in one and the same right; else, if the freehold be in his own right, and he has a term in right of another (*en autre droit*), there is no merger. Therefore, if tenant for years dies, and makes him who hath the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge; for he hath the fee in his own right, and the term of years in the right of the testator, and subject to his debts and legacies. So also, if he who hath the reversion in fee marries the tenant for years, there is no merger; for he hath the inheritance in his own right, the lease in the right of his wife. An estate-tail is an exception to this rule: for a man may have in his own right, both an estate tail and a reversion in fee: and the estate-tail, though a less estate, shall not merge in the fee. For estates-tail are protected and preserved from merger by the operation and construction, though not by the express words, of the statute *de donis*.

Chapter XII.

OF ESTATES IN SEVERALTY, JOINT-TENANCY, COPARCENARY, AND COMMON.

179-195.

We come now to treat of estates, with respect to the number and connections of their owners, the tenants who occupy and hold them. And, considered in this view, estates of any quantity or length of duration, and whether they be in actual possession or expectancy, may be held in four different ways: in severalty, in joint-tenancy, in coparcenary, and in common.

Severalty.

I. He that holds lands or tenements in *severalty*, or is sole tenant thereof, is he that holds them in his own right only, without any other person being joined or connected with him in point of interest, during his estate therein. This is the most common and usual way of holding an estate.

Joint-Tenancy.

II. An estate in *joint-tenancy* is where lands or tenements are granted to two or more persons, to hold in fee-simple, fee-tail, for life, for years, or at will. In consequence of such grants an estate is called an estate in joint-tenancy, and sometimes an estate in *jointure*, which word as well as the other signifies a union or conjunction of interest; though in common speech the term *jointure* is now usually confined to that joint-estate which, by virtue of

the statute 27 Hen. VIII. c. 10, is frequently vested in the husband and wife before marriage, as a full satisfaction and bar of the woman's dower.

In unfolding this title, and the two remaining ones in the present chapter, we will first inquire how these estates may be *created*; next, their *properties* and respective *incidents*; and lastly how they may be *severed* or *destroyed*.

How Created.

1. The *creation* of an estate in joint-tenancy depends on the wording of the deed or devise, by which the tenants claim title: for this estate can only arise by purchase or grant, that is by the act of the parties, and never by the mere act of law. Now, if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A and B and their heirs, this makes them immediately joint-tenants in fee of the lands.

The Properties.

2. The *properties* of a joint-estate are derived from its unity, which is fourfold; the unity of *interest*, the unity of *title*, the unity of *time*, and the unity of *possession*; or, in other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.

First, they must have one and the same *interest*. One joint-tenant cannot be entitled to one period of duration or quantity of interest in lands, and the other to a different; one cannot be tenant for life, and the other for years; one cannot be tenant in fee, and the other in tail. But if land be limited to A and B for their lives, this makes them joint-tenants of the freehold; if to A and B and their heirs, it makes them joint-tenants of the inheritance. If land be granted to A and B for their lives, and to the heirs of A; here A and B are joint-tenants of the freehold during their respective lives, and A has the remainder of the fee in severalty; or if land be given to A and B, and the heirs of the body of A; here both have a joint-estate for life, and A hath a several remainder in tail. *Secondly*, joint-tenants must also have a unity of *title*; their estate must be created by one and the same act, whether legal or illegal; as by one and the same grant, or by one and the same disseisin. Joint-tenancy cannot arise by descent or act of law; but merely by purchase or acquisition by the act of the party; and, unless that act be one and the same, the two tenants would have different titles; and if they had different titles, one might prove good and the other bad, which would absolutely destroy the jointure. *Thirdly*, there must also be a unity of *time*; their estates must be vested at one and the same period, as well as by one and the same title.

As in case of a present estate made to A and B; or a remainder in fee to A and B after a particular estate; in either case A and B are joint-tenants of this present estate, or this vested remainder. But if, after a lease for life, the remainder be limited to the heirs of A and B; and during the continuance of the particular estate A dies, which vests the remainder of one moiety in his heir; and then B dies, whereby the other moiety becomes vested in the heir of B: now A's heir and B's heir are not joint-tenants of this remainder, but tenants in common; for one moiety vested at one time, and the other moiety vested at another. Yet where a feoffment was made to the use of a man, and such wife as he should afterwards marry, for term of their lives, and he afterwards married; in this case it seems to have been held that the husband and wife had a joint-estate, though vested at different times; because the *use* of the wife's estate was in abeyance and dormant till the intermarriage; and, being then awakened, had relation back and took effect from the original time of creation. Lastly, in joint-tenancy there must be a unity of *possession*. Joint-tenants are said to be seised *per my et per tout* by the *half or moiety*, and by *all*: that is, they each of them have the entire possession, as well of every *parcel* as of the *whole*. They have not, one of them a seisin of one-half or moiety, and the other of the other moiety; neither can one be exclusively seised of one acre, and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety. And therefore, if an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common: for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, *per tout et non per my*; the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor.

Upon these principles, of a thorough and intimate union of interest and possession, depend many other consequences and incidents to the joint-tenant's estate. If two joint-tenants let a verbal lease of their land, reserving rent to be paid to one of them, it shall inure to both, in respect of the joint reversion. If their lessee surrenders his lease to one of them, it shall also inure to both, because of the privity, or relation, of their estate. On the same reason, livery of seisin, made to one joint-tenant, shall inure to both of them: and the entry, or re-entry, of one joint-tenant is as effectual in law as if it were the act of both. In all actions also relating to their joint-estate, one joint-tenant cannot sue or be sued without joining the other.

Upon the same ground it is held, that one joint-tenant cannot have an action against another for trespass, in respect of his land: for each has an equal right to enter on any part of it.

But one joint-tenant is not capable by himself to do any act which may tend to defeat or injure the estate of the other; as to let leases, or to grant copyholds: and if any waste be done, which tends to the destruction of the inheritance, one joint-tenant may have an action of waste against the other, by construction of the statute Westm. 2 c. 22. So too, though at common law no action of account lay for one joint-tenant against another, unless he had constituted him his bailiff or receiver, yet now by the statute 4 Anne, c. 16, joint-tenants may have actions of account against each other, for receiving more than their due share of the profits of the tenements held in joint-tenancy.

Survivorship.

From the same principle also arises the remaining grand incident of joint-estates; viz., the doctrine of *survivorship*: by which when two or more persons are seised of a joint estate, of inheritance, for their own lives, or *pur auter vie*, or are jointly possessed of any chattel-interest, the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it be, whether an inheritance, or a common freehold only, or even a less estate. This is the natural and regular consequence of the union and entirety of their interest. The interest of two joint-tenants is not only equal or similar, but also is one and the same. One has not originally a distinct moiety from the other; but, if by any subsequent act (as by alienation or forfeiture of either) the interest becomes separate and distinct, the joint-tenancy instantly ceases. But, while it continues, each of two joint-tenants has a concurrent interest in the whole, and therefore on the death of his companion, the sole interest in the whole remains to the survivor. For the interest which the survivor originally had is clearly not divested by the death of his companion; and no other person can now claim to have a *joint*-estate with him, for no one can now have an interest in the whole, accruing by the same title and taking effect at the same time with his own; neither can any one claim a *separate* interest in any part of the tenements: for that would be to deprive the survivor of the right which he has in all and every part. As therefore the survivor's original interest in the whole still remains; and as no one can now be admitted, either jointly or severally, to any share with him therein; it follows, that his own interest must now be entire and several, and that he shall alone be entitled to the whole estate (whatever it be) that was created by the original grant.

This right of survivorship is called by our ancient authors the *jus accrescendi*, because the right upon the death of one joint-tenant accumulates and increases to the survivors.

How Severed and Destroyed.

3. We are, lastly, to inquire how an estate in joint-tenancy may be *severed* and *destroyed*. And this may be done by destroying any of its constituent unities. 1. That of *time*, which respects only the original commencement of the joint-estate, cannot indeed (being now past) be affected by any subsequent transactions. But, 2. The joint-tenant's estate may be destroyed without any alienation, by merely disuniting their *possession*. For joint-tenants being seised *per my et per tout*, everything that tends to narrow that interest, so that they shall not be seised throughout the whole and throughout every part, is a severance or destruction of the jointure. And therefore, if two joint-tenants agree to part their lands, and hold them in severalty, they are no longer joint-tenants: for they have now no joint-interest in the whole, but only a several interest respectively in the several parts. And for that reason also, the right of survivorship is by such separation destroyed. By common law all the joint-tenants might agree to make partition of the lands, but one of them could not compel the other so to do: for this being an estate originally created by the act and agreement of the parties, the law would not permit any one or more of them to destroy the united possession without a similar universal consent. But now by the statutes 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32, joint-tenants, either of inheritance or other less estates, are compellable by writ of partition to divide their lands. 3. The jointure may be destroyed by destroying the unity of *title*. As if one joint-tenant alienes and conveys his estate to a third person; here the joint-tenancy is severed, and turned into tenancy in common; for the grantee and the remaining joint-tenant hold by different titles (one derived from the original, the other from the subsequent, grantor), though, till partition made, the unity of possession continues. But a devise of one's share by will is no severance of the jointure; for no testament takes effect till after the death of the testator, and by such death the right of the survivor (which accrued at the original creation of the estate, and has therefore a priority to the other) is already vested. 4. It may also be destroyed by destroying the unity of *interest*. And therefore, if there be two joint-tenants for life, and the inheritance is purchased by or descends upon either, it is a severance of the jointure; though, if an estate is originally limited to two for life, and after to the heirs of one of them, the freehold shall remain in jointure, without merging in the inheritance; because, being created by one and the same conveyance, they are not separate estates (which is requisite in order to a merger), but branches of one entire estate. In like manner, if a joint-tenant in fee makes a lease for life of his share, this defeats the jointure: for it destroys the unity both of title and of interest. And whenever or

by whatever means the jointure ceases or is severed, the right of survivorship, or *jus accrescendi*, the same instant ceases with it. Yet, if one of three joint-tenants alienes his share, the two remaining tenants still hold their parts by joint-tenancy and survivorship: and if one of three joint-tenants release his share to one of his companions, though the joint-tenancy is destroyed with regard to that part, yet the two remaining parts are still held in jointure; for they still preserve their original constituent unities. But when, by an act or event, different interests are created in the several parts of the estate, or they are held by different titles, or if merely the possession is separated; so that the tenants have no longer these four indispensable properties, a sameness of interest, and undivided possession, a title vesting at one and the same time, and by one and the same act or grant; the jointure is instantly dissolved.

In general it is advantageous for the joint tenants to dissolve the jointure; since thereby the right of survivorship is taken away, and each may transmit his own part to his own heirs. Sometimes, however, it is disadvantageous to dissolve the joint-estate; as if there be joint-tenants for life, and they make partition, this dissolves the jointure; and, though before they each of them had an estate in the whole for their own lives and the life of their companion, now they have an estate in a moiety only for their own lives merely; and on the death of either, the reversioner shall enter on his moiety. And therefore if there be two joint-tenants for life, and one grants away his part for the life of his companion, it is forfeiture: for in the first place, by the severance of the jointure he has given himself in his own moiety only an estate for his own life; and then he grants the same land for the life of another; which grant, by a tenant for his own life merely, is a forfeiture of his estate; for it is creating an estate which may by possibility last longer than that which he is legally entitled to.

Coparcenary.

III. An estate held in *coparcenary* is where lands of inheritance descend from the ancestor to two or more persons. It *arises* either by common law or particular custom. By common law: as where a person seised in fee-simple or in fee-tail dies and his next heirs are two or more females, his daughters, sisters, aunts, cousins, or their representatives: in this case they shall all inherit, as will be more fully shown when we treat of descents hereafter; and these co-heirs are then called *coparceners*; or, for brevity, *parceners* only. Parceners by particular custom are where lands descend, as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, etc. And, in either of these cases, all the parceners put together make but one heir, and have but one estate among them.

The Properties of Parceners.

The *properties* of parceners are in some respects like those of joint-tenants: having the same unities of *interest, title, and possession*. They may sue and be sued jointly for matters relating to their own lands; and the entry of one of them shall in some cases inure as the entry of them all. They cannot have an action of trespass against each other; but herein they differ from joint-tenants, that they are also excluded from maintaining an action of waste: for coparceners could at all times put a stop to any waste by writ of partition, but till the statute of Henry the Eighth joint-tenants had no such power. Parceners also differ materially from joint-tenants in four other points: 1. They always claim by descent, whereas joint-tenants always claim by purchase. Therefore, if two sisters purchase lands, to hold to them and their heirs, they are not parceners, but joint-tenants; and hence it likewise follows, that no lands can be held in coparcenary, but estates of inheritance, which are of a descendible nature; whereas not only estates in fee and in tail, but for life or years, may be held in joint-tenancy. 2. There is no unity of *time* necessary to an estate in coparcenary. For if a man hath two daughters, to whom his estate descends in coparcenary, and one dies before the other, the surviving daughter and the heir of the other, or, when both are dead, their two heirs, are still parceners; the estates vesting in each of them at different times, though it be the same quantity of interest, and held by the same title. 3. Parceners, though they have a *unity*, have not an *entirety* of interest. They are properly entitled each to the whole of a distinct moiety; and of course there is no *jus accrescendi*, or survivorship between them; for each part descends severally to their respective heirs, though the unity of possession continues. And as long as the lands continue in a course of descent, and united in possession, so long are the tenants therein, whether male or female, called parceners. But if the possession be once severed by partition, they are no longer parceners, but tenants in severalty; or if one parcener alienes her share, though no partition be made, then are the lands no longer held in *coparcenary*, but in *common*.

The estate in coparcenary may be dissolved either by partition, which disunites the possession; by alienation of one parcener, which disunites the title and may disunite the interest; or by the whole at last descending to and vesting in one single person, which brings it to an estate in severalty.

Tenancy in Common.

IV. Tenants in *common* are such as hold by several and distinct titles, but by unity of possession; because none knoweth his severalty, and therefore they all occupy promiscuously. This tenancy therefore happens where there is a unity of possession merely,

but perhaps an entire disunion of interest, of title, and of time. For if there be two tenants in common of lands, one may hold his part in fee-simple, the other in tail or for life; so that there is no necessary unity of interest; one may hold by descent, the other by purchase; or the one by purchase from A, the other by purchase from B, so that there is no unity of title: one's estate may have been vested fifty years, the other's but yesterday; so there is no unity of time. The only unity there is, is that of possession; and for this Littleton gives the true reason, because no man can certainly tell which part is his own: otherwise even this would be soon destroyed.

How Created.

Tenancy in common may be created, either by the destruction of the two other estates, in joint-tenancy and coparcenary, or by special limitation in a deed. By the destruction of the two other estates, I mean such destruction as does not sever the unity of possession, but only the unity of title or interest. As, if one of two joint-tenants in fee alienes his estate for the life of the alienee, the alienee and the other joint-tenants are tenants in common; for they have now several titles, the other joint-tenant by the original grant, the alienee by the new alienation; and they also have several interests, the former joint-tenant in fee-simple, the alienee for his own life only. So, if one joint-tenant gives his part to A in tail, and the other gives his to B in tail, the donees are tenants in common, as holding by different titles and conveyances. If one of two parceners alienes, the alienee and the remaining parcener are tenants in common; because they hold by different titles, the parcener by descent, the alienee by purchase. So, likewise, if there be a grant to two *men* or two *women*, and the heirs of their bodies, here the grantees shall be joint-tenants of the life-estate, but they shall have several inheritances: because they cannot possibly have one heir of their two bodies, as might have been the case had the limitation been to *a man and woman*, and the heirs of their bodies begotten: and in this, and the like cases, their issue shall be tenants in common; because they must claim by different titles, one as heir of A, and the other as heir of B; and those two not titles by purchase, but descent. In short, whenever an estate in joint-tenancy or coparcenary is dissolved, so that there be no partition made, but the unity of possession continues, it is turned into a tenancy in common.

A tenancy in common may also be created by express limitation in a deed; but here care must be taken not to insert words which imply a joint estate; and then if lands be given to two or more, and it be not joint-tenancy, it must be a tenancy in common. But the law is apt in its constructions to favor joint-tenancy rather than tenancy in common; because the divisible services issuing

from land (as rent, etc.) are not divided, nor the entire services (as fealty) multiplied, by joint-tenancy, as they must necessarily be upon a tenancy in common. Land given to two, to be holden the one moiety to one and the other moiety to the other, is an estate in common; and, if one grants to another *half* his land, the grantor and grantee are also tenants in common; because as has been before observed, joint-tenants do not take by distinct halves or moieties; and by such grants the division and severalty of the estate is so plainly expressed, that it is impossible they should take a joint-interest in the whole of the tenements. But a *devise* to two persons to hold *jointly and severally*, is said to be a joint-tenancy; because that is necessarily implied in the word "jointly," the word "severally" perhaps only implying the power of partition; and an estate given to A and B, *equally to be divided* between them, though in *deeds* it hath been said to be a joint-tenancy (for it implies no more than the law has annexed to that estate, *viz.*, divisibility), yet in *wills* it is certainly a tenancy in common; because the devisor may be presumed to have meant what is most beneficial to both the devisees, though his meaning is imperfectly expressed. And this nicety in the wording of grants makes it the most usual as well as the safest way, when a tenancy in common is meant to be created, to add express words of exclusion as well as description, and limit the estate to A and B, to hold *as tenants in common, and not as joint-tenants*.

Its Incidents.

As to the *incidents* attending a tenancy in common: tenants in common (like joint-tenants) are compellable by the statutes of Henry VIII. and William III., before mentioned, to make partition of their lands; which they were not at common law. They properly take by distinct moieties, and have no entirety of interest; and therefore there is no survivorship between tenants in common. Their other incidents are such as merely arise from the unity of possession; and are therefore the same as appertain to joint-tenants merely upon that account: such as being liable to reciprocal actions of waste, and of account, by the statutes of Westm. 2, c. 22, and 4 Anne c. 16. For by the common law no tenant in common was liable to account with his companion for embezzling the profits of the estate; though if one actually turns the other out of possession, an action of ejectment will lie against him. But, as for other incidents of joint-tenants, which arise from the privity of title, or the union and entirety of interest (such as joining or being joined in actions, unless in the case where some entire or indivisible thing is to be recovered), these are not applicable to tenants in common, whose interests are distinct, and whose titles are not joint but several.

How Dissolved.

Estates in common can only be dissolved two ways: 1. By uniting all the titles and interests in one tenant, by purchase or otherwise; which brings the whole to one severalty. 2. By making partitions between the several tenants in common, which gives them all respective severalties. For indeed tenancies in common differ in nothing from sole estates but merely in the blending and unity of possession. And this finishes our inquiries with respect to the nature of *estates*.

Chapter XIII.**OF THE TITLE TO THINGS REAL, IN GENERAL.**

195-201.

The chapter treats of the title to things real, with the manner of acquiring and losing it. A title is thus defined by Sir Edward Coke: It is the means whereby the owner of lands hath the just possession of his property. There are three several stages or degrees requisite to form a complete title to lands and tenements.

1st. Naked possession; 2nd, Right of possession; 3rd, Right of property. A good title is where the right of possession is joined with the right of property. When to this is added actual possession then is the title completely legal.

Chapter XIV.**OF TITLE BY DESCENT.**

201-241.

Methods of Acquiring and Losing Title.

The methods of acquiring on the one hand, and of losing on the other, a title to estates in things real, are reduced by our law to two: *descent*, where the title is vested in a man by the single operation of law; and *purchase*, where the title is vested in him by his own act or agreement.

Descent.

Descent, or hereditary succession, is the title whereby a man on the death of his ancestor acquires his estate by right of representation, as his heirs-at-law. An heir therefore is he upon whom the law casts the estate immediately on the death of the ancestor: and an estate so descending to the heir, is in law called the inheritance.

The doctrine of descents, or law of inheritances in fee-simple, is a point of the highest importance; and is indeed the principal object of the laws of real property in England.

The common-law doctrine of inheritance, it will now be our business to explain.

And, as this depends not a little on the nature of kindred, and

the several degrees of consanguinity, it will be previously necessary to state as briefly as possible, the true notion of this kindred or alliance in blood.

Consanguinity.

Consanguinity, or kindred, is defined by the writers on these subjects to be the connection or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal or collateral.

Lineal.

Lineal consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other, as between John Stiles and his father, grandfather, great-grandfather, and so upwards in the direct ascending line; or between John Stiles and his son, grandson, great-grandson, and so downwards in the direct descending line. Every generation in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards: the father of John Stiles is related to him in the first degree, and so likewise is his son; his grandsire and grandson in the second; his great-grandsire and great-grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore universally obtains, as well in the civil and canon as in the common law.

Collateral.

Collateral kindred answers the same description: collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor; but differing in this that they do not descend one from the other. Collateral kinsmen are such then as lineally spring from one and the same ancestor who is the *stirps*, or root, the *stipes*, trunk or common stock, from whence these relations are branched out. As, if John Stiles hath two sons, who have each a numerous issue; both these issues are lineally descended from John Stiles as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguineos*.

We must be careful to remember, that the very being of collateral consanguinity consists in this descent from one and the same common ancestor. Thus *Titius* and his brother are related; why? because both are derived from one father: *Titius* and his first cousin are related; why? because both descend from the same grandfather; and his second cousin's claim to consanguinity is this, that they are both derived from one and the same great-grandfather. In short, as many ancestors as a man has, so many common stocks he has from which collateral kinsmen may be derived.

Method of Computing Degrees.

The method of computing these degrees in the canon law, which our law has adopted, is as follows: we begin at the common ancestor and reckon downwards: and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. Thus, *Titius* and his brother are related in the first degree; for from the father to each of them is counted only one; *Titius* and his nephew are related in the second degree; for the nephew is two degrees removed from the common ancestor; viz., his own grandfather, the father of *Titius*.

The civilians count upwards from either of the persons related, to the common stock, and then downwards again to the other, reckoning a degree for each person both ascending and descending.

Rules of Inheritance.

The nature and degrees of kindred being thus in some measure explained, I shall next proceed to lay down a series of rules or canons of inheritance, according to which estates are transmitted from the ancestor to the heir; together with an explanatory comment, remarking their original and progress, the reasons upon which they are founded, and in some cases their agreement with the laws of other nations.

I. The first rule is, that inheritances shall lineally descend to the issue of the person who last died actually seized *in infinitum*; but shall never lineally ascend.

To explain the more clearly both this and the subsequent rules, it must first be observed, that by law no inheritance can vest nor can any person be the actual complete heir of another, till the ancestor is previously dead. *Nemo est haeres viventis*. Before that time the person who is next in the line of succession is called an *heir apparent*, or *heir presumptive*. Heirs *apparent* are such whose right of inheritance is indefeasible provided they outlive the ancestor; as the eldest son or his issue, who must by the course of the common law be heir to the father whenever he happens to die. Heirs *presumptive* are such who, if the ancestor should die immediately, would in the present circumstances of things be his heirs; but whose right of inheritance may be defeated by the contingency of some nearer heir being born; as a brother or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter whose present hopes may be hereafter cut off by the birth of a son. Nay, even if the estate hath descended, by the death of the owner, to such brother, or nephew, or daughter, in the former cases, the estate shall be divested and taken away by the birth of a posthumous child; and in the latter, it shall also be totally divested by the birth of a posthumous son.

We must also remember that no person can be properly such an ancestor as that an inheritance of lands or tenements can be derived from him, unless he hath had *actual seisin* of such lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or by receiving rent from a lessee of a freehold: or unless he hath had what is equivalent to corporal seisin in hereditaments that are incorporeal; such as the receipt of rent, a presentation to the church in case of an advowson, and the like. But he shall not be accounted an ancestor, who hath had only a bare right or title to enter or be otherwise seised.

II. A second general rule or canon is, that the male issue shall be admitted before the female.

Thus sons shall be admitted before daughters; or, as our male law-givers have somewhat uncomplaisantly expressed it, the worthiest of blood shall be preferred.

III. A third rule or canon of descent is this: that where there are two or more males, in equal degree, the eldest only shall inherit; but the females all together.

IV. A fourth rule or canon of descents, is this: that the lineal descendants, *in infinitum*, of any person deceased, shall represent their ancestors: that is, shall stand in the same place as the person himself would have done had he been living.

Thus the child, grandchild, or great-grandchild (either male or female) of the eldest son succeeds before the younger son, and so *in infinitum*. And these representatives shall take neither more nor less, but just so much as their principals would have done.

This taking by representation is called succession *in stirpes*, according to the roots; since all the branches inherit the same share that their root whom they represent, would have done.

V. A fifth rule is that on failure of lineal descendants, or issue, of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser, subject to the three preceding rules.

Thus if Geoffrey Stiles purchases land, and it descends to John Stiles his son, and John dies seised thereof without issue; whoever succeeds to this inheritance must be of the blood of Geoffrey, the first purchaser of this family. The first purchaser, *perquisitor* is he who first acquired the estate to his family, whether the same was transferred to him by sale or by gift, or by any other method, except only that of descent.

The rules of inheritance that remain are only rules of evidence, calculated to investigate who the purchasing ancestor was; which *in feudis vere antiquis* has in process of time been forgotten, and is supposed to be in feuds that are held *ut antiquis*.

VI. A sixth rule or canon therefore is: that the collateral heir of the person last seised must be his next collateral kinsman of the *whole blood*.

First, he must be his next collateral kinsman either personally or *jure representationis*; which proximity is reckoned according to the canonical degrees of consanguinity before mentioned. Therefore, the brother being in the first degree, he and his descendants shall exclude the uncle and his issue, who is only in the second.

The right of representation being thus established, the former part of the present rule amounts to this: that on failure of issue of the person last seized, the inheritance shall descend to the other subsisting issue of his next immediate ancestor. Thus, if John Stiles dies without issue, his estate shall descend to Francis his brother, or his representatives, he being lineally descended from Geoffrey Stiles, John's next immediate ancestor, or father. On the failure of brethren, or sisters, and their issue, it shall descend to the uncle of John Stiles, the lineal descendant of his grandfather George, and so on *in infinitum*.

But though the common ancestor be thus the root of the inheritance, yet with us it is not necessary to *name* him in making out the pedigree or descent. For the descent between two brothers is held to be an *immediate* descent, and therefore title may be made by one brother or his representatives *to* or *through* another without mentioning their common father. But though the common ancestors are not named in deducing the pedigree, yet the law still respects them as the fountains of inheritable blood; and, therefore, in order to ascertain the collateral heir of John Stiles, it is first necessary to recur to his ancestors in the first degree, and if they have left any other issue besides John, that issue will be his heir. On default of such we must ascend one step higher, to the ancestors in the second degree, and then to those in the third and fourth, and so upwards *in infinitum*, till some couple of ancestors be found who have other issue descending from them besides the deceased in a parallel or collateral line. From these ancestors the heir of John Stiles must derive his decent, and in such derivation the same rules must be observed with regard to the sex, primogeniture, and representation, that have before been laid down with regard to lineal descents from the person of the last proprietor.

But, secondly, the heir need not be the nearest kinsman absolutely but only *sub modo*; that is, he must be the nearest kinsman of the *whole-blood*; for if there be a much nearer kinsman of the *half-blood*, a distant kinsman of the whole-blood shall be admitted, and the other entirely excluded; nay, the estate shall escheat to the lord sooner than the half-blood shall inherit.

A kinsman of the whole-blood is he that is derived, not only from the same ancestor, but from the same couple of ancestors.

VII. The seventh and last rule or canon is: that in collateral inheritances the male stocks shall be preferred to the female (that is, kindred derived from the blood of the male ancestors, however

remote, shall be admitted before those from the blood of the female, (however near); unless where the lands have, in fact, descended from a female.

Thus the relations on the father's side are admitted *in infinitum*, before those on the mother's side are admitted at all; and the relations of the father's father, before those of the father's mother, and so on.

Chapter XV. OF TITLE BY PURCHASE.

AND I. BY ESCHEAT.

241-258.

Purchase in Law.

Purchase, *perquisitio*, taken in its largest and most extensive sense, is thus defined by Littleton: the possession of lands and tenements, which a man hath by his own act or agreement, and not by descent from any of his ancestors or kindred. In this sense it is contradistinguished from acquisition by right of blood, and includes every other method of coming to an estate, but merely that by inheritance: wherein the title is vested in a person not by his own act or agreement, but by the single operation of law.

Purchase, indeed, in its vulgar and confined acceptation, is applied only to such acquisitions of land as are obtained by way of bargain and sale for money, or some other valuable consideration. But this falls far short of the legal idea of purchase: for if I give land freely to another, he is in the eye of the law a purchaser, and falls within Littleton's definition, for he comes to the estate by his own agreement; that is, he consents to the gift. A man who has his father's estate settled upon him in tail, before he was born, is also a purchaser; for he takes quite another estate than the law of descents would have given him. Nay, even if the ancestor devises his estate to his heir-at-law by will, *with* other limitations, *or* in any other shape, than the course of descents would direct, such heir shall take by purchase. But if a man, seised in fee, devises his whole estate to his heir-at-law, so that the heir takes neither a greater nor a less estate by the devise than he would have done without it, he shall be adjudged to take by descent, even though it be charged with incumbrances: this being for the benefit of creditors, and others, who have demands on the estate of the ancestor. If a remainder be limited to the heirs of Sempronius, here Sempronius himself takes nothing; but if he dies during the continuance of the particular estate his heirs shall take as purchasers. But if an estate be made to A for life, remainder to his right heirs

in fee, his heirs shall take by descent, for it is an ancient rule of law, that whenever the ancestor takes an estate for life, the heir cannot by the same conveyance take an estate in fee by *purchase*, but only by *descent*. And if A dies before entry, still his heirs shall take by descent, and not by purchase; for where the heir takes anything that might have vested in the ancestor, he takes by way of descent. The ancestor, during his life, beareth in himself all his heirs; and therefore, when once he is or might have been seised of the lands, the inheritance so limited to his heirs vests in the ancestor himself: and the word "heirs" in this case is not esteemed a word of *purchase*, but a word of *limitation*, inuring so as to increase the estate of the ancestor from a tenancy for life to a fee-simple.

Difference in Acquisition of Estate by Purchase and by Descent.

The difference, in effect, between the acquisition of an estate by descent and by purchase, consists principally in these two points: 1. That by purchase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, and not the blood only of some particular ancestor. For, when a man takes an estate by purchase he takes it not *ut feudum paternum* or *maternum*, which would descend only to the heirs by the father's or mother's side; but he takes it *ut feudum antiquum*, as a feud of indefinite antiquity, whereby it becomes inheritable to his heirs general, first of the paternal and then of the maternal line. 2. An estate taken by purchase will not make the heir answerable for the acts of the ancestor, as an estate by descent will. For if the ancestor, by any deed, obligation, covenant or the like, bindeth himself and his heirs, and he dieth, this deed, obligation, or covenant shall be binding upon the heirs so far forth only as he (or any other in trust for him) had any estate of inheritance vested in him by descent from (or any estate *pur auter vie* coming to him by special occupancy, as heir to) that ancestor, sufficient to answer the charge; whether he remains in possession, or hath aliened it before action brought; which sufficient estate is in the law called *assets*; from the French word *assez*, enough. Therefore, if a man covenant, for himself and his heirs, to keep my house in repair, I can then (and then only) compel his heir to perform this covenant, when he has an estate sufficient for this purpose, or *assets*, by descent from the covenanter; for though the covenant descends to the heir, whether he inherits any estate or no, it lies dormant, and is not compulsory, until he has assets by descent.

Five Modes of Acquiring Title by Purchase.

This is the legal signification of the word *perquisitio*, or pur-

chase, and in this sense it includes the five following methods of acquiring a title to estates: 1, Escheat. 2, Occupancy. 3, Prescription. 4, Forfeiture. 5, Alienation. Of all these in their order.

Escheat.

I. Escheat, we may remember, was one of the fruits and consequences of feudal tenure. With us it denotes an obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen contingency: in which case the land naturally results back, by a kind of reversion, to the original grantor or lord of the fee.

But it must be remembered that, in order to complete this title by escheat, it is necessary that the lord perform an act of his own, by *entering* on the lands and tenements so escheated, or suing out a *writ of escheat*; on failure of which, or by doing any act that amounts to an implied waiver of his right, as by accepting homage or rent of a stranger who usurps the possession, his title by escheat is barred. It is therefore in some respects a title acquired by his own act, as well as by act of law.

The law of escheats is founded upon this single principle, that the blood of the person last seised in fee-simple is, by some means or other, utterly extinct and gone; and since none can inherit his estate but such as are of his blood and consanguinity, it follows, as a regular consequence, that when such blood is extinct, the inheritance itself must fail: the land must become what the feudal writers denominate *feudum apertum*; and must result back again to the lord of the fee, by whom, or by those whose estate he hath, it was given.

Divisions of Escheats.

Escheats are frequently divided into those *propter defectum sanguinis*, and those *propter delictum tenentis*: the one sort, if the tenant dies without heirs; the other, if his blood be attainted. But both these species may well be comprehended under the first denomination only; for he that is attainted suffers an extinction of his blood, as well as he that dies without relations. The inheritable quality is expunged in one instance, and expires in the other.

Deficiency of Inheritable Blood.

Escheats therefore arising merely upon the deficiency of the blood, whereby the descent is impeded, their doctrine will be better illustrated by considering the several cases wherein hereditary blood may be deficient than by any other method whatsoever.

1, 2, 3. The first three cases, wherein inheritable blood is wanting, may be collected from the rules of descent laid down and explained in the preceding chapter, and therefore will need very

little illustration or comment. First, when the tenant dies without any relations on the part of any of his ancestors; secondly, when he dies without any relations on the part of those ancestors from whom his estate descended; thirdly, when he dies without any relations of the whole blood.

4. A monster, which hath not the shape of mankind, but in any part evidently bears the resemblance of the brute creation, hath no inheritable blood, and cannot be heir to any land, albeit it be brought forth in marriage; but, although it hath deformity in any part of its body, yet if it hath human shape it may be heir. But our law will not admit a birth of this kind to be such an issue as shall entitle the husband to be tenant by the curtesy; because it is not capable of inheriting. And therefore, if there appears no other heir than such a prodigious birth, the land shall escheat to the lord.

Bastards.

5. Bastards are incapable of being heirs. Bastards, by our law, are such children as are not born either in lawful wedlock, or within a competent time after its determination. Such are held to be *nullius filii*, the sons of nobody. Being thus the sons of nobody, they have no blood in them, at least no inheritable blood: consequently none of the blood of the first purchaser: and therefore if there be no other claimant than such illegitimate children, the land shall escheat to the lord.

There is, indeed, one instance, in which our law has shown them some little regard; and that is usually termed the case of *bastard eigné* and *mulier puisné*. This happens when a man has a bastard son, and afterwards marries the mother, and by her has a legitimate son, who, in the language of the law, is called a *mulier*, or, as Glanvil expresses it in his Latin *filius mulieratus*; the woman before marriage being *concupina*, and afterwards *mulier*. Now, here the eldest son is bastard, or *bastard eigné*; and the younger son is legitimate, or *mulier puisné*. If then the father dies, and the *bastard eigné* enters upon his land, and enjoys it to his death, and dies seised thereof whereby the inheritance descends to his issue; in this case *mulier puisné*, and all other heirs (though minors, feme-coverts, or under any incapacity whatsoever), are totally barred of their right.

As bastards cannot be heirs themselves, so neither can they have any heirs but those of their own bodies. For, as all collateral kindred consists in being derived from the same common ancestor, and as a bastard has no legal ancestors, he can have no collateral kindred; and, consequently, can have no legal heirs but such as claim by a lineal descent from himself. And, therefore, if a bastard purchase land and dies seised thereof without issue, and intestate, the land shall escheat to the lord of the fee.

Aliens.

6. Aliens, also, are incapable of taking by descent, or inheriting: for they are not allowed to have any inheritable blood in them; rather indeed upon a principle of national or civil policy, than upon reasons strictly feudal. Though, if lands had been suffered to fall into their hands who owe no allegiance to the crown of England, the design of introducing our feuds, the defense of the kingdom, would have been defeated. Wherefore if a man leaves no other relations but aliens, his land shall escheat to the lord.

As aliens cannot inherit, so far they are on a level with bastards; but as they are also disabled to hold by purchase, they are under still greater disabilities. And, as they can neither hold by purchase nor by inheritance, it is almost superfluous to say that they can have no heirs, since they can have nothing for an heir to inherit; but so it is expressly holden, because they have not in them any inheritable blood.

And, further, if an alien be made a denizen by the king's letters-patent, and then purchases lands (which the law allows such a one to do), his son, born before his denization, shall not (by the common law) inherit those lands; but a son born afterwards may, even though his elder brother be living; for the father, before denization, had no inheritable blood to communicate to his eldest son; but by denization it acquires an hereditary quality, which will be transmitted to his subsequent posterity. Yet if he had been naturalized by act of parliament, such *eldest son* might then have inherited; for that cancels all defects, and is allowed to have a *retrospective* energy, which simple *denisation* has not.

It is now held for law, that the sons of an alien born here, may inherit to each other; the descent from one brother to another being an *immediate* descent. And reasonably enough upon the whole: for, as (in common purchases) the whole of the supposed descent from indefinite ancestors is but fictitious, the law may as well suppose the requisite ancestors as suppose the requisite descent.

Persons Attainted.

7. By attainder also, for treason or other felony, the blood of the person attainted is so corrupted, as to be rendered no longer inheritable.

In Case of Corporations.

Before I conclude this head of escheat, I must mention one singular instance in which lands held in fee-simple are not liable to escheat to the lord, even when their owner is no more, and hath left no heirs to inherit them. And this is the case of a corporation; for if that comes by any accident to be dissolved, the donor

or his heirs shall have the land again in reversion, and not the lord by escheat; which is perhaps the only instance where a reversion can be expectant on a grant in fee-simple absolute. But the law, we are told, doth tacitly annex a condition to every such gift or grant, that if the corporation be dissolved, the donor or grantor shall re-enter; for the cause of the gift or grant faileth. This is indeed founded upon the self-same principle as the law of escheat; the heirs of the donor being only substituted instead of the chief lord of the fee; which was formerly very frequently the case in subinfeudations, or alienations of lands by a vassal to be holden as of himself, till that practice was restrained by the statute of *quia emptores*, 18 Edw. I. st. 1; to which this very singular instance still in some degree remains an exception.

Chapter XVI.

II. OF TITLE BY OCCUPANCY.

258-263.

Definition and Extent of Right.

Occupancy is the taking possession of those things which before belonged to nobody.

This right of occupancy, so far as it concerns real property (for of personal chattels I am not in this place to speak), hath been confined by the laws of England within a very narrow compass; and was extended only in a single instance; namely, where a man was tenant *pur auter vie*, or had an estate granted to himself only (without mentioning his heirs) for the life of another man, and died during the life of *cestui que vie*, or him by whose life it was holden; in this case he that could first enter on the land might lawfully retain the possession, so long as *cestui que vie* lived, by right of occupancy. It did not revert to the grantor, though it formerly was supposed so to do, for he had parted with all his interest so long as *cestui que vie* lived; it did not escheat to the lord of the fee, for all escheats must be of the absolute entire fee, and not of any particular estate carved out of it, much less of so minute a remnant as this; it did not belong to the grantee, for he was dead; it did not descend to his heirs, for there were no words of inheritance in the grant, nor could it vest in his executors, for no executors could succeed to a freehold. Belonging, therefore, to nobody, like the *haereditas jacens* of the Romans, the law left it open to be seized and appropriated by the first person that could enter upon it during the life of *cestui que vie* under the name of an occupant.

But there was no right of occupancy allowed, where the king had the reversion of the lands, for the reversioner hath an equal right with any other man to enter upon the vacant possession, and

where the king's title and a subject concur, the king's shall be always preferred. Against the king, therefore, there could be no prior occupant, because *nullum tempus occurrit regi*. And even in the case of a subject, had the estate *pur auter vie* been granted to a man and his heirs during the life of *cestui que vie*, there the heir might and still may enter and hold possession, and is called in law a special occupant, as having a special exclusive right, by the terms of the original grant, to enter upon and occupy this *haereditas jacens* during the residue of the estate granted.

But the title of common occupancy is now reduced almost to nothing by two statutes: the one, 29 Car. II., c. 3, which enacts that where there is no special occupant, in whom the estate may vest, the tenant *pur auter vie* may devise it by will, or it shall go to the executors or administrators, and be assets in their hands for payment of debts; the other, that of 14 Geo. II., c. 20, which enacts that the surplus of such estate *pur auter vie*, after payment of debts, shall go in a course of distribution like a chattel interest.

By these two statutes the title of *common* occupancy is utterly extinct and abolished; though that of *special* occupancy by the heir-at-law continues to this day; such heir being held to succeed to the ancestor's estate, not by descent, for then he must take an estate of inheritance, but as an occupant specially marked out and appointed by the original grant. But, as before the statutes there could no common occupancy be had of incorporeal hereditaments, as of rents, tithes, advowsons, commons, or the like (because, with respect to them, there could be no actual entry made, or corporal seisin had; and therefore by the death of the grantee *pur auter vie* a grant of such hereditaments was entirely determined), so now, I apprehend, notwithstanding these statutes, such grant would be determined likewise; and the hereditaments would not be devisable, nor vest in the executors, nor go in a course of distribution.

Title by Occupancy to New Found Islands, Coast Lands, etc.

So also in some cases, where the laws of other nations give a right by occupancy, as in lands newly created by the rising of an island in the sea or in a river, or by the alluvion or dereliction of the waters: in these instances the law of England assigns them an immediate owner. For Bracton tells us, that if an island arises in the *middle* of a river, it belongs in common to those who have lands on each side thereof; but if it be nearer to one bank than the other, it belongs only to him who is proprietor of the nearest shore: which is agreeable to, and probably copied from, the civil law. Yet this seems only to be reasonable, where the soil of the river is equally divided between the owners of the opposite shores; for if the whole soil is the freehold of any one man, as it usually is whenever a several fishery is claimed, there it seems just (and so is the constant practice) that the eyotts or little islands, arising in

any part of the river, shall be the property of him who owneth the piscary and the soil. However in case a new island rise in the *sea*, though the civil law gives it to the first occupant, yet ours gives it to the king. And as to lands gained from the sea, either by *alluvion*, by the washing up of sand and earth, so as in time to make *terra firma*; or by *dereliction*, as when the sea shrinks back below the usual water-mark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex*: and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss. But if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king, for, as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry. So that the quantity of ground gained, and the time during which it is gaining, are what make it either the king's or the subject's property. In the same manner if a river, running between two lordships, by degrees gains upon the one, and thereby leaves the other dry, the owner who loses his ground thus imperceptibly has no remedy: but if the course of the river be changed by a sudden and violent flood, or other hasty means, and thereby a man loses his ground, it is said that he shall have what the river has left in any other place as a recompense for this sudden loss.

Chapter XVII.

III. OF TITLE BY PRESCRIPTION.

263-267.

A third method of acquiring real property by purchase is that by *prescription*; as when a man can show no other title to what he claims, than that he, and those under whom he claims, have immemorially used to enjoy it.

Custom and Prescription—The Distinction.

The distinction between custom and prescription is this: 1. That custom is properly a *local usage*, and not annexed to a *person*: such as a custom in the manor of Dale that lands shall descend to the youngest son: prescription is merely a *personal usage*; as, that Sempronius and his ancestors, or those whose estate he hath, have used time out of mind to have such an advantage or privilege.

All prescription must be either in a man and his ancestors, or in a man and those whose estate he hath: which last is called prescribing in a *que estate*.

By the statute of limitations, 32 Hen. VIII., c. 2, it is enacted, that no person shall make any prescription by the seisin or possession of his ancestor or predecessor, unless such seisin or possession hath been within threescore years next before such prescription made.

What May be Prescribed for.

Secondly, as to the several species of things which may, or may not, be prescribed for: we may, in the first place, observe, that nothing but incorporeal hereditaments can be claimed by prescription; as a right of way, a common, etc.; but that no prescription can give a title to lands, and other corporeal substances, of which more certain evidence may be had.

But, as to a right of way, a common, or the like, a man may be allowed to prescribe; for of these there is no corporal seisin, the enjoyment will be frequently by intervals, and therefore the right to enjoy them can depend on nothing else but immemorial usage. 2. A prescription must always be laid in him that is tenant of the fee, a tenant for life, for years, at will, or a copyholder, cannot prescribe, by reason of the imbecility of their estates. For, as prescription is usage beyond time of memory, it is absurd that they should pretend to prescribe for anything, whose estates commenced within the remembrance of man. And therefore the copyholder must prescribe under cover of his lord's estate, and the tenant for life under cover of the tenant in fee-simple. As if tenant for life of a manor would prescribe for a right of common as appurtenant to the same, he must prescribe under cover of the tenant in fee-simple; and must plead that John Stiles and his ancestors had immemorially used to have this right of common, appurtenant to the said manor, and that John Stiles demised the said manor, with its appurtenances, to him the said tenant for life. 3. A prescription cannot be for a thing which cannot be raised by grant. For the law allows prescription only in supply of the loss of a grant, and therefore every prescription presupposes a grant to have existed. 4. A fourth rule is, that what is to arise by matter of record cannot be prescribed for, but must be claimed by grant, entered on record; such as, for instance, the royal franchise of deodands, felons' goods, and the like. But the franchises of treasure-trove, waifs, estrays, and the like, may be claimed by prescription; for they arise from private contingencies, and not from any matter of record. 5. Among things incorporeal, which may be claimed by prescription, a distinction must be made with regard to the manner of prescribing; that is, whether a man shall prescribe in a *que estate*, or in himself and his ancestors. For, if a man prescribes in a *que estate* (that is, in himself and those whose estate he holds), nothing is claimable by this prescription, but such things as are incident, appendant, or appurtenant to

lands; for it would be absurd to claim anything as the consequence or appendix of an estate, with which the thing claimed has no connection; but, if he prescribes in himself and his ancestors, he may prescribe for anything whatsoever that lies in grant; not only things that are appurtenant, but also such as may be in gross.

Therefore, a man may prescribe, that he, and those whose estate he hath in the manor of Dale, have used to hold the advowson of Dale, as *appendant* to that manor; but, if the advowson be a distinct inheritance, and not *appendant*, then he can only prescribe in his ancestors. So also a man may prescribe in a *que estate* for a common *appurtenant* to a manor; but, if he would prescribe for a common *in gross*, he must prescribe in himself and his ancestors. 6. Lastly we may observe, that estates gained by prescription are not, of course, descendible to the heirs general, like other purchased estates, but are an exception to the rule. For, properly speaking, the prescription is rather to be considered as an evidence of a former acquisition than as an acquisition *de novo*: and therefore, if a man prescribes for a right of way in himself and his ancestors, it will descend only to the blood of that line of ancestors in whom he so prescribes; the prescription in this case being indeed a species of descent. But, if he prescribes for it in a *que estate*, it will follow the nature of that estate in which the prescription is laid, and be inheritable in the same manner, whether that were acquired by descent or purchase; for every accessory followeth the nature of its principal.

Chapter XVIII.

IV. OF TITLE BY FORFEITURE.

267-287.

Definition of Forfeiture.

Forfeiture is a punishment annexed by law to some illegal act, or negligence, in the owner of lands, tenements, or hereditaments; whereby he loses all his interest therein, and they go to the party injured, as a recompense for the wrong which either he alone, or the public together with himself, hath sustained.

For what Title may be Forfeited.

Lands, tenements, and hereditaments may be forfeited in various degrees and by various means: 1, By crimes and misdemeanors. 2, By alienation contrary to law. 3, By non-presentation to a benefice, when the forfeiture is denominated a *lapse*. 4, By simony. 5, By non-performance of condition. 6, By waste. 7, By breach of copyhold customs. 8, By bankruptcy.

By Crime.

At present I shall only observe in general, that the offenses

which induce a forfeiture of lands and tenements to the crown are principally the following six: 1, Treason. 2, Felony. 3, Misprision of treason. 4, *Praemunire*. 5, Drawing a weapon on a judge, or striking any one in the presence of the king's principal courts of justice. 6, Popish recusancy, or non-observance of certain laws enacted in restraint of papists.

By Alienation.

II. Lands and tenements may be forfeited by *alienation*, or conveying them to another contrary to law. This is either alienation in *mortmain*, alienation to an *alien*, or alienation by *particular tenants*; in the two former of which cases the forfeiture arises from the incapacity of the alienee to take, in the latter from the incapacity of the alienor to grant.

Alienation in Mortmain.

I. Alienation in *mortmain*, *in mortua manu*, is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal. But these purchases having been chiefly made by religious houses, in consequence whereof the lands became perpetually inherent in one dead hand, this hath occasioned the general appellation of mortmain to be applied to such alienations, and the religious houses themselves to be principally considered in forming the statutes of mortmain.

By the common law any man might dispose of his lands to any other private man at his own discretion, especially when the feudal restraints of alienation were worn away. Yet, in consequence of these it was always, and is still necessary, for corporations to have a license in mortmain from the crown to enable them to purchase lands. But, besides this general license from the king, as lord paramount of the kingdom, it was also requisite, whenever there was a mesne or intermediate lord between the king and the alienor, to obtain his license also (upon the same feudal principles) for the alienation of the specific land. And if no such license was obtained, the king or other lord might respectively enter on the land so aliened in mortmain as a forfeiture.

The religious houses resorted to the following contrivance when a license could not be obtained: The tenant who meant to alienate, first conveyed his lands to the religious houses and instantly took them back again to hold as tenant to the monastery, which sort of instantaneous seisin was probably held not to occasion any forfeiture. Then, by pretext of some other forfeiture, surrender or escheat, the society entered into the land in right of the newly acquired signiory, as immediate lords of the fee.

In the reign of Henry III., all such attempts were declared void, and the land became forfeited to the lord of the fee.

This extended only to religious *houses*, sole corporations not being included in the statute. Ecclesiastical bodies, however, found means to creep out of this statute, one of which was by taking long leases for years.

This produced the statute *de religiosis*, 7 Edw. I.; which provided, that *no person*, religious or other, whatsoever, should buy or sell, or receive under pretense of a gift, or term of years, or any other title whatsoever, nor should by any art or ingenuity appropriate to himself, any lands or tenements in mortmain: upon pain that the immediate lord of the fee, or, on his default for one year, the lords paramount, and, in default of all of them, the king, might enter thereon as a forfeiture.

Common Recoveries.

This seemed to be a sufficient security against all alienations in mortmain, but as these statutes extended only to gifts and conveyances between the parties, the religious houses now began to set up a fictitious title to the land, which it was intended they should have, and to bring an action to recover it against the tenant; who, by fraud and collusion, made no defense, and thereby judgment was given for the religious house, which then *recovered* the land by sentence of law upon a supposed prior title. And thus they had the honour of inventing those fictitious adjudications of right, which are since become the great assurance of the kingdom, under the name of *common recoveries*. But upon this the statute of Westminster the second, 13 Edw. I., c. 32, enacted, that in such cases a jury shall try the true right of the demandants or plaintiffs to the land, and if the religious house or corporation be found to have it, they shall still recover seisin; otherwise it shall be forfeited to the immediate lord of the fee, or else to the next lord, and finally to the king, upon the immediate or other lord's default.

So careful, indeed, was this provident prince to prevent any future evasions, that when the statute of *quia emptores*, 18 Edw. I., abolished all subinfeudations, and gave liberty for all men to alienate their lands to be holden of their next immediate lord, a proviso was inserted that this should not extend to authorize any kind of alienation in mortmain. And when afterwards the method of obtaining the king's license by writ of *ad quod damnum* was marked out by the statute 27 Edw. I. st. 2, it was further provided by statute 34 Edw. I. st. 3, that no such license should be effectual, without the consent of the mesne or intermediate lords.

Origin of Uses and Trusts.

Yet still it was found difficult to set bounds to ecclesiastical ingenuity; for when they were driven out of all their former holds, they devised a new method of conveyance, by which the lands were granted, not to themselves directly, but to nominal feoffees *to the use* of the religious houses: thus distinguishing between the *possession* and the *use*, and receiving the actual profits, while the seisin of the land remained in the nominal feoffee; who was held by the courts of equity (then under the direction of the clergy) to

be bound in conscience to account to his *cestui que use* for the rents and emoluments of the estate. And it is to these inventions that our practisers are indebted for the introduction of uses and trusts, the foundation of modern conveyancing. But, unfortunately for the inventors themselves, they did not long enjoy the advantage of their new device; for the statute 15 Ric. II., c. 5, enacts, that the lands which had been so purchased to uses should be amortised by license from the crown, or else be sold to private persons; and that, for the future, uses shall be subject to the statutes of mortmain, and forfeitable like the lands themselves. And whereas the statutes had been eluded by purchasing large tracts of land, adjoining to churches, and consecrating them by the name of churchyards, such subtle imagination is also declared to be within the compass of the statutes of mortmain. And civil or lay corporations, as well as ecclesiastical, are also declared to be within the mischief, and of course within the remedy provided by those salutary laws. And lastly, as during the times of popery, lands were frequently given to superstitious uses, though not to any corporate bodies; or were made liable in the hands of heirs and devisees to the charge of obits, chaunteries, and the like, which were equally pernicious in a well-governed state as actual alienations in mortmain; therefore, at the dawn of the reformation, the statute of 23 Hen. VIII. c. 10, declares, that all future grants of lands for any of the purposes aforesaid, if granted for any longer term than twenty years, shall be void.

Alienation to an Alien.

2. Secondly, alienation *to an alien* is also a cause of forfeiture to the crown of the land so alienated: not only on account of his incapacity to hold them, which occasions him to be passed by in descents of land, but likewise on account of his presumption in attempting, by an act of his own, to acquire any real property.

Alienation by Particular Tenants.

3. Lastly, alienation *by particular tenants*, when they are greater than the law entitles them to make, and devest the remainder or reversion, are also forfeitures to him whose right is attacked thereby.

Equivalent both in its nature and its consequences, to an illegal alienation by the particular tenant, is the civil crime of *disclaimer*; as where a tenant, who holds of any lord, neglects to render him the due services, and, upon an action brought to recover them, disclaims to hold of his lord. Which disclaimer of tenure in any court of record is a forfeiture of the lands to the lord, upon reasons most apparently feodal.

By Lapse.

III. Lapse is a species of forfeiture, whereby the right of

presentation to a church accrues to the ordinary by neglect of the patron to present, to the metropolitan by neglect of the ordinary, and to the king by neglect of the metropolitan.

By Simony.

IV. By *simony*, the right of presentation to a living is forfeited, and vested *pro hac vice* in the crown. Simony is the corrupt presentation of any one to an ecclesiastical benefice for money, gift or reward. It is so called from the resemblance it is said to bear to the sin of Simon Magus, though the purchasing of holy orders seems to approach nearer to his offense.

By Breach of Condition.

V. The next kind of forfeitures are those by *breach* or non-performance of a *condition* annexed to the estate, either expressly by deed at its original creation, or impliedly by law from a principle of natural reason.

By Waste.

VI. Another species of forfeiture is *waste*. Waste, *vastum*, is a spoil of destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee-simple or fee-tail.

Waste is either *voluntary*, which is a crime of commission, as by pulling down a house; or it is *permissive*, which is a matter of omission only, as by suffering it to fall for want of necessary reparations. Whatever does a lasting damage to the freehold or inheritance is waste. Therefore removing wainscot, floors, or other things once fixed to the freehold of a house, is waste. If a house be destroyed by tempest, lightning, or the like, which is the act of Providence, it is no waste: but otherwise, if the house be burned by the carelessness or negligence of the lessee, though now, by the statute 6 Anne, c. 31, no action will lie against a tenant for an accident of this kind. Waste may also be committed in ponds, dove-houses, warrens, and the like; by so reducing the number of the creatures therein, that there will not be sufficient for the reversioner when he comes to the inheritance. Timber also is part of the inheritance. Such are oak, ash, and elm in all places; and in some particular counties, by local custom, where other trees are generally used for building, they are for that reason considered as timber; and to cut down such trees, or top them, or do any other act whereby the timber may decay, is waste. But underwood the tenant may cut down at any seasonable time that he pleases; and may take sufficient estovers of common right for house-bote and cart-bote; unless restrained (which is usual) by particular covenants or exceptions. The conversion of land from one species to another is waste. To convert wood, meadow, or

pasture into arable; to turn arable, meadow, or pasture into woodland; or to turn arable or woodland into meadow or pasture, are all of them waste. And the same rule is observed, for the same reason, with regard to converting one species of edifice into another, even though it is improved in its value. To open the land to search for mines of metal, coal, etc., is waste, for that is a detriment to the inheritance; but if the pits or mines were open before it is no waste for the tenant to continue digging them for his own use; for it is now become the mere annual profit of the land. These three are the general heads of waste, viz.: in houses, in timber, and in land. Though, as was before said, whatever else tends to the destruction, or depreciating the value of the inheritance, is considered by the law as waste.

Who May Commit Waste.

In our ancient common law waste was not punishable in any tenant, save only in three persons; guardian in chivalry, tenant in dower, and tenant by the curtesy; and not in tenant for life or years. And the reason for the diversity was, that the estate of the three former was created by the act of the law itself, which therefore gave a remedy against them; but tenant for life, or for years, came in by the demise and lease of the owner of the fee, and therefore he might have provided against the committing of waste by his lessee; and, if he did not, it was his own fault.

But tenant in tail after possibility of issue extinct is not impeachable for waste, because his estate was at its creation an estate of inheritance, and so not within the statutes. Neither does an action of waste lie for the debtor against tenant by statute, recognizance, or *elegit*; because against them the debtor may set off the damages in account: but it seems reasonable that it should lie for the reversioner, expectant on the determination of the debtor's own estate, or of these estates derived from the debtor.

The Punishment.

The punishment for waste committed was, by common law and by statute of Marlbridge, only single damages; except in the case of a guardian, who also forfeited his wardship by the provisions of the great charter; but the statute of Gloucester directs that the other four species of tenant shall lose and forfeit the place wherein the waste is committed, and also treble damages to him that hath the inheritance.

By Breach of the Customs.

VII. A seventh species of forfeiture is that of *copyhold* estates, by *breach* of the *customs* of the manor. Copyhold estates are not only liable to the same forfeiture as those which are held in socage, for treason, felony, alienation and waste: whereupon the

lord may seize them without any presentment by the homage; but also to peculiar forfeitures annexed to this species of tenures, which are incurred by the breach of either the general customs of all copyholds, or the peculiar local customs of certain particular manors.

By Bankruptcy.

VIII. The eighth and last method whereby lands and tenements may become forfeited, is that of *bankruptcy*, or the act of becoming a bankrupt; which unfortunate person may, from the several descriptions given of him in our statute law, be thus defined: a trader who secretes himself, or does certain other acts tending to defraud his creditors.

Chapter XIX.

V. OF TITLE BY ALIENATION.

287-295.

The most usual and universal method of acquiring a title to real estates is that of alienation, conveyance, or purchase in its limited sense; under which may be comprised any method wherein estates are voluntarily resigned by one man and accepted by another; whether that be effected by sale, gift, marriage settlement, devise, or other transmission of property, by the mutual consent of the parties.

History of the Right to Aliene.

This means of taking estates by alienation is not of equal antiquity in the law of England with that of taking them by descent. For we may remember that, by the feudal law, a pure and genuine feud could not be transferred from one feudatory to another without the consent of the lord. Neither could the feudatory then subject the land to his debts. And, as he could not aliene it in his lifetime, so neither could he by will defeat the succession by devising his feud to another family; nor even alter the course of it by imposing particular limitations, or prescribing an unusual path of descent. Nor, in short, could he aliene the estate, even with the consent of the lord, unless he had also obtained the consent of his own next apparent or presumptive heir. And therefore it was very usual in ancient feoffments to express that the alienation was made by consent of the heirs of the feoffer; or sometimes for the heir-apparent himself to join with the feoffer in the grant. And, on the other hand, as the feudal obligation was looked upon to be reciprocal, the lord could not aliene or transfer his signiory without the consent of his vassal. This

consent of the vassal was expressed by what was called *attorning*, or professing to become the tenant of the new lord, which doctrine of attornment was afterwards extended to all lessees for life or years.

But by degrees this feudal severity is worn off; and experience hath shown that property best answers the purposes of civil life, especially in commercial countries, when its transfer and circulation are totally free and unrestrained. The road was cleared in the first place by a law of King Henry the First, which allowed a man to sell and dispose of lands which he himself had purchased; but he was not allowed to sell the whole of his own acquisitions, so as totally to disinherit his children, any more than he was at liberty to aliene his paternal estate. Afterwards a man seems to have been at liberty to part with all his own acquisitions, if he had previously purchased to him and his *assigns* by name; but, if his *assigns* were not specified in the purchase deed, he was not empowered to aliene; and also he might part with one-fourth of the inheritance of his ancestors without the consent of his heir. By the great charter of Henry III., no subinfeudation was permitted of part of the land, unless sufficient was left to answer the services due to the superior lord, which sufficiency was probably interpreted to be one-half or moiety of the land. But these restrictions were in general removed by the statute of *quia emptores*, whereby all persons, except the king's tenants *in capite*, were left at liberty to aliene all or any part of their lands at their own discretion. As to the power of *charging* lands with the debts of the owner, this was introduced so early as stat. Westm. 2, which subjected a *moiety* of the tenant's lands to executions, for debts recovered by law; as the *whole* of them was likewise subjected to be pawned in a statute merchant by the statute *de mercatoribus*, made the same year, and in a statute staple by statute 27 Edw. III. c. 9, and in other similar recognizances by statute 23 Hen. VIII. c. 6. And now, the whole of them is not only subject to be *pawned* for the debts of the owner, but likewise to be absolutely *sold* for the benefit of trade and commerce by the several statutes of bankruptcy. The restraint of *devising* lands by will, except in some places by particular custom, lasted longer; that not being totally removed till the abolition of the military tenures. The doctrine of *attornments* continued still later than any of the rest, and became extremely troublesome, though many methods were invented to evade them; till at last they were made no longer necessary to complete the grant or conveyance by statute 4 and 5 Anne, c. 16; nor shall, by statute 11 Geo. II., c. 19, the attornment of any tenant affect the possession of any lands, unless made with consent of the landlord, or to a mortgagee after the mortgage is forfeited, or by direction of a court of justice.

Who May Aliene and to Whom.

1. Who may aliene and to whom: or, in other words, who is capable of conveying and who of purchasing. And herein we must consider rather the incapacity, than capacity, of the several parties; for all persons in *possession* are *prima facie* capable both of conveying and purchasing, unless the law has laid them under any particular disabilities. But, if a man has only in him the *right* of either possession or property, he cannot convey it to any other, lest pretended titles might be granted to great men, whereby justice might be trodden down and the weak oppressed. Yet reversions and vested remainders may be granted; because the possession of the particular tenant is the possession of him in reversion or remainder; but *contingencies*, and mere *possibilities*, though they may be released, or devised by will, or may pass to the heir or executor, yet cannot (it hath been said) be assigned to a stranger, unless coupled with some present interest.

Persons Attainted, etc.

Persons attainted of treason, felony, and *praemunire*, are incapable of conveying from the time of the offense committed, provided attainder follows: for such conveyance by them may tend to defeat the king of his forfeiture, or the lord of his escheat. But they may *purchase* for the benefit of the crown, or the lord of the fee, though they are disabled to *hold*; the lands so purchased, if after attainder, being subject to immediate forfeiture; if before, to escheats as well as forfeiture, according to the nature of the crime. So also corporations, religious or others, may purchase lands; yet, unless they have a license to hold in mortmain, they cannot retain such purchase; but it shall be forfeited to the lord of the fee.

Idiots, Infants, and Others.

Idiots and persons of non-sane memory, infants and persons under duress, are not totally disabled either to convey or purchase, but *sub modo* only. For their conveyances and purchases are voidable, but not actually void. The king indeed, on behalf of an idiot, may avoid his grants or other acts. But it hath been said that a *non compos* himself, though he be afterwards brought to a right mind, shall not be permitted to allege his own insanity in order to avoid such grant: for that no man shall be allowed to stultify himself, or plead his own disability. And, clearly, the next heir, or other person interested, may, after the death of the idiot or *non compos*, take advantage of his incapacity and avoid the grant. And so, too, if he purchase under this disability, and does not afterwards, upon recovering his senses, agree to the purchase, his heir may either waive or accept the estate at his option. In like manner an infant may waive such purchase or conveyance

when he comes to full age; or, if he does not actually agree to it, his heirs may waive it after him. Persons also, who purchase or convey under duress, may affirm or avoid such transactions whenever the duress is ceased. For all these are under the protection of the law; which will not suffer them to be imposed upon through the imbecility of their present condition; so that their acts are only binding in case they be afterwards agreed to, when such imbecility ceases. Yet the guardians or committees of a lunatic, by the statute of 11 Geo. III. c. 20, are empowered to renew in his right under the directions of the court of chancery, any lease for lives or years, and apply the profits of such renewal for the benefit of such lunatic, his heirs or executors.

Feme-Coverts.

The case of a feme-covert is somewhat different. She may *purchase* an estate without the consent of her husband, and the conveyance is good during the coverture, till he avoids it by some act declaring his dissent. And though he does nothing to avoid it, or even if he actually consents, the feme-covert herself may, after the death of her husband, waive or disagree to the same: nay, even her heirs may waive it after her, if she dies before her husband, or if in her widowhood she does nothing to express her consent or agreement. But the *conveyance* or other contract of a feme-covert (except by some matter of record) is absolutely void, and not merely voidable; and therefore cannot be affirmed or made good by any subsequent agreement.

Aliens.

The case of an alien born is also peculiar. For he may purchase anything: but after purchase he can *hold* nothing except a lease for years of a house for convenience of merchandise, in case he be an alien friend; all other purchases (when found by an inquest of office) being immediately forfeited to the crown.

Modes of Conveyance.

II. We are next, but principally, to inquire how a man may aliene or convey; which will lead us to consider the several modes of conveyance.

For the purpose of continuing the possession of property, the municipal law has established *descents* and *alienations*; the former to continue the possession in the heirs of the proprietor, after his *involuntary* dereliction of it by his death; the latter to continue it in those persons to whom the proprietor, by his own *voluntary* act, should choose to relinquish it in his lifetime. A translation, or transfer, of property being thus admitted by law, it became necessary that this transfer should be properly evidenced; in order to prevent disputes, either about the fact, as whether there was any

transfer at all; or concerning the persons by whom and to whom it was transferred; or with regard to the subject-matter, as what the thing transferred consisted of: or, lastly, with relation to the mode and quality of the transfer, as for what period of time (or, in other words, for what estate and interest) the conveyance was made. The legal evidences of this translation of property are called the *common assurances* of the kingdom; whereby every man's estate is assured to him, and all controversies, doubts and difficulties are either prevented or removed.

These common assurances are of four kinds: 1. By matter *in pais*, or deed; which is an assurance transacted between two or more private persons *in pais*, in the country; that is (according to the old common law), upon the very spot to be transferred. 2. By matter of *record*, or an assurance transacted only in the king's public courts of record. 3. By special *custom*, obtaining in some particular places, and relating only to some particular species of property. Which three are such as take effect during the life of the party conveying or assuring. 4. The fourth takes no effect till after his death; and that is by *devise*, contained in his last will and testament.

SYNOPSIS OF CHAPTER XX.

Of Alienation by deed	1. Nature of deed	1. What is a deed	<ul style="list-style-type: none"> 1. Indenture. 2. Deed poll. 	
		2. Requisites	<ul style="list-style-type: none"> 1. Parties and subject matter 2. Consideration. 3. Writing. 4. Orderly parts 5. Reading. 6. Sealing and signing. 7. Delivery. 8. Attestation. 	
		3. How avoided	<ul style="list-style-type: none"> 1. By want of any of above requisites. 2. By subsequent matter as 	
			<ul style="list-style-type: none"> 1. Premises. 2. Habendum. 3. Tenendum. 4. Reddendum. 5. Conditions. 6. Warranty. 7. Covenants. 8. Conclusion. 	
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Of Alienation by deed	2. Species	1. To convey	1. By common law	<ul style="list-style-type: none"> 1. Original 2. Secondary
			2. By statute	<ul style="list-style-type: none"> 1. Releases. 2. Confirmations. 3. Surrenders. 4. Assignments. 5. Defeazances. 6. Covenant to stand seized to uses. 7. Bargain and sale. 8. Lease and release. 9. Deed to declare the use. 10. Revocation of uses.
		2. To charge or discharge		<ul style="list-style-type: none"> 1. Obligations. 2. Recognizances. 3. Defeazances.

Chapter XX. OF ALIENATION BY DEED.

295-344.

In treating of deeds, I shall consider first their general nature; and, next, the several sorts or kinds of deeds, with their respective incidents. And in explaining the former, I shall examine, first, what a deed is; secondly, its requisites; and, thirdly, how it may be avoided.

Definition.

I. First, then, a deed is a writing sealed and delivered by the parties. It is sometimes called a charter, *carta*, from its materials; but most usually, when applied to the transactions of private subjects, it is called a deed, in Latin *factum*, *ἡγερέσειον* because it is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of his property; and therefore a man shall always be *estopped* by his own deed, or not permitted to aver or prove anything in contradiction to what he has once so solemnly and deliberately avowed. If a deed be made by more parties than one, there ought to be regularly as many copies of it as there are parties, and each should be cut or indented (formerly in acute angles *instar dentium*, like the teeth of a saw, but at present in a waving line) on the top or side, to tally or correspond with the other; which deed, so made, is called an indenture. Formerly when deeds were more concise than at present, it was usual to write both parts on the same piece of parchment, with some word or letters of the alphabet written between them; through which the parchment was cut, either in a straight or indented line, in such a manner as to leave half of the word on one part and half on the other. But at length indenting only has come into use, without cutting through any letters at all; and it seems at present to serve for little other purpose than to give name to the species of the deed. When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the *original*, and the rest are *counterparts*: though of late it is most frequent for all the parties to execute every part; which renders them all originals. A deed made by one party only is not indented, but *polled* or shaved quite even: and therefore called a *deed poll*, or a single deed.

Requisites.

II. We are in the next place to consider the *requisites* of a deed. The *first* of which is, that there be persons able to contract and be contracted with for the purposes intended by the deed: and also a thing, or subject-matter, to be contracted for; all of

which must be expressed by sufficient names. So as in every grant there must be a grantor, a grantee, and a thing granted; in every lease a lessor, a lessee, and a thing demised.

Consideration.

Secondly, the deed must be founded upon good and sufficient *consideration*. Not upon an usurious contract; nor upon fraud or collusion, either to deceive purchasers *bona fide*, or just and lawful creditors; any of which bad considerations will vacate the deed, and subject such persons, as put the same in use, to forfeitures and often to imprisonment. A deed also, or other grant, made without any consideration, is as it were, of no effect: for it is construed to inure, or to be effectual, only to the use of the grantor himself. The consideration may be either a *good* or a *valuable* one. A *good* consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation; being founded on motives of generosity, prudence, and natural duty; a *valuable* consideration is such as money, marriage, or the like; which the law esteems an equivalent given for the grant; and is therefore founded in motives of justice. Deeds made upon good consideration only, are considered as merely voluntary, and are frequently set aside in favor of creditors, and *bona fide* purchasers.

Must be Written.

Thirdly, the deed must be *written* or I presume *printed*, for it may be in any character or any language; but it must be upon paper or parchment. For if it be written on stone, board, linen, leather, or the like, it is no deed. Wood or stone may be more durable, and linen less liable to rasures; but writing on paper or parchment unites in itself, more perfectly than any other way, both these desirable qualities; for there is nothing else so durable, and at the same time so little liable to alteration; nothing so secure from alteration, that is at the same time so durable. It must also have the regular *stamps* imposed on it by the several statutes for the increase of the public revenue; else it cannot be given in evidence. Formerly many conveyances were made by parol, or word of mouth only, without writing; but this giving a handle to a variety of frauds, the statute 29 Car. II. c. 3, enacts, that no lease, estate or interest in lands, tenements, or hereditaments, made by livery of seisin, or by parol only (except leases, not exceeding three years from the making, and whereon the reserved rent is at least two-thirds of the real value), shall be looked upon as of greater force than a lease, or estate at will; nor shall any assignment, grant, or surrender of any interest in any freehold hereditaments be valid: unless in both cases the same be put in writing, and signed by the party granting, or his agent lawfully authorized in writing.

Parts of a Deed.

Fourthly, the matter written must be *legally* and *orderly* set forth; that is, there must be words sufficient to specify the agreement and bind the parties: which sufficiency must be left to the courts of law to determine. For it is not absolutely necessary in law to have all the formal parts that are usually drawn out in deeds, so as there be sufficient words to declare clearly and legally the party's meaning. But as these formal and orderly parts are calculated to convey that meaning in the clearest, distinctest, and most effectual manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them without good reason or urgent necessity; and therefore I will here mention them in their usual order.

The Premises.

1. The *premises* may be used to set forth the number and names of the parties with their additions or titles. They also contain the recital, if any, of such deeds, agreements, or matters of facts, as are necessary to explain the reasons upon which the present transaction is founded; and herein also is set down the consideration upon which the deed is made. And then follows the certainty of the grantor, grantee, and thing granted.

Habendum and Tenendum.

2, 3. Next comes the *habendum* and *tenendum*. The office of the *habendum* is properly to determine what estate or interest is granted by the deed: though this may be performed, and sometimes is performed, in the premises. In which case the *habendum* may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to the estate granted in the premises. As if the grant be "to A and the heirs of his body," in the premises, *habendum* "to him and his heirs forever," or *vice versa*; here A has an estate-tail and a fee-simple expectant thereon. But had it been in the premises "to him and his heirs," *habendum* "to him for life," the *habendum* would be utterly void; for an estate of inheritance is vested in him before the *habendum* comes, and shall not afterwards be taken away or divested by it. The *tenendum*, "and to hold," is now of very little use and is only kept in by custom. It was sometimes formerly used to signify the tenure by which the estate granted was to be holden; viz., "*tenendum per servitium militare, in burgagio, in libero socagio, etc.*" But, all these being now reduced to free and common socage, the tenure is never specified.

Reddendum.

4. Next follow the terms of stipulation, if any, upon which the grant is made; the first of which is the *reddendum*; or reservation, whereby the grantor doth create or reserve some new

thing to himself out of what he had before granted. As "rendering therefore yearly the sum of ten shillings, or a pepper-corn, or two days' ploughing, or the like." To make a *reddendum* good, if it be of anything newly created by the deed, the reservation must be to the grantors, or some, or one of them, and not to any stranger to the deed. But if it be of ancient services or the like annexed to the land, then the reservation may be to the lord of the fee.

Condition.

5. Another of the terms upon which a grant may be made is a *condition*; which is a clause of contingency, on the happening of which the estate granted may be defeated: as "provided always, that if the mortgagor shall pay the mortgagee 500*l.* upon such a day, the whole estate granted shall determine;" and the like.

Warranty.

6. Next may follow the clause of *warranty*; whereby the grantor doth, for himself and his heirs, warrant and secure to the grantee the estate so granted.

Covenants.

7. After warranty usually follow *covenants*, or conventions, which are clauses of agreement contained in a deed, whereby either party may stipulate for the truth of certain facts, or may bind himself to perform, or give something to the other. Thus the grantor may covenant that he hath a right to convey; or for the grantee's quiet enjoyment, or the like: the grantee may covenant to pay his rent, or keep the premises in repair, etc. If the covenantor covenants for himself and his *heirs*, it is then a covenant real, and descends upon the heirs; who are bound to perform it, provided they have assets by descent, but not otherwise; if he covenants also for his *executors* and *administrators*, his personal assets, as well as his real, are likewise pledged for the performance of the covenant; which makes such covenant a better security than any warranty. It is also in some respects a less security, and therefore more beneficial to the grantor; who usually *covenants* only for the acts of himself and his ancestors, whereas a general *warranty* extends to all mankind. For which reasons the covenant has in modern practice totally superseded the other.

Conclusion.

8. Lastly comes the *conclusion*, which mentions the execution and date of the deed, or the time of its being given or executed, either expressly, or by reference to some day and year before mentioned. Not but a deed is good, although it mention no date; or hath a false date; or even if it hath an impossible date, as the thirtieth of February; provided the real day of its being dated or given, that is, delivered, can be proved.

Reading.

I proceed now to the *fifth* requisite for making a good deed; the *reading* of it. This is necessary wherever any of the parties desire it; and, if it be not done on his request, the deed is void as to him. If he can, he should read it himself; if he be blind or illiterate, another must read it to him. If it be read falsely, it will be void; at least for so much as is mis-recited: unless it be agreed by collusion that the deed shall be read falsely, on purpose to make it void; for in such case it shall bind the fraudulent party.

Sealing.

Sixthly, it is requisite that the party, whose deed it is, should *seal*, and now in most cases I apprehend should *sign* it also.

This neglect of signing, and resting only upon the authenticity of seals, remained very long among us; for it was held in all our books that sealing alone was sufficient to authenticate a deed; and so the common form of attesting deeds, "*sealed and delivered*," continues to this day: notwithstanding the statute 29 Car. II. c. 3, before mentioned, revives the Saxon custom, and expressly directs the signing, in all grants of lands, and many other species of deeds; in which therefore signing seems to be now as necessary as sealing, though it hath been sometimes held that the one includes the other.

Delivery.

A seventh requisite to a good deed is, that it be *delivered* by the party himself or his certain attorney, which therefore is also expressed in the attestation; "*sealed and delivered*." A deed takes effect only from this tradition of delivery; for if the date be false or impossible, the delivery ascertains the time of it. And if another person seals the deed, yet if the party delivers it himself, he thereby adopts the sealing, and by a parity of reason the signing also, and makes them both his own. A delivery may be either absolute, that is to the party, or grantee himself; or to a third person, to hold till some conditions be performed on the part of the grantee; in which last case it is not delivered as a *deed*, but as an *escrow*; that is, as a scrawl or writing, which is not to take effect as a deed till the conditions be performed; and then it is a deed to all intents and purposes.

Attestation.

The *last* requisite to the validity of a deed is the *attestation*, or execution of it *in the presence of witnesses*: though this is necessary, rather for preserving the evidence, than for constituting the essence of the deed.

How Avoided.

III. We are next to consider how a deed may be *avoided*, or

rendered of no effect. And from what has been before laid down, it will follow, that if a deed wants any of the essential requisites before mentioned; either, 1, Proper parties, and a proper subject-matter; 2, A good and sufficient consideration; 3, Writing on paper or parchment, duly stamped; 4, Sufficient and legal words, properly disposed; 5, Reading, if desired, before the execution; 6, Sealing, and, by the statute, in most cases signing also; or, 7, Delivery; it is a void deed *ab initio*. It may also be avoided by matter *ex post facto*: as, 1, By rasure, interlining, or other alteration in any material part: unless a memorandum be made thereof at the time of the execution and attestation. 2. By breaking off, or defacing the seal. 3. By delivering it up to be cancelled; that is, to have lines drawn over it in the form of lattice-work or *cancelli*: though the phrase is now used figuratively for any manner of obliteration or defacing it. 4. By the disagreement of such, whose concurrence is necessary, in order for the deed to stand: as the husband, where a feme-covert is concerned; an infant, or person under duress, when those disabilities are removed, and the like. 5. By the judgment or decree of a court of judicature. This was anciently the province of the court of starchamber, and now of the chancery; when it appears that the deed was obtained by fraud, force, or other foul practice; or is proved to be an absolute forgery. In any of these cases the deed may be avoided, either in part or totally, according as the cause of avoidance is more or less extensive.

Kind of Conveyances.

Deeds used in the conveyance of real estate are either conveyances at *common law*, or such as receive their force and efficacy by virtue of the *statute of uses*.

I. Of conveyances by the common law, some may be called *original* or *primary* conveyances; which are those by means whereof the benefit or estate is created or first arises: others are *derivative* or *secondary*; whereby the benefit or estate originally created is enlarged, restrained, transferred, or extinguished.

Original conveyances are the following: 1, Feoffment; 2, Gift; 3, Grant; 4, Lease; 5, Exchange; 6, Partition: *Derivative* are, 7, Release; 8, Confirmation; 9, Surrender; 10, Assignment; 11, Defeazance.

Feoffment.

1. A feoffment, *feoffamentum* is a substantive derived from the verb to enfeoff, *feoffare* or *infeudare* to give one a feud; and therefore feoffment is properly *donatio feudi*. It is the most ancient method of conveyance, the most solemn and public, and therefore the most easily remembered and proved. And it may

properly be defined, the gift of any corporeal hereditament to another. He that so gives, or enfeoffs, is called the *feoffor*; and the person enfeoffed is denominated the *feoffee*.

Livery of Seisin.

But by the mere words of the deed the feoffment is by no means perfected; there remains a very material ceremony to be performed, called *livery of seisin*; without which the feoffee has but a mere estate at will. This livery of seisin is no other than the pure feudal investiture, or delivery of corporal possession of the land or tenement; which was held absolutely necessary to complete the donation.

Investitures, in their original rise, were probably intended to demonstrate in conquered countries the actual possession of the *lord*; and that he did not grant a bare litigious right, which the soldier was ill qualified to prosecute, but a peaceable and firm possession. And at a time when writing was seldom practiced, a mere oral gift, at a distance from the spot that was given, was not likely to be either long or accurately retained in the memory of bystanders, who were very little interested in the grant. Afterwards they were retained as a public and notorious act, that the country might take notice of and testify the transfer of the estate; and that such, as claimed title by other means, might know against whom to bring their actions.

The corporal tradition of lands being sometimes inconvenient, a symbolical delivery of possession was in many cases anciently allowed; by transferring something near at hand, in the presence of credible witnesses, which by agreement should serve to represent the very thing designed to be conveyed; and an occupancy of this sign or symbol was permitted as equivalent to occupancy of the land itself. With our Saxon ancestors the delivery of a turf was a necessary solemnity to establish the conveyance of lands. And to this day the conveyance of our copyhold estates is usually made from the seller to the lord or his steward by delivery of a rod or verge, and then from the lord to the purchaser by redelivery of the same, in the presence of a jury of tenants. Conveyances in writing were the last and most refined improvement.

Livery of seisin, by the common law, is necessary to be made upon every grant of an estate of freehold in hereditaments corporeal, whether of inheritance or for life only. In hereditaments incorporeal it is impossible to be made; for they are not the object of the senses; and in leases for years, or other chattel interests, it is not necessary. In leases for years indeed an actual *entry* is necessary to vest the estate in the lessee; for the bare lease gives him only a right to enter, which is called his interest in the term,

or *interesse termini*: and when he enters in pursuance of that right, he is then, and not before, in possession of his term, and complete tenant for years. This entry by the tenant himself serves the purpose of notoriety, as well as livery of seisin from the grantor could have done; which it would have been improper to have given in this case, because that solemnity is appropriated to the conveyance of a freehold. And this is one reason why freeholds cannot be made to commence *in futuro*, because they cannot (at the common law) be made but by livery of seisin; which livery, being in actual manual tradition of the land, must take effect *in praesenti*, or not at all.

On the creation of a *freehold* remainder, at one and the same time with a particular estate for years, we have before seen, that at the common law livery must be made to the particular tenant. But if such a remainder be created afterwards, expectant on a lease for years now in being, the livery must not be made to the lessee for years, for then it operates nothing; "*nam quod semel meum est, amplius meum esse non potest*," but it must be made to the remainderman himself, by consent of the lessee for years: for without his consent no livery of the possession can be given; partly because such forcible livery would be an ejectment of the tenant from his term, and partly for the reason before given for introducing the doctrine or attainments.

Livery in Deed.

Livery of seisin is either in *deed* or in *law*. Livery in *deed* is thus performed: The feoffor, lessor, or his attorney, together with the feoffee, lessee, or his attorney (for this may as effectually be done by deputy or attorney as by the principals themselves in person), come to the land, or to the house; and there, in the presence of witnesses, declare the contents of the feoffment or lease, on which livery is to be made. And then the feoffor, if it be of land, doth deliver to the feoffee, all other persons being out of the ground, a clod or turf, or a twig, or bough there growing, with words to this effect: "I deliver these to you in the name of seisin of all the lands and tenements contained in this deed." But if it be of a house, the feoffor must take the ring or latch of the door, the house being quite empty, and deliver it to the feoffee in the same form; and then the feoffee must enter alone, and shut to the door, and then open it, and let in the others. If the conveyance or feoffment be of divers lands, lying scattered in one and the same county, then in the feoffor's possession, livery of seisin of any parcel in the name of the rest, sufficeth for all: but if they be in several counties, there must be as many liveries as there are counties. For if the title to these lands comes to be disputed, there must be as many trials as there are counties, and the jury of one county are no judges of the notoriety of a fact in another. Besides, anciently

this seisin was obliged to be delivered *coram paribus de vicineto*, before the peers or freeholders of the neighborhood, who attested such delivery in the body or on the back of the deed; according to the rule of the feudal law, *pares debent interesse investituræ feudi, et non alii*: for which this reason is expressly given; because the peers or vassals of the lord, being bound by their oath of fealty, will take care that no fraud be committed to his prejudice, which strangers might be apt to connive at. And though afterwards the ocular attestation of the *pares* was held unnecessary, and livery might be made before any credible witnesses, yet the trial in case it was disputed (like that of all other attestations), was still reserved to the *pares* or jury of the county. Also, if the lands be out on lease, though all lie in the same county, there must be as many liversies as there are tenants: because no livery can be made in this case but by the consent of the particular tenant; and the consent of one will not bind the rest. And in all these cases it is prudent, and usual, to endorse the livery of seisin on the back of the deed, specifying the manner, place, and time of making it; together with the names of the witnesses.

Livery in Law.

Livery in law is where the same is not made *on* the land, but in *sight of it* only; the feoffor saying to the feoffee: "I give you yonder land; enter and take possession." Here, if the feoffee enters during the life of the feoffor, it is good livery but not otherwise; unless he dares not enter through fear of his life or bodily harm: and then his continual claim, made yearly, in due form of law, as near as possible to the lands, will suffice without an entry. This livery in law cannot, however, be given or received by attorney, but only by the parties themselves.

Gift.

2. The conveyance by *gift, donatio*, is properly applied to the creation of an estate-tail, as feoffment is to that of an estate in fee, and lease to that of an estate for life or years. It differs in nothing from a feoffment, but in the nature of an estate passing by it: for the operative words of conveyance in this case are *do* or *dedi*; and gifts in tail are equally imperfect without livery of seisin, as feoffments in fee-simple. In common acceptance gifts are frequently confounded with the next species of deeds, which are:

Grant.

3. Grants, *concessionēs*; the regular method by the common law of transferring the property of *incorporeal* hereditaments, or such things whereof no livery can be had. For which reason all corporeal hereditaments, as lands and houses, are said to lie *in livery*; and the others, as advowsons, commons, rents, reversions,

etc., to lie *in grant*. These, therefore, pass merely by the delivery of the deed. And in signiorities, or reversions of lands, such grant, together with the attornment of the tenant (while attornments were requisite), were held to be of equal notoriety with, and therefore equivalent to, a feoffment and livery of lands in immediate possession. It therefore differs but little from a feoffment, except in its subject matter: for the operative words therein commonly used are *dedi et concessi*, "have given and granted."

Lease.

4. A lease is properly a conveyance of any lands or tenements (usually in consideration of rent or other annual recompense) made for life, for years, or at will, but always for a *less* time than the lessor hath in the premises; for if it be for the *whole* interest, it is more properly an assignment than a lease. The usual words of operation in it are, "demise, grant, and to farm let; *dimisi, concessi, et ad firmam tradidi*." *Farm* or *feorme*, is an old Saxon word signifying provisions; and it came to be used instead of rent or render, because anciently the great part of rents were reserved in provisions; in corn, in poultry, and the like; till the use of money became more frequent. So that a farmer, *firmarius*, was one who held his lands upon payment of a rent or *feorme*: though at present, by a gradual departure from the original sense, the word *farm* is brought to signify the very estate or lands so held upon farm or rent. By this conveyance an estate for life, for years, or at will, may be created, either in corporeal or incorporeal hereditaments; though livery of seisin is indeed incident and necessary to one species of leases, viz., leases for life of corporeal hereditaments; but to no other.

Whatever restriction, by the severity of the feudal law, might in times of very high antiquity be observed with regard to leases: yet by the common law, as it has stood for many centuries, all persons seised of any estate might let leases to endure so long as their own interest lasted, but no longer. Therefore, tenant in fee-simple might let leases of any duration; for he hath the whole interest; but tenant in tail, or tenant for life, could make no leases which should bind the issue in tail or reversioner.

Certain restraints upon the power of making leases are referred to, followed by a review of the restraining and enabling statutes by which these restraints were increased or diminished in a variety of cases.

Exchange.

5. An *exchange* is a mutual grant of equal interests, the one in consideration of the other. The word "exchange" is so individually requisite and appropriated by law to this case, that it cannot be supplied by any other word, or expressed by any circumlocution. The estates exchanged must be equal in quantity; not of *value*, for that is immaterial, but of *interest*; as fee-simple

for fee-simple, a lease for twenty years for a lease for twenty years, and the like. And the exchange may be of things that lie either in grant or in livery. But no livery of seisin, even in exchanges of freehold, is necessary to perfect the conveyance; for each party stands in the place of the other, and occupies his right, and each of them hath already had corporal possession of his own land. But entry must be made on both sides; for, if either party die before entry, the exchange is void, for want of sufficient notoriety.

Partition.

6. A partition is when two or more joint-tenants, coparceners, or tenants in common, agree to divide the lands so held among them in severalty, each taking a distinct part. Here, as in some instances, there is a unity of interest, and in all a unity of possession, it is necessary that they all mutually convey and assure to each other the several estates which they are to take and enjoy separately. By the common law, coparceners, being compellable to make partition, might have made it by parol only; but joint-tenants and tenants in common must have done it by deed; and in both cases the conveyance must have been perfected by livery of seisin. But the statute of frauds, 20 Car. II., c. 2, hath now abolished this distinction, and made a deed in all cases necessary.

Secondary Conveyances.

These are the several species of *primary* or *original* conveyances. Those which remain are of the *secondary* or *derivative* sort, which presuppose some other conveyance precedent, and only serve to enlarge, confirm, alter, restrain, restore or transfer the interest granted by such original conveyance. As,

Releases.

7. Releases; which are a discharge or a conveyance of a man's right in lands or tenements, to another that hath some former estate in possession. The words generally used therein are "remised, released, and forever quit-claimed." And these releases may inure either: 1. By way of *enlarging an estate* or *enlarger l'estate*: as if there be tenant for life or years, remainder to another in fee, and he in remainder releases all his right to the particular tenant and his heirs, this gives him the estate in fee. But in this case the releesee must be in *possession* of some estate, for the release to work upon; for if there be lessee for years, and, before he enters and is in possession, the lessor releases to him all his right in the reversion, such release is void for want of possession in the releesee. 2. By way of *passing an estate*, as when one of two coparceners releaseth all her right to the other, this passeth the fee-simple of the whole. And in both these cases there must be a privity of estate between the releasor and releesee; that is,

one of their estates must be so related to the other, as to make but one and the same estate in law. 3. By way of *passing a right*, as if a man be disseised, and releaseth to his disseisor all his right, hereby the disseisor acquires a new right, which changes the quality of his estate, and renders that lawful which before was tortious or wrongful. 4. By way of *extinguishment*: as if my tenant for life makes a lease to A for life, remainder to B and his heirs, and I release to A; this extinguishes my right to the reversion, and shall inure to the advantage of B's remainder as well as of A's particular estate. 5. By way of *entry and feoffment*; as if there be two joint disseisors, and the disseisee releases to one of them he shall be sole seised, and shall keep out his former companion; which is the same in effect as if the disseisee had entered and thereby put an end to the disseisin, and afterwards had enfeoffed one of the disseisors in fee. And hereupon we may observe, that when a man has in himself the possession of lands, he must at the common law convey the freehold by feoffment and livery; which makes a notoriety in the country; but if a man has only a right or a future interest, he may convey that right or interest by a mere release to him that is in possession of the land: for the occupancy of the lessee is a matter of sufficient notoriety already.

Confirmation.

8. A confirmation is of a nature nearly allied to a release. Sir Edward Coke defines it to be a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased; and the words of making it are these: "Have given, granted, ratified, approved and confirmed." An instance of the first branch of the definition is, if tenant for life leaseth for forty years, and dieth during that term; here the lease for years is voidable by him in reversion: yet, if he hath confirmed the estate of the lessee for years, before the death of tenant for life, it is no longer voidable, but sure. The latter branch, or that which tends to the increase of a particular estate, is the same in all respects with that species of release which operates by way of enlargement.

Surrender.

9. A surrender, *sursumredditio*, or rendering up, is of a nature directly opposite to a release; for as that operates by the greater estate's descending upon the less, a surrender is the falling of a less estate into a greater. It is defined a yielding up of an estate for life or years to him that hath the immediate reversion or remainder, wherein the particular estate may merge or drown, by mutual agreement between them. It is done by these words: "Hath surrendered, granted, and yielded up." The surrenderor

must be in possession; and the surrenderee must have a higher estate, in which the estate surrendered may merge; therefore tenant for life cannot surrender to him in remainder for years. In a surrender there is no occasion for livery of seisin; for there is a privity of estate between the surrenderor and the surrenderee; the one's particular estate and the other's remainder are one and the same estate; and livery having been once made at the creation of it, there is no necessity for having it afterwards. And, for the same reason, no livery is required on a release or confirmation in fee to tenant for years or at will, though a freehold thereby passes: since the reversion of the lessor, or confirmor, and the particular estate of the lessee, or confirmer, are one and the same estate; and where there is already a possession, derived from such a privity of estate, any further delivery of possession would be vain and nugatory.

Assignment.

10. An *assignment* is properly a transfer or making over to another of the right one has in *any* estate; but it is usually applied to an estate for life or years. And it differs from a lease only in this: that by a lease one grants an interest less than his own, reserving to himself a reversion; in assignments he parts with the whole property, and the assignee stands to all intents and purposes in the place of the assignor.

Defeazance.

11. A defeazance is a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be *defeated* or totally undone. And in this manner mortgages were in former times usually made: the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of defeazance, whereby the feoffment was rendered void on repayment of the money borrowed at a certain day. And this, when executed at the same time with the original feoffment, was considered as a part of it by the ancient law; and therefore only indulged: no subsequent secret revocation of a solemn conveyance, executed by livery of seisin, being allowed in those days of simplicity and truth; though, when uses were afterward introduced, a revocation of such uses was permitted by the courts of equity. But things that were merely executory, or to be completed by matter subsequent (as rents of which no seisin could be had till the time of payment; and so also annuities, conditions, warranties, and the like), were always liable to be recalled by defeazances made subsequent to the time of their creation.

Uses and Trusts.

II. There yet remains to be spoken of some few conveyances,

which have their force and operation by virtue of the *statute of uses*.

Uses and *trusts* are in their original of a nature very similar, or rather exactly the same. In our law, a use was a confidence reposed in another who was tenant of the land, or *terre-tenant*, that he should dispose of the land according to the intentions of *cestui que use*, or him to whose use it was granted, and suffer him to take the profits. As, if a feoffment was made to A and his heirs, to the use of (or in trust for) B and his heirs; here at the common law A the *terre-tenant* had the legal property and possession of the land, but B the *cestui que use* was in conscience and equity to have the profits and disposal of it.

This notion was transplanted into England from the civil law, about the close of the reign of Edward III., by means of the foreign ecclesiastics; who introduced it to evade the statutes of mortmain, by obtaining grants of land, not to religious houses directly, but to *the use* of the religious houses. But we have seen how this evasion was crushed in its infancy, by statute 15 Ric. II., c. 5, with respect to religious houses.

Yet, the idea being once introduced, however fraudulently, it afterwards continued to be often innocently, and sometimes very laudably, applied to a number of civil purposes. Wherefore about the reign of Edw. IV., the courts of equity began to reduce them to something of a regular system.

Originally it was held that the chancery could give no relief, but against the very person himself intrusted for *cestui que use*, and not against his heir or alienee. This was altered in the reign of Henry VI. with respect to the heir; and afterwards the same rule, by a parity of reason, was extended to such alienees as had purchased either without a valuable consideration, or with an express notice of the use. But a purchaser for a valuable consideration, without notice, might hold the land discharged of any trust or confidence.

The use itself, or interest of *cestui que use*, was learnedly refined upon with many elaborate distinctions. And, 1, It was held that nothing could be granted to a use, whereof the use is inseparable from the possession: as annuities, ways, commons, and authorities, or whereof the seisin could not be instantly given. 2, A use could not be raised without a sufficient consideration. For where a man makes feoffment to another, without any consideration, equity presumes that he meant it to the use of himself, unless he expressly declares it to be to the use of another, and then nothing shall be presumed contrary to his own expressions. But if either a good or a valuable consideration appears, equity will immediately raise a use correspondent to such consideration. 3, Uses were descendible according to the rules of the common law, in the case of

inheritances in possession; for in this and many other respects *aequitas sequitur legem*, and cannot establish a different rule of property from that which the law has established. 4, Uses might be assigned by secret deeds between the parties, or be devised by last will and testament; for, as the legal estate in the soil was not transferred by these transactions, no livery of seisin was necessary; and, as the intention of the parties was the leading principle in this species of property, any instrument declaring that intention was allowed to be binding in equity. But *cestui que use* could not at common law aliene the legal interest of the lands, without the concurrence of his feoffee; to whom he was accounted by law to be only tenant at sufferance. 5, Uses were not liable to any of the feudal burthens; and particularly did not escheat for felony or other defect of blood; for escheats, etc., are the consequence of *tenure*, and uses are *held* of nobody; but the land itself was liable to escheat, whenever the blood of the feoffee to uses was extinguished by crime or by defect; and the lord (as was before observed) might hold it discharged of the use. 6, No wife could be endowed, or husband have his curtesy, of a use; for no trust was declared for their benefit, at the original grant of the estate. And, therefore, it became customary, when most estates were put in use, to settle before marriage some joint-estate to the use of the husband and wife for their lives; which was the original of modern jointures. 7, A use could not be extended by writ of *elegit*, or other legal process, for the debts of *cestui que use*. For, being merely a creature of equity, the common law, which looked no further than to the person actually seised of the land, could award no process against it.

These principal outlines will be fully sufficient to show the ground of Lord Bacon's complaint, that this course of proceeding was turned to deceive many of their just and reasonable right. To remedy these inconveniences, abundance of statutes were provided, which made the lands liable to be extended by the creditors of *cestui que use*; allowed actions for the freehold to be brought against him if in the actual pernancy or enjoyment of the profits; made him liable to actions of waste; established his conveyances and leases made without the concurrence of his feoffees; and gave the lord the wardship of his heir, with certain other feudal perquisites.

Statute of Uses.

These provisions all tended to consider *cestui que use* as the real owner of the estate; and at length that idea was carried into full effect by the statute 27 Hen. VIII., c. 10, which is usually called the *statute of uses*, or, in conveyances and pleadings, the *statute for transferring uses into possession*. The statute after reciting the various inconveniences before mentioned, and many

others, enacts, that "when any person shall be *seised* of lands, etc., to the use, confidence, or trust of any other person or body politic, the person or corporation entitled to the use in fee-simple, fee-tail, for life, or years, or otherwise, shall from thenceforth stand and be seised or possessed of the land, etc., of and in the like estates as they have in the use, trust or confidence: and that the estate of the person so seised to uses shall be deemed to be in him or them that have the use, in such quality, manner, form and condition, as they had before in the use." The statute thus *executes* the use, as our lawyers term it; that is, it conveys the possession to the use, and transfers the use into possession; thereby making *cestui que use* complete owner of the lands and tenements, as well at law as in equity.

The statute having thus not abolished the conveyance to uses, but only annihilated the intervening estate of the feoffee, and turned the interest of *cestui que use* into a legal instead of an equitable ownership; the courts of common law began to take cognizance of uses, instead of sending the party to seek his relief in chancery. And, considering them now as merely a mode of conveyance, very many of the rules before established in equity were adopted with improvements by the judges of the common law. The same persons only were held capable of being seised to a use, the same considerations were necessary for raising it, and it could only be raised of the same hereditaments, as formerly. But as the statute, the instant it was raised, converted it into an actual possession of the land, a great number of the incidents, that formerly attended it in its fiduciary state, were now at an end. The land could not escheat or be forfeited by the act or defect of the feoffee, nor be aliened to any purchaser discharged of the use, nor be liable to dower or curtesy on account of the seisin of such feoffee; because the legal estate never rests in him for a moment, but is instantaneously transferred to *cestui que use* as soon as the use is declared. And, as the use and the land were now convertible terms, they became liable to dower, curtesy, and escheat, in consequence of the seisin of *cestui que use*, who was now become the *terre-tenant* also; and they likewise were no longer devisable by will.

Contingent Use.

The various necessities of mankind induced also the judges very soon to depart from the rigour and simplicity of the rules of the common law, and to allow a more minute and complex construction upon conveyances to uses than upon others. Hence it was adjudged that the use need not always be executed the instant the conveyance is made; but, if it cannot take effect at that time, the operation of the statute may wait till the use shall arise upon some future contingency, to happen within a reasonable period

of time; and in the meanwhile the ancient use shall remain in the original grantor: as, when lands are conveyed to the use of A and B, after a marriage shall be had between them, or to the use of A and his heirs till B shall pay him a sum of money, and then to the use of B and his heirs. Which doctrine, when devises by will were again introduced, and considered as equivalent in point of construction to declaration of uses, was also adopted in favor of *executory devises*. But herein these, which are called *contingent* or *springing* uses, differ from an executory devise; in that there must be a person seised to such uses at the time when the contingency happens, else they can never be executed by the statute; and therefore if the estate of the feoffee to such use be destroyed by alienation or otherwise, before the contingency arises, the use is destroyed forever; whereas by an executory devise the freehold itself is transferred to the future devisee. And in both these cases, a fee may be limited to take effect after a fee; because, though that was forbidden by the common law in favor of the lord's escheat, yet when the legal estate was not extended beyond one fee-simple, such subsequent uses (after a use in fee) were before the statute permitted to be limited in equity; and then the statute executed the legal estate in the same manner as the use before subsisted.

Shifting Use.

It was also held, that a use, though executed, may change from one to another by circumstances *ex post facto*; as, if A makes a feoffment to the use of his intended wife and her eldest son for their lives, upon the marriage the wife takes the whole use in severalty; and upon the birth of a son, the use is executed jointly in them both. This is sometimes called a *secondary*, sometimes a *shifting*, use.

Resulting Use.

And, whenever the use limited by the deed expires, or cannot vest, it returns back to him who raised it, after such expiration, or during such impossibility, and is styled a *resulting* use. As, if a man makes a feoffment to the use of his intended wife for life, with remainder to the use of her first-born son in tail: here, till he marries, the use results back to himself; after marriage, it is executed in the wife for life; and, if she dies without issue, the whole results back to him in fee. It was likewise held, that the uses originally declared may be revoked at any future time, and new uses be declared of the land, provided the grantor reserved to himself such a power at the creation of the estate; whereas the utmost that the common law would allow, was a deed of defeazance coeval with the grant itself, and therefore esteemed a part of it, upon events specially mentioned. And, in case of such a revocation, the

old uses were held instantly to cease, and the new ones to become executed in their stead.

By this equitable train of decisions in the courts of law, the power of the court of chancery over landed property was greatly curtailed and diminished. But one or two technical scruples, which the judges found it hard to get over, restored it with tenfold increase. They held, in the first place, that "no use could be limited on a use;" and that when a man bargains and sells his land for money, which raises a use by implication to the bargainee, the limitation of a further use to another person is repugnant, and therefore void. And therefore on a feoffment to A and his heirs, to the use of B and his heirs, in trust for C and his heirs, they held that the statute executed only the first use, and that the second was a mere nullity; not adverting, that the instant the first use was executed in B he became seised to the use of C, which second use the statute might as well be permitted to execute as it did the first; and so the legal estate might be instantaneously transmitted down through a hundred uses upon uses, till finally executed in the last *cestui que use*. Again; as the statute mentions only such persons as were *seised* to the use of others, this was held not to extend to terms of years, or other chattel interests, whereof the termor is not *seised* but only *possessed*; and therefore, if a term of one thousand years be limited to A, to the use of (or in trust for) B, the statute does not execute this use, but leaves it as at common law. And lastly (by more modern resolutions), where lands are given to one and his heirs, in trust to receive and pay over the profits to another, this use is not executed by the statute; for the land must remain in the trustee to enable him to perform the trust.

Trusts.

Of the two more ancient distinctions the courts of equity quickly availed themselves. In the first case it was evident that B was never intended by the parties to have any beneficial interest; and, in the second, the *cestui que use* of the term was expressly driven into the court of chancery to seek his remedy; and therefore that court determined, that though these were no *uses* which the statute could execute, yet still they were *trusts* in equity, which in conscience ought to be performed. To this the reason of mankind assented, and the doctrine of uses was revived under the denomination of *trusts*; and thus, by this strict construction of the courts of law, a statute, made upon great deliberation, and introduced in the most solemn manner, has had little other effect than to make a slight alteration in the formal words of a conveyance.

However, the courts of equity, in the exercise of this new jurisdiction, have wisely avoided in a great degree those mischiefs which made uses intolerable. The statute of frauds, 29 Car. II., c. 3, having required that every declaration, assignment or grant of

any trust in lands or hereditaments (except such as arise from implication or construction of law) shall be made in writing, signed by the party, or by his written will: the courts now consider a trust-estate (either when expressly declared or resulting by such implication) as equivalent to the legal ownership, governed by the same rules of property, and liable to every charge in equity which the other is subject to in law; and by a long series of uniform determinations, for now near a century past, with some assistance from the legislature, they have raised a new system of rational jurisprudence, by which trusts are made to answer in general all the beneficial ends of uses, without their inconvenience or frauds. The trustee is considered as merely the instrument of conveyance and can in no shape affect the estate, unless by alienation for a valuable consideration to a purchaser without notice; which, as *cestui que use* is generally in possession of the land, is a thing that can rarely happen. The trust will descend, may be aliened, is liable to debts, to executions on judgments, statutes and recognizances (by the express provision of the statute of frauds), to forfeiture, to leases, and other encumbrances, nay even to the curtesy of the husband, as if it was an estate of law. It has not yet indeed been subjected to dower, more from a cautious adherence to some hasty precedents than from any well grounded principle. It hath also been held not liable to escheat to the lord in consequence of attainder or want of heirs: because the trust could never be intended for his benefit. But let us now return to the statute of uses.

The only service, as was before observed, to which this statute is now consigned, is in giving efficacy to certain new and secret species of conveyances; introduced in order to render transactions of this sort as private as possible, and to save the trouble of making livery of seisin, the only ancient conveyance of corporal freeholds; the security and notoriety of which public investiture abundantly overpaid the labour of going to the land, or of sending an attorney in one's stead. But this now has given way to

Covenant to Stand Seised to Uses.

12. A twelfth species of conveyance, called a *covenant to stand seised to uses*: by which a man, seised of lands, covenants in consideration of blood or marriage that he will stand seised of the same to the use of his child, wife, or kinsman; for life, in tail, or in fee. Here the statute executes at once the estate; for the party intended to be benefited, having thus acquired the use, is thereby put at once into corporal possession of the land, without ever seeing it, by a kind of parliamentary magic. But this conveyance can only operate when made upon such weighty and interesting considerations as those of blood or marriage.

Bargain and Sale.

13. A thirteenth species of conveyance, introduced by this

statute, is that of a *bargain and sale* of lands; which is a kind of real contract, whereby the bargainor, for some pecuniary consideration, bargains and sells, that is contracts to convey, the land to the bargainee; and becomes, by such a bargain, a trustee for, or seised to the use of, the bargainee; and then the statute of uses completes the purchase; or as it hath been well expressed, the bargain first vests the use, and then the statute vests the possession. But as it was foreseen that conveyances, thus made, would want all those benefits of notoriety which the common law assurances were calculated to give; to prevent, therefore, clandestine conveyances of freeholds, it was enacted in the same session of parliament, by statute 27 Hen. VIII., c. 16, that such bargains and sales should not inure to pass a freehold unless the same be made by indenture, and *enrolled* within six months in one of the courts of Westminster hall, or with the *custos rotulorum* of the county. Clandestine bargains and sales of chattel interests, or leases for years, were thought not worth regarding, as such interests were very precarious, till about six years before: which also occasioned them to be overlooked in framing the statute of uses; and therefore such bargains and sales are not directed to be enrolled. But how impossible is it to foresee, and provide against, *all* the consequences of innovations. This omission has given rise to

Lease and Release.

14. A fourteenth species of conveyance, viz., by *lease and release*; first invented by Serjeant Moore, soon after the statute of uses, and now the most common of any, and therefore not to be shaken. It is thus contrived. A lease, or rather bargain and sale, upon some pecuniary consideration, for one year, is made by the tenant of the freehold to the lessee or bargainee. Now, this without any enrollment, makes the bargainor stand seised to the use of the bargainee, and vests in the bargainee the *use* of the term for a year; and then the statute immediately invests the *possession*. He, therefore, being thus in possession, is capable of receiving a release of the freehold and reversion; which, we have seen before, must be made to a tenant in possession: and, accordingly, the next day a release is granted to him. This is held to supply the place of livery of seisin: and so a conveyance by lease and release is said to amount to a feoffment.

Deeds to Declare the Uses.

15. To these may be added deeds to *lead* or *declare the uses* of other more direct conveyances, as feoffments, fines, and recoveries, and

Deeds of Revocation of Uses.

16. Deeds of *revocation of uses*, hinted at in a former page, and founded in a previous power, reserved at the raising of the

uses, to revoke such as were then declared; and to appoint others in their stead, which is incident to the power of revocation.

Deeds to Charge and Discharge Lands.

Before we conclude, it will not be improper to subjoin a few remarks upon such deeds as are used not to convey, but to charge or encumber, lands, and to discharge them again; of which nature are obligations or bonds, recognizances, and defeasances upon them both.

Obligation or Bond.

1. An *obligation*, or bond, is a deed whereby the obligor obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another at a day appointed. If this be all, the bond is called a single one, *simplex obligatio*; but there is generally a condition added, that if the obligor does some particular act, the obligation shall be void, or else shall remain in full force: as payment of rent; performance of covenants in a deed; or repayment of a principal sum of money borrowed of the obligee, with interest, which principal sum is usually one-half of the penal sum specified in the bond. In case this condition is not performed, the bond becomes forfeited, or absolute at law, and charges the obligor, while living; and after his death the obligation descends upon his heir, who (on defect of personal assets) is bound to discharge it, provided he has real assets by descent as a recompense. So that it may be called, though not a *direct*, yet a *collateral*, charge upon the lands. How it affects the personal property of the obligor will be more properly considered hereafter.

If the condition of a bond be impossible at the time of making it, or be to do a thing contrary to some rule of law that is merely positive, or be uncertain, or insensible, the condition alone is void, and the bond shall stand single, and unconditional; for it is the folly of the obligor to enter into such an obligation, from which he can never be released. If it be to do a thing that is *malum in se*, the obligation itself is void: for the whole is an unlawful contract, and the obligee shall take no advantage from such a transaction. And if the condition be possible at the time of making it, and afterwards becomes impossible by the act of God, the act of law, or the act of the obligee himself, there the penalty of the obligation is saved; for no prudence or foresight of the obligor could guard against such a contingency. On the forfeiture of the bond, or its becoming single, the whole penalty was formerly recoverable at law: but here the courts of equity interposed, and would not permit a man to take more than in conscience he ought; viz., his principal, interest, and expenses, in case the forfeiture accrued by non-payment of money borrowed; the damages sustained upon non-performance of covenants, and the like. And the like practice having gained some footing in the courts of law, the statute 4 and

5 Anne, c. 16, at length enacted, in the same spirit of equity, that in case of a bond conditioned for the payment of money, the payment or tender of the principal sum due, with interest and costs, even though the bond be forfeited and a suit commenced thereon, shall be a full satisfaction and discharge.

Recognizance.

2. A *recognizance* is an obligation of record, which a man enters into before some court of record or magistrate duly authorized, with condition to do some particular act; as to appear at the assizes, to keep the peace, to pay a debt, or the like. It is in most respects like another bond: the difference being chiefly this: that the bond is the creation of a fresh debt or obligation *de novo*, the recognizance is an acknowledgment of a former debt upon record; the form whereof is, "that A B doth acknowledge to owe to our lord the king, to the plaintiff, to C D, or the like, the sum of ten pounds," with condition to be void on performance of the thing stipulated: in which case, the king, the plaintiff, C D, etc., is called the cognizee, as he that enters into the recognizance is called the cognizor. This, being either certified to or taken by the officer of some court, is witnessed only by the record of that court, and not by the party's seal: so that it is not in strict propriety a deed, though the effects of it are greater than a common obligation, being allowed a priority in point of payment, and binding the lands of the cognizor, from the time of enrollment on record.

Defeazance.

3. A defeazance, or a bond, or recognizance, or judgment recovered, is a condition which, when performed, defeats or undoes it, in the same manner as a defeazance of an estate before mentioned. It differs only from the common condition of a bond, in that the one is always inserted in the deed or bond itself, the other is made between the same parties by a separate, and frequently a subsequent deed. This, like the condition of a bond, when performed, discharges and disencumbers the estate of the obligor.

These are the principal species of deeds or matter *in pais*, by which estates may be either conveyed, or at least affected. Among which the conveyances to uses are by much the most frequent of any.

Chapter XXI.

OF ALIENATION BY MATTER OF RECORD.

344-365.

Assurances by *matter of record* are such as do not entirely depend on the act or consent of the parties themselves; but the sanction of a court of record is called in to substantiate, preserve, and be a perpetual testimony of the transfer of property from one

man to another; or of its establishment, when already transferred. Of this nature are, 1, Private acts of parliament. 2, The king's grants. 3, Fines. 4, Common recoveries.

Private Acts of Parliament.

I. *Private acts of parliament* are, especially of late years, become a very common mode of assurance. For it may sometimes happen that, by the ingenuity of some, and the blunders of other practitioners, an estate is most grievously entangled by a multitude of contingent remainders, resulting trusts, springing uses, executory devises, and the like artificial contrivances (a confusion unknown to the simple conveyances of the common law); so that it is out of the power of either the courts of law or equity to relieve the owner. In these, or other cases of the like kind, the transcendent power of parliament is called in to cut the Gordian knot; and by a particular law, enacted for this very purpose, to unfetter an estate; to give its tenant reasonable powers; or to assure it to a purchaser, against the remote or latent claims of infants or disabled persons, by settling a proper equivalent in proportion to the interest so barred.

Acts of this kind are, however, at present carried on, in both houses, with great deliberation and caution.

A law thus made, though it binds all parties to the bill, is yet looked upon rather as a private conveyance, than as the solemn act of the legislature. It remains, however, enrolled among the public records of the nation, to be forever preserved as a perpetual testimony of the conveyance or assurance so made or established.

King's Grants.

II. The *king's grants* are also matter of public record. These grants, whether of lands, honours, liberties, franchises, or aught besides, are contained in charters, or letters *patent*, that is, open letters, *literae patentis*; so called because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom; and are usually directed or addressed by the king to all his subjects at large.

The *manner* of granting by the king does not more differ from that by a subject, than the *construction* of his grants, when made. 1. A grant made by the king, *at the suit of the grantee*, shall be taken most beneficially *for* the king, and *against* the party: whereas the grant of a subject is construed most strongly *against the grantor*. 2. A subject's grant shall be construed to include many things, besides what are expressed, if necessary for the operation of the grant. But the king's grant shall not inure to any other intent than that which is precisely expressed in the grant. 3. When it appears, from the face of the grant, that the king is mistaken, or deceived, either in matter of fact or matter of law, as

in case of false suggestion, misinformation, or misrecital of former grants; or if his own title to the thing granted be different from what he supposes; or if the grant be informal; or if he grants an estate contrary to the rules of law: in any of these cases the grant is absolutely void.

Fine.

III. We are next to consider a very usual species of assurance, which is also of record; viz., a *fine* of lands and tenements. In which it will be necessary to explain, 1, The *nature* of a fine; 2, Its several *kinds*; and 3, Its *force* and *effect*.

Its Nature.

1. A fine is sometimes said to be a feoffment of record; though it might with more accuracy be called an acknowledgment of a feoffment on record. It is one of those methods of transferring estates of freehold by the common law, in which livery of seisin is not necessary to be actually given; the supposition and acknowledgment thereof in a court of record, however fictitious, inducing an equal notoriety. But, more particularly, a fine may be described to be an amicable composition or agreement of a suit, either actual or fictitious, by leave of the king or his justices: whereby the lands in question become, or are acknowledged to be, the right of one of the parties. In its original it was founded on an actual suit, commenced at law for recovery of the possession of land or other hereditaments; and the possession thus gained by such composition was found to be so sure and effectual, that fictitious actions were, and continue to be, every day commenced, for the sake of obtaining the same security.

A fine is so-called because it puts *an end*, not only to the suit thus commenced, but also to all other suits and controversies concerning the same matter.

Its Parts.

1. The party to whom the land is to be conveyed or assured, commences an action or suit at law against the other, generally an action of covenant, by suing out a writ of *praecipe*, called a writ of covenant: the foundation of which is a supposed agreement or covenant that the one shall convey the lands to the other; on the breach of which agreement the action is brought. The suit being thus commenced, then follows:

2. *The licentia concordandi*, or leave to agree the suit. This leave is readily granted.

3. Next comes the *concord*, or agreement itself, after leave obtained from the court: which is usually an acknowledgment from the deforciant (or those who keep the other out of possession) that the lands in question are the right of the complainant.

And from this acknowledgment, or recognition of right, the party levying the fine is called the *cognizor*, and he to whom it is levied the *cognizee*.

If there be any feme-covert among the cognizors, she is privately examined whether she does it willingly and freely, or by compulsion of her husband.

By these acts all the essential parts of a fine are completed: and if the cognizor dies the next moment after the fine is acknowledged, provided it be subsequent to the day on which the writ is made returnable, still the fine shall be carried on in all its remaining parts: of which the next is:

4. The *note* of the fine: which is only an abstract of the writ of covenant, and the concord; naming the parties, the parcels of land, and the agreement. This must be enrolled of record in the proper office.

5. The fifth part is the *foot* of the fine, or conclusion of it: which includes the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied. Of this there are indentures made, or engrossed, at the chirographer's office, and delivered to the cognizor and the cognizee. And thus the fine is completely levied at common law.

Its Kinds.

2. Fines, thus levied, are of four kinds. 1. What in our French law is called a fine "*sur cognizance de droit, come ceo que il ad de son done*," or a fine upon acknowledgment of the right of the cognizee, as that which he hath of the gift of the cognizor. This is the best and surest kind of fine: for thereby the deforciant, in order to keep his covenant with the plaintiff, of conveying to him the lands in question, and at the same time to avoid the formality of an actual feoffment and livery, acknowledges in court a former feoffment, or gift in possession, to have been made by him to the plaintiff. 2. A fine "*sur cognizance de droit tantum*," or upon acknowledgment of the right merely; not with the circumstance of a preceding gift from the cognizor. This is commonly used to pass a *reversionary* interest which is in the cognizor. 3. A fine "*sur concessit*" is where the cognizor, in order to make an end of disputes, though he acknowledges no precedent right, yet grants to the cognizee an estate *de novo*, usually for life, or years by way of supposed composition. And this may be done reserving a rent, or the like; for it operates as a new grant. 4. A fine "*sur done, grant, et render*," is a double fine, comprehending the fine *sur cognizance de droit come ceo, etc.*, and the fine *sur concessit*: and may be used to create particular limitations of estate: whereas the fine *sur cognizance de droit come ceo, etc.* conveys nothing but an absolute estate either of inheritance or at least of freehold.

Its Force and Effect.

3. We are next to consider the *force* and *effect* of a fine. These principally depend, at this day, on the common law, and the two statutes 4 Hen. VII., c. 24, and 32 Hen. VIII., c. 36.

From a view of the common law, regulated by these statutes, it appears, that a fine is a solemn conveyance on record from the cognizor to the cognizee, and that the persons bound by a fine are *parties, privies* and *strangers*.

The *parties* are either the cognizors, or cognizees, and these are immediately concluded by the fine, and barred of any latent right they might have, even though under the legal impediment of coverture. And indeed, as this is almost the only act that a *feme-covert*, or married woman, is permitted by law to do (and that because she is privately examined as to her voluntary consent, which removes the general suspicion of compulsion by her husband), it is therefore the usual and almost the only safe method whereby she can join in the sale, settlement, or encumbrance of any estate.

Privies to a fine are such as are any way related to the parties who levy the fine, and claim under them by any right of blood or other right of representation. Such as are the heirs general of the cognizor, the issue in tail since the statute of Henry the Eighth, the vendee, the devisee, and all others who must make title by the persons who levied the fine. For the act of the ancestor shall bind the heir, and the act of the principal his substitute, or such as claim under any conveyance made by him subsequent to the fine so levied.

Strangers to a fine are all other persons in the world, except only parties and privies. And these are also bound by a fine, unless, within five years after proclamations made, *they interpose their claim*: provided they are under no legal impediments, and have then a present interest in the estate. The impediments, as hath before been said, are coverture, infancy, imprisonment, insanity, and absence beyond sea: and persons, who are thus incapacitated to prosecute their rights, have five years allowed them to put in their claims after such impediments are removed. Persons also that have not a present, but a future interest only, as those in remainder or reversion, have five years allowed them to claim in, from the time that such right accrues. And if within that time they neglect to claim, or (by the statute 4 Anne, c. 16) if they do not bring an action to try the right within one year after making such claim, and prosecute the same with effect, all persons whatsoever are barred of whatever right they may have, by force of the statute of non-claim.

A Common Recovery.

IV. The fourth species of assurance, by matter of record, is a

common recovery. Concerning the original of which it was formerly observed, that common recoveries were invented by the ecclesiastics to elude the statutes of mortmain; and afterwards encouraged by the finesse of the courts of law in 12 Edw. IV. in order to put an end to all fettered inheritances, and bar not only estates-tail, but also all remainders and reversions expectant thereon. I am now, therefore, only to consider, first, the *nature* of a common recovery; and, secondly, its *force* and *effect*.

Its Nature.

1. And, first, the *nature* of it; or what a common recovery is. A common recovery is so far like a fine, that it is a suit or action, either actual or fictitious; and in it the lands are *recovered* against the tenant of the freehold; which recovery, being a supposed adjudication of the right, binds all persons, and vests a free and absolute fee-simple in the recoveror. I shall endeavor to state its nature and progress, as clearly and concisely as I can; avoiding, as far as possible, all technical terms and phrases not hitherto interpreted.

Let us, in the first place, suppose David Edwards to be tenant of the freehold, and desirous to suffer a common recovery, in order to bar all entails, remainders, and reversions, and to convey the same in fee-simple to Francis Golding. To effect this, Golding is to bring an action against him for the lands; and he accordingly sues out a writ, called a *praecipe quod reddat*, because those were its initial or most operative words when the law proceedings were in Latin. In this writ the demandant Golding alleges that the defendant Edwards (here called the tenant) has no legal title to the land; but that he came into possession of it after one Hugh Hunt had turned the demandant out of it. The subsequent proceedings are made up into a record or recovery-roll, in which the writ and complaint of the demandant are first recited: whereupon the tenant appears, and calls upon one Jacob Morland, who is supposed, at the original purchase to have warranted the title to the tenant; and thereupon he prays that the said Jacob Morland may be called in to defend the title which he so warranted. This is called the *voucher*, *vocatio*, or calling of Jacob Morland to warranty; and Morland is called the *vouchee*. Upon this, Jacob Morland, the vouchee, appears, is impleaded, and defends the title. Whereupon Golding the demandant desires leave of the court to *imparl*, or confer with the vouchee in private: which is (as usual) allowed him. And soon afterwards the demandant Golding returns to court, but Morland the vouchee disappears, or makes default. Whereupon judgment is given for the demandant Golding, now called the recoveror, to recover the lands in question against the tenant, Edwards, who is now the recoveree; and Edwards has judgment to recover of Jacob Morland lands of equal

value, in recompense for the lands so warranted by him, and now lost by his default; which is agreeable to the doctrine of warranty mentioned in the preceding chapter. This is called the recompense, or *recovery in value*. But Jacob Morland having no lands of his own, being usually the crier of the court (who, from being frequently thus vouched, is called the *common vouchee*), it is plain that Edwards has only a nominal recompense for the land so recovered against him by Golding, which lands are now absolutely vested in the said recoveror by judgment of law, and seisin thereof is delivered by the sheriff of the county. So that this collusive recovery operates merely in the nature of a conveyance in fee-simple, from Edwards the tenant in tail, to Golding the purchaser.

The recovery here described, is with a single voucher only; but sometimes it is with *double, treble*, or further voucher, as the exigency of the case may require. And indeed it is now usual always to have a recovery with double voucher at least: by first conveying an estate of freehold to any indifferent person, against whom the *praecipe* is brought; and then he vouches the tenant in tail, who vouches over the common vouchee. For, if a recovery be had immediately against tenant in tail, it bars only such estate in the premises of which he is then actually seised; whereas if the recovery be had against another person, and the tenant in tail be vouched, it bars every latent right and interest which he may have in the lands recovered. If Edwards therefore be tenant of the freehold in possession, and John Barker be tenant in tail in remainder, here Edwards doth first vouch Barker, and then Barker vouches Jacob Morland the common vouchee; who is always the last person vouched, and always makes default; whereby the demandant Golding recovers the land against the tenant Edwards, and Edwards recovers a recompense of equal value against Barker the first vouchee; who recovers the like against Morland the common vouchee, against whom such ideal recovery in value is always ultimately awarded.

This supposed recompense in value is the reason why the issue in tail is held to be barred by a common recovery. For if the recoveree should obtain a recompense in lands from the common vouchee (which there is a possibility in contemplation of law, though a very improbable one, of his doing), these lands would supply the place of those so recovered from him by collusion, and would descend to the issue in tail.

Its Force and Effect.

2. The *force* and *effect* of common recoveries may appear, from what has been said, to be an absolute bar not only of all estates-tail, but of remainders and reversions expectant on the termination of such estates. So that a tenant in tail may, by this

method of assurance, convey the lands held in tail to the recoveror, his heirs and assigns, absolutely free and discharged of all conditions and limitations in tail, and of all remainders and reversions.

In all recoveries it is necessary that the recoveree, or tenant to the *praecipe*, as he is usually called, be actually seised of the freehold, else the recovery is void. For all actions to recover the seisin of lands, must be brought against the actual tenant of the freehold, else the suit will lose its effect; since the freehold cannot be recovered of him who has it not. And though these recoveries are in themselves fabulous and fictitious, yet it is necessary that there be *actors fabulae*, properly qualified.

Deeds to Lead the Uses.

Before I conclude this head, I must add a word concerning deeds to *lead*, or to *declare*, the *uses* of fines, and of recoveries. For if they be levied or suffered without any good consideration and without any uses declared, they, like other conveyances, inure only to the use of him who levies or suffers them. And if a consideration appears, yet as the most usual fine, "*sur cognissance de droit come ceo, etc.*" conveys an absolute estate, without any limitations, to the cognizee; and as common recoveries do the same to the recoveror, these assurances could not be made to answer the purpose of family settlements (wherein a variety of uses and designations is very often expedient), unless their force and effect were subjected to the direction of other more complicated deeds, wherein particular uses can be more particularly expressed. If these deeds are made previous to the fine or recovery, they are called deeds to *lead* the uses; if subsequent, deeds to *declare* them. As if A, tenant in tail, with reversion to himself in fee, would settle his estate on B for life, remainder to C in tail, remainder to D in fee; that is what by law he has no power of doing effectually while his own estate-tail is in being. He therefore, usually, after making the settlement proposed, covenants to levy a fine (or, if there be any intermediate remainders, to suffer a recovery) to E, and directs that the same shall inure to the uses in such settlement mentioned. This is now a deed to *lead* the uses of the fine or recovery; and the fine when levied, or recovery when suffered, shall inure to the uses so specified, and no other. For though E, be cognizee or recoveror, hath a fee-simple vested in himself by the fine or recovery, yet, by the operation of this deed, he becomes a mere instrument or conduit-pipe, seised only to the *use* of B, C and D in successive order: which use is executed immediately, by force of the statute of uses. Or, if a fine or recovery be had without any previous settlement, and a deed be *afterwards* made between the parties, *declaring* the uses to which the same shall be applied, this will be equally good as if it had been expressly levied or suffered in consequence of a deed direct-

ing its operation to those particular uses. For by statute 4 and 5 Anne, c. 16, indentures to *declare* the uses of fines and recoveries, made *after* the fines and recoveries had and suffered, shall be good and effectual in law, and the fine and recovery shall inure to such uses, and be esteemed to be only in trust, notwithstanding any doubts that had arisen on the statute of frauds, 29 Car. II. c. 3, to the contrary.

Chapter XXII.

OF ALIENATION BY SPECIAL CUSTOM.

365-373.

The chapter treats of alienation by special custom, obtaining only in particular places, and relative only to a particular species of property, and especially to copyhold lands.

Chapter XXIII.

OF ALIENATION BY DEVISE.

373-384.

The last method of conveying real property is by *devise*, or disposition contained in a man's last will and testament. And, in considering this subject, I shall not at present inquire into the nature of wills and testaments, which are more properly the instruments to convey personal estates; but only into the original and antiquity of devising real estates by will, and the construction of the several statutes upon which that power is now founded.

Origin of Devise of Real Estate by Will.

It seems sufficiently clear, that, before the conquest, lands were devisable by will. But upon the introduction of the military tenures, the restraint of devising lands naturally took place, as a branch of the feudal doctrine of non-alienation without the consent of the lord.

We find that, by the common law of England since the conquest, no estate, greater than for term of years, could be disposed of by testament; except only in Kent, and in some ancient burghs, and a few particular manors, where their Saxon immunities by special indulgence subsisted. And though the feudal restraint on alienations by *deed* vanished very early, yet this on wills continued for some centuries after.

But when ecclesiastical ingenuity had invented the doctrine of uses as a thing distinct from the land, uses began to be devised very frequently, and the devisee of the use could in chancery compel its execution. But, when the statute of uses had annexed the possession to the use, these uses, being now the very land itself, became no longer devisable; which might have occasioned

a great revolution in the law of devises, had not the statute of wills been made about five years after, which enacted, that all persons being *seised in fee-simple* (except feme-coverts, infants, idiots, and persons of non-sane memory) might by will and testament in writing devise to any other *person*, except to bodies corporate, two-thirds of their lands, tenements, and hereditaments, held in chivalry, and the whole of those held in socage: which now, through the alteration of tenures by the statute of Charles the Second, amounts to the whole of their landed property, except their copyhold tenements.

Corporations were excepted in these statutes, to prevent the extension of gifts in mortmain: but now, by construction of the statute 43 Eliz. c. 4, it is held, that a devise to a corporation for a charitable use is valid, as operating in the nature of an *appointment* rather than of *bequest*.

With regard to devises in general, experience soon showed how difficult and hazardous a thing it is, even in matters of public utility, to depart from the rules of the common law; which are so nicely constructed and so artificially connected together, that the least breach in any one of them disorders for a time the texture of the whole. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance; for so loose was the construction made upon this act by the courts of law, that bare notes in the handwriting of another person were allowed to be good wills within the statute. To remedy which, the statute of frauds and perjuries 29, Car. II. c. 3, directs that all devises of lands and tenements shall not only be in writing, but signed by the testator, or some other person in his presence and by his express direction; and be subscribed, in his presence, by three or four credible witnesses. And a solemnity nearly similar is requisite for revoking a devise by writing, though the same may be also revoked by burning, cancelling, tearing, or obliterating thereof by the devisor, or in his presence and with his consent: as likewise *impliedly*, by such a great and entire alteration in the circumstances and situation of the devisor, as arises from marriage and the birth of a child.

In the construction of this last statute, it has been adjudged that the testator's name written with his own hand, at the beginning of his will, as "I, John Mills, do make this my last will and testament," is a sufficient signing, without any name at the bottom: though the other is the safer way. It has also been determined that, though the witnesses must all see the testator sign, or at least acknowledge the signing, yet they may do it at different times. But they must all subscribe their names as witnesses *in his presence*, lest by any possibility they should mistake the instrument. And, in one case determined by the court of King's

Bench, the judges were extremely strict in regard to the credibility, or rather the competency, of the witness: for they would not allow any legatee, nor by consequence a creditor, where the legacies and debts were charged on the real estate, to be a competent witness to the devise, as being too deeply concerned in interest not to wish the establishment of the will; for, if it were established, he gained a security for his legacy or debt from the real estate, whereas, otherwise he had no claim but on the personal assets. This determination, however, alarmed many purchasers and creditors, and threatened to shake most of the titles in the kingdom, that depended on devises by will.

This occasioned the statute 25 Geo. II. c. 6, which restored both the competency and the credit of such *legatees*, by declaring void all legacies given to witnesses, and thereby removing all possibility of their interest affecting their testimony. The same statute likewise established the competency of *creditors* by directing the testimony of all such creditors to be admitted; but leaving their credit (like that of all other witnesses) to be considered, on a view of all the circumstances, by the court and jury before whom such will shall be contested. And in a much later case the testimony of three witnesses who were creditors was held to be sufficiently credible, though the land was charged with the payment of debts; and the reasons given on the former determination were said to be insufficient.

Another inconvenience was found to attend this new method of conveyance by devise; in that creditors by bond and other specialties, which affected the *heir*, provided he had assets by descent, were now defrauded of their securities, not having the same remedy against the *devisee* of their debtor. To obviate which, the statute 3 and 4 W. and M. c. 14, hath provided, that all wills and testaments, limitations, dispositions, and appointments of real estates, by tenants in fee-simple or having power to dispose by will, shall (as against such creditors only) be deemed to be fraudulent and void: and that such creditors may maintain their actions jointly against both the *heir* and the *devisee*.

A will of lands, made by the permission and under the control of these statutes, is considered by the courts of law not so much in the nature of a testament as of a conveyance declaring the uses to which the land shall be subject: with this difference, that in other conveyances the actual *subscription* of the witnesses is not required by law, though it is prudent for them so to do, in order to assist their memory when living, and to supply their evidence when dead; but in devises of lands such subscription is now absolutely necessary by statute, in order to identify a conveyance, which in its nature can never be set up till after the death of the devisor. And upon this notion, that a devise affecting lands is

merely a species of conveyance, is founded this distinction between such devises and testaments of personal chattels; that the latter will operate upon whatever the testator dies possessed of, the former only upon such real estates as were his at the time of executing and publishing his will, wherefore no after-purchased lands will pass under such devise, unless, subsequent to the purchase or contract, the devisor republishes his will.

Rules of Construction.

We have now considered the several species of common assurances, whereby a title to lands and tenements may be transferred and conveyed from one man to another. But, before we conclude this head, it may not be improper to take notice of a few general rules and maxims, which have been laid down by courts of justice, for the construction and exposition of them all. These are,

1. That the construction be *favourable*, and as near the minds and apparent intents of the parties as the rules of law will admit. And therefore the construction must also be *reasonable*, and agreeable to common understanding.

2. That *quoties in verbis nulla est ambiguitas ibi nulla exposito contra verba fienda est*: but that, where the *intention* is clear, too minute a stress be not laid on the strict and precise signification of *words*; *nam qui haeret in liera, haeret in cortice*. Therefore, by a grant of a remainder a reversion may well pass, and *e converso*.

3. That the construction be made upon the entire deed, and not merely upon disjointed parts of it. And therefore that every part of it be (if possible) made to take effect; and no word but what may operate in some shape or other.

4. That the deed be taken most strongly against him that is the agent or contractor, and in favor of the other party. As, if tenant in fee-simple grants to any one an estate for life. But here a distinction must be taken between an indenture and a deed-poll: for the words of an indenture, executed by both parties, are to be considered as the words of them both; for, though delivered as the words of one party, yet they are not his words only, because the other party hath given his consent to every one of them. But in a deed-poll, executed only by the grantor, they are the words of the grantor only, and shall be taken most strongly against him. And, in general, this rule, being a rule of some strictness and rigour, is the last to be resorted to; and is never to be relied upon, but where all other rules of exposition fail.

5. That, if the words will bear two senses, one agreeable to, and another against, law, that sense be preferred which is most agreeable thereto.

6. That, in a deed, if there be two clauses so totally repug-

nant to each other, that they cannot stand together, the first shall be received, and the latter rejected: wherein it differs from a will; for there, of two such repugnant clauses the latter shall stand. Which is owing to the different natures of the two instruments; for the first deed and the last will are always most available in law. Yet in both cases we should rather attempt to reconcile them.

7. That a devise be most favorably expounded, to pursue if possible the will of the devisor, who for want of advice or learning may have omitted the legal or proper phrases. And therefore many times the law dispenses with the want of words in devises that are absolutely requisite in all other instruments. Thus, a fee may be conveyed without words of inheritance; and an estate-tail without words of procreation. By a will also an estate may pass by mere implication, without any express words to direct its course. And, in general, where any implications are allowed, they must be such as are *necessary* (or at least highly *probable*) and not merely *possible* implications. And herein there is no distinction between the rules of law and of equity; for the will, being considered in both courts in the light of a limitation of uses, is construed in each with equal favour and benignity, and expounded rather on its own particular circumstances, than by any general rules of positive law.

Chapter XXIV. OF THINGS PERSONAL.

384-389.

Under the name of things *personal* are included all sorts of things *movable*, which may attend a man's person wherever he goes.

Chattels.

But things personal, by our law, do not only include things *movable*, but also something more: the whole of which is comprehended under the general name of *chattels*, which Sir Edward Coke says is a French word signifying goods. The appellation is in truth derived from the technical Latin word *catalla*: which primarily signified only beasts of husbandry, or (as we still call them) *cattle*, but in its secondary sense was applied to all movables in general. In the *grand coustumier* of Normandy a *chattel* is described as a mere movable, but at the same time it is set in opposition to a fief or feud; so that not only goods, but whatever was not a feud, were accounted chattels. And it is in this latter, more extended, negative sense, that our law adopts it.

Chattels therefore are distributed by the law into two kinds; chattels *real*, and chattels *personal*.

Chattels Real.

1. Chattels *real*, saith Sir Edward Coke, are such as concern, or savour of, the realty; as terms for years of land, wardships in chivalry (while the military tenures subsisted), the next presentation to a church, estates by a statute-merchant, statute-staple, *elegit* or the like. And these are called real chattels, as being interests issuing out of, or annexed to, real estates, of which they have one quality, viz., immobility, which denominates them *real*; but want the other, viz., a sufficient, legal, indeterminate duration; and this want it is that constitutes them *chattels*. A chattel interest in lands which the Normans put in opposition to fief, and we to freehold, is conveyed by no seisin or corporal investiture, but the possession is gained by the mere entry of the tenant himself; and it will certainly expire at a time prefixed and determined, if not sooner. Thus a lease for years must necessarily fail at the end and completion of the term.

Chattels Personal.

2. Chattels *personal* are properly and strictly speaking, things *movable*; which may be annexed to or attendant on the person of the owner, and carried about with him from one part of the world to another. Such are animals, household stuff, money, jewels, corn, garments, and everything else that can properly be put in motion and transferred from place to place. And of this kind of chattels it is that we are principally to speak in the remainder of this book; having been unavoidably led to consider the nature of chattels real, and their incidents, in the former chapters, which were employed upon real estates.

Chapter XXV.
OF PROPERTY IN THINGS PERSONAL.

389-400.

Property in chattels personal may be either in *possession*; which is where a man hath not only the right to enjoy, but hath the actual enjoyment of the thing; or else it is in *action*; where a man hath only a bare right, without any occupation or enjoyment. And of these the former, or property in *possession*, is divided into two sorts, an *absolute* and a *qualified* property.

Property in Possession Absolute.

I. First, then, of property in *possession absolute*, which is where a man hath, solely and exclusively, the right, and also the occupation of any movable chattels; so that they cannot be transferred from him, or cease to be his, without his own act or default. Such may be all *inanimate* things, as goods, plate, money, jewels, implements of war, garments, and the like.

With regard to *animals*, which have in themselves a principle

and power of motion, and (unless particularly confined) can convey themselves from one part of the world to another, there is a great difference made with respect to their several classes, not only in our law, but in the law of nature and of all civilized nations.

As to Domestic Animals.

In such as are of a nature tame and domestic (as horses, kine, sheep, poultry, and the like), a man may have as absolute a property as in any inanimate being; because these continue perpetually in his occupation, and will not stray from his house or person, unless by accident or fraudulent enticement, in either of which cases the owner does not lose his property. The stealing, or forcible abduction, of such property as this, is also felony; for these are things of intrinsic value, serving for the food of man, or else for the uses of husbandry. But in animals *ferae naturae* a man can have no absolute property.

Of all tame and domestic animals, the brood belongs to the owner of the dam or mother; the English law agreeing with the civil, that "*partus sequitur ventrem*" in the brute creation, though for the most part in the human species it disallows that maxim.

Qualified Property.

II. Other animals, that are not of a tame and domestic nature, are either not the objects of property at all, or else fall under our other division, namely, that of *qualified, limited, or special* property; which is such as is not in its nature permanent, but may sometimes subsist and at other times not subsist. In discussing which subject, I shall in the first place show how this species of property may subsist in such animals as are *ferae naturae*, or of a wild nature; and then how it may subsist in any other things, when under particular circumstances.

First, then, a man may be invested with a qualified, but not an absolute, property in all creatures that are *ferae naturae*, either *per industriam, propter impotentiam, or propter privilegium*.

Qualified Property in Wild Animals.

I. A qualified property may subsist in animals *ferae naturae, per industriam hominis*: by a man's *reclaiming* and making them tame by art, industry, and education; or by so confining them within his own immediate power that they cannot escape and use their natural liberty. But however well this notion may be founded, abstractly considered, our law apprehends the most obvious distinction to be, between such animals as we generally see tame, and are therefore seldom, if ever, found wandering at large, which it calls *domitae naturae*; and such creatures as are usually found at liberty, which are therefore supposed to be emphatically *ferae naturae*, though it may happen that the latter shall be sometimes

tamed and confined by the art and industry of man. These are no longer the property of a man, than while they continue in his keeping or actual possession; but if at any time they regain their natural liberty, his property instantly ceases; unless they have *animum revertendi*, which is only to be known by their usual custom of returning. The law therefore extends this possession further than the mere manual occupation. But if they stray without my knowledge, and do not return in the usual manner, it is then lawful for any stranger to take them. But if a deer, or any wild animal reclaimed, hath a collar or other mark put upon him, and goes and returns at his pleasure, or if a wild swan is taken, and marked and turned loose in the river, the owner's property in him still continues, and it is not lawful for any one else to take him; but otherwise, if the deer has been long absent without returning, or the swan leaves the neighborhood. Bees also are *ferae naturae*; but, when hived and reclaimed, a man may have a qualified property in them, by the law of nature, as well as by the civil law.

In all these creatures, reclaimed from the wildness of their nature, the property is not absolute, but defeasible; a property that may be destroyed if they resume their ancient wildness and are found at large. But while they thus continue my qualified or defeasible property, they are as much under the protection of the law as if they were absolutely and indefeasibly mine; and an action will lie against any man that detains them from me, or unlawfully destroys them. It is also as much felony by common law to steal such of them as are fit for food, as it is to steal tame animals: but not so if they are only kept for pleasure, curiosity, or whim, as dogs, bears, cats, apes, parrots, and singing-birds; because their value is not intrinsic, but depending only on the caprice of their owner; though it is such an invasion of property as may amount to a civil injury, and be redressed by a civil action.

A QUALIFIED property may also subsist with relation to animals *ferae naturae, ratione impotentiae*, on account of their own inability. As when hawks, herons, or other birds build in my trees, or coney or other creatures make their nests or burrows in my land, and have young ones there; I have a qualified property in those young ones until such time as they can fly or run away, and then my property expires; but, till then, it is in some cases trespass, and in others felony, for a stranger to take them away.

3. A man may lastly, have a qualified property in animals *ferae naturae, propter privilegium*: that is, he may have the privilege of hunting, taking, and killing them, in exclusion of other persons. Here he has a transient property in these animals, usually called game, so long as they continue within his liberty; and may restrain any stranger from taking them therein; but the instant they depart into another liberty, this qualified property ceases.

Qualified Property in Other Things.

The qualified property which we have hitherto considered extends only to animals *ferae naturae*, when either reclaimed, impotent, or privileged. Many other things may also be the objects of qualified property. It may subsist in the very elements, of fire or light, of air, and of water. A man can have no absolute permanent property in these, as he may in the earth and land; since these are of a vague and fugitive nature, and therefore can admit only of a precarious and qualified ownership, which lasts so long as they are in actual use and occupation, but no longer. If a man disturbs another, and deprives him of the lawful enjoyment of these; if one obstructs another's ancient windows, corrupts the air of his house or gardens, fouls his water, or unpens and lets it out, or if he diverts an ancient watercourse that used to run to the other's mill or meadow; the law will animadvert hereon as an injury, and protect the party injured in his possession. But the property in them ceases the instant they are out of possession; for, when no man is engaged in their actual occupation, they become again common, and every man has an equal right to appropriate them to his own use.

These kinds of qualification in property depend upon the peculiar circumstances of the subject-matter, which is not capable of being under the absolute dominion of any proprietor. But property may also be of a qualified or special nature, on account of the peculiar circumstances of the owner, when the thing itself is very capable of absolute ownership. As in case of *bailment*, or delivery of goods to another person for a particular use; as to a carrier to convey to London, to an innkeeper to secure in his inn, or the like. Here there is no absolute property in either the bailor or the bailee, the person delivering, or him to whom it is delivered; for the bailor hath only the right, and not the immediate possession; the bailee hath the possession, and only a temporary right. But it is a qualified property in them both; and each of them is entitled to an action, in case the goods be damaged or taken away: the bailee on account of his immediate possession; the bailor, because the possession of the bailee is, immediately, his possession also. So also in case of goods pledged or pawned upon condition, either to repay money or otherwise; both the pledgor and the pledgee have a qualified, but neither of them an absolute, property in them; the pledgor's property is conditional, and depends upon the performance of the condition of repayment, etc.; and so too is that of the pledgee, which depends upon its non-performance. The same may be said of goods distreined for rent, or other cause of distress: which are in the nature of a pledge, and are not, at the first taking, the absolute property of either the distreiner, or party distreined upon; but may be re-

deemed, or else forfeited by the subsequent conduct of the latter. But a servant, who hath the care of his master's goods or chattels, as a butler of plate, a shepherd of sheep, and the like, hath not any property or possession either absolute or qualified, but only a mere charge or oversight.

Property in Action.

Having thus considered the several divisions of property in *possession*, which subsists there only where a man hath both the right and also the occupation of the thing; we will proceed next to take a short view of the nature of property in *action*, or such where a man hath not the occupation, but merely a bare right to occupy the thing in question; the possession whereof may, however, be recovered by a suit or action at law; from whence the thing so recoverable is called a thing or *chose in action*. Thus money due on a bond is a *chose* in action; for a property in the debt vests at the time of forfeiture mentioned in the obligation, but there is no possession till recovered by course of law. If a man promises, or covenants with me, to do any act and fails in it, whereby I suffer damage, the recompense for this damage is a *chose* in action; for though a right to some recompense vests in me at the time of damage done, yet what and how large such recompense shall be, can only be ascertained by verdict; and the possession can only be given me by legal judgment and execution. In the former of these cases the student will observe that the property, or right of action, depends upon an *express* contract or obligation to pay a stated sum; and in the latter it depends upon an *implied* contract, that if the covenantor does not perform the act he engaged to do, he shall pay me the damages I sustain by this breach of covenant. And hence it may be collected, that all property in action depends entirely upon contracts, either express or implied; which are the only regular means of acquiring a *chose* in action, and of the nature of which we shall discourse at large in a subsequent chapter.

At present we have only to remark, that upon all contracts or promises, either express or implied, and the infinite variety of cases into which they are and may be spun out, the law gives an action of some sort or other to the party injured in case of non-performance; to compel the wrong-doer to do justice to the party with whom he has contracted and, on failure of performing the identical thing he engaged to do, to render a satisfaction equivalent to the damage sustained. But while the thing, or its equivalent, remains in suspense, and the injured party has only the right and not the occupation, it is called a *chose* in action; being a thing rather in *potentia* than in *esse*: though the owner may have as absolute a property in, and be as well entitled to, such things in action as to things in possession.

Time of Enjoyment and Number of Owners.

And, having thus distinguished the different *degree* or *quantity of dominion* or *property* to which things personal are subject, we may add a word or two concerning the *time* of their *enjoyment* and the *number* of their *owners*: in conformity to the method before observed in treating of the property of things real.

Time of Enjoyment.

First, as to the *time of enjoyment*. By the rules of the ancient common law, there could be no future property, to take place in expectancy, created in personal goods and chattels. But yet in last wills and testaments such limitations of personal goods and chattels in remainder after a bequest for life, were permitted: though originally that indulgence was only shown when merely the use of the goods, and not the goods themselves, was given to the first legatee; the property being supposed to continue all the time in the executor of the deviser. But now that distinction is disregarded; and therefore if a man, either by deed or will, limits his books or furniture to A for life, with remainder over to B, this remainder is good. But where an estate-tail in things personal is given to the first or any subsequent possessor, it vests in him the total property, and no remainder over shall be permitted on such a limitation.

Number of Owners.

Next, as to the *number of owners*. Things personal may belong to their owners, not only in severalty, but also in joint-tenancy, and in common, as well as real estates. They cannot indeed be vested in coparcenary; because they do not descend from the ancestor to the heir, which is necessary to constitute coparceners. But if a horse, or other personal chattel, be given to two or more, absolutely, they are joint-tenants hereof; and, unless the jointure be severed, the same doctrine of survivorship shall take place as in estates of land and tenements. And, in like manner, if the jointure be severed, as by either of them selling his share, the vendee and the remaining part-owner, shall be tenants in common, without any *jus accrescendi* or survivorship. So, also, if 100*l.* be given by will to two or more, *equally to be divided* between them, this makes them tenants in common; as we have formerly seen the same words would have done in regard to real estates. But, for the encouragement of husbandry and trade, it is held that a stock on a farm, though occupied jointly, and also a stock used in a joint undertaking, by way of partnership in trade, shall always be considered as common and not as joint property, and there shall be no survivorship therein.

Chapter XXVI.

OF TITLE TO THINGS PERSONAL BY OCCUPANCY.

400-408.

How Acquired and Lost.

We are next to consider the *title* to things personal, or the various means of *acquiring* and of *losing* such property as may be had therein; both which considerations of gain and loss shall be blended together in one and the same view, as was done in our observations upon real property; since it is for the most part impossible to contemplate the one without contemplating the other also. And these methods of acquisition or loss are principally twelve: 1, By occupation. 2, By prerogative. 3, By forfeiture. 4, By custom. 5, By succession. 6, By marriage. 7, By judgment. 8, By gift or grant. 9, By contract. 10, By bankruptcy. 11, By testament. 12, By administration.

Title by Occupancy.

And, first, a property in goods and chattels may be acquired by *occupancy*: which, we have more than once remarked, was the original and only primitive method of acquiring any property at all; but which has since been restrained and abridged by the positive laws of society.

Goods of an Alien.

1. Thus in the first place, it hath been said that anybody may seize to his own use such goods as belong to an alien enemy. But this, however generally laid down by some of our writers, must in reason and justice be restrained to such captors as are authorized by the public authority of the state, residing in the crown; and to such goods as are brought into this country by an alien enemy, after a declaration of war, without a safe-conduct or passport. And therefore it hath been holden that where a foreigner is resident in England, and afterwards a war breaks out between his country and ours, his goods are not liable to be seized. It hath also been adjudged, that if an enemy take the goods of an Englishman, which are afterwards retaken by another subject of this kingdom, the former owner shall lose his property therein, and it shall be indefeasibly vested in the second taker; unless they were retaken the same day, and the owner before sunset puts in his claim of property.

And, as in the goods of an enemy, so also in his *person*, a man may acquire a sort of qualified property, by taking him a prisoner in war; at least till his ransom be paid.

Things Abandoned.

2. Thus again, whatever movables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner,

are supposed to be abandoned by the last proprietor; and, as such are returned into the common stock and mass of things; and therefore they belong, as in a state of nature, to the first occupant or fortunate finder, unless they fall within the description of waifs, or estrays, or wrecks, or hidden treasure; for these, we have formerly seen, are vested by law in the king, and form a part of the ordinary revenue of the crown.

The Elements.

3. Thus, too, the benefit of the elements, the light, the air, and the water, can only be appropriated by occupancy. If I have an ancient window overlooking my neighbor's ground, he may not erect any blind to obstruct the light; but if I build my house close to his wall, which darkens it, I cannot compel him to demolish his wall; for there the first occupancy is rather in him than in me. If my neighbor makes a tan-yard, so as to annoy and render less salubrious the air of my house or garden, the law will furnish me with a remedy; but if he is first in possession of the air, and I fix my habitation near him, the nuisance is of my own seeking, and may continue. If a stream be unoccupied, I may erect a mill thereon, and detain the water; yet not so as to injure my neighbor's prior mill, or his meadow; for he hath by the first occupancy acquired a property in the current.

Wild Animals.

4. When a man has once seized them (wild animals), they become while living his *qualified* property, or, if dead, are *absolutely* his own: so that to steal them, or otherwise invade his property, is, according to their respective values, sometimes a criminal offense, sometimes only a civil injury.

Emblements.

5. To this principle of occupancy also must be referred the method of acquiring a special personal property in corn growing on the ground, or other *emblements* by any *possessor* of the land who hath sown or planted it, whether he be owner of the inheritance, or of a less estate: which emblements are distinct from the real estate in the land, and subject to many, though not all, the incidents attending personal chattels.

Accession.

6. The doctrine of property arising from *accession* is also grounded on the right of occupancy. By the Roman law, if any given corporeal substance received afterwards an accession by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled by his right of possession to the property

of it under such its state of improvement; but if the thing itself, by such operation, was changed into a different species, as by making wine, oil or bread, out of another's grapes, olives, or wheat, it belonged to the new operator; who was only to make a satisfaction to the former proprietor for the materials which he had so converted. And these doctrines are implicitly copied and adopted by our Bracton, and have since been confirmed by many resolutions of the courts.

Confusion.

7. But in the case of *confusion* of goods, where those of two persons are so intermixed, that the several portions can be no longer distinguished, the English law partly agrees with, and partly differs from, the civil. If the intermixture be by consent, I apprehend that in both laws the proprietors have an interest in common, in proportion to their respective shares. But if one willfully intermixes his money, corn or hay with that of another man, without his approbation or knowledge, or casts gold in like manner into another's melting pot or crucible, the civil law, though it gives the sole property of the whole to him who has not interfered in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost. But our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded, and endeavored to be rendered uncertain without his own consent.

Literary Composition. Copyright.

8. There is still another species of property, which (if it subsists by the common law), being grounded on labour and invention, is more properly reducible to the head of occupancy than any other; since the right of occupancy itself is supposed by Mr. Locke, and many others, to be founded on the personal labour of the occupant. And this is a right which an author may be supposed to have in his own original literary composition: so that no other person without his leave may publish or make profit of the copies. When a man by the exertion of his rational powers has produced an original work, he seems to have clearly a right to dispose of that identical work as he pleases, and any attempt to vary the disposition he has made of it appears to be an invasion of that right. Now the identity of a literary composition consists entirely in the *sentiment* and the *language*; the same conceptions clothed in the same words, must necessarily be the same composition; and whatever method be taken of exhibiting that composition to the ear or the eye of another, by recital, by writing, or by printing in any number of copies, or at any period of time, it is always the identical work of the author which is so exhibited; and no other man (it hath been thought) can have a right to ex-

hibit it, especially for profit, without the author's consent. This consent may perhaps be tacitly given to all mankind, when an author suffers his work to be published by another hand, without any claim or reserve of right, and without stamping on it any marks of ownership; it being then a present to the public, like building a church or bridge, or laying out a new highway; but, in case the author sells a single book, or totally grants the copyright, it hath been supposed, in the one case, that the buyer hath no more right to multiply copies of that book for sale, than he hath to imitate for the like purpose the ticket which is bought for admission to an opera or a concert; and that, in the other, the whole property, with all its exclusive rights, is perpetually transferred to the grantee. On the other hand it is urged, that though the exclusive property of the manuscript, and all which it contains, undoubtedly belongs to the author *before* it is printed or published; yet, from the instant of publication, the exclusive right of an author or his assigns to the sole communication of his ideas immediately vanishes and evaporates; as being a right of too subtle and unsubstantial a nature to become the subject of property at the common law, and only capable of being guarded by positive statutes and special provisions of the magistrate.

With us in England there hath not been (till very lately) any final determination upon the right of authors at the common law.

But whatever inherent copyright might have been supposed to subsist by the common law, the statute 8 Anne, c. 19 (amended by statute 15 Geo. III. c. 53), hath now declared that the author and his assigns shall have the sole liberty of printing and reprinting his works for the term of fourteen years, *and no longer*; and hath also protected that property by additional penalties and forfeitures: directing further, that if at the end of that term, the author himself be living, the right shall then return to him for another term of the same duration: and a similar privilege is extended to the inventors of prints and engravings, for the term of eight-and-twenty years, by the statutes 8 Geo. II. c. 13, and 7 Geo. III. c. 38, besides an action for damages, with double costs, by statute 17 Geo. III. c. 59. All which parliamentary protections appear to have been suggested by the exception in the statute of monopolies, 21 Jac. I. c. 3, which allows a royal *patent* of privilege to be granted for fourteen years to any inventor of a new manufacture, for the sole working or making of the same; by virtue whereof it is held, that a temporary property therein becomes vested in the king's patentee.

Chapter XXVII.

OF TITLE BY PREROGATIVE AND FORFEITURE.

408-422.

Tribute, Taxes, etc.

The chapter treats of the method of acquiring property in personal chattels by the king's prerogative whereby a right may accrue either to the crown itself or to such as claim under the crown, by the king's grant or by prescription, which supposes an ancient grant.

Prerogative property comprises tributes, taxes, customs, forfeitures, fines, amercements, copyright in certain books, as liturgies, books of worship, law-books, grammars, Bibles, acts of state and government, certain species of game.

It is stated that the king cannot have a joint property with any person in one entire chattel.

The subject of forfeiture of goods and chattels for crime is briefly discussed.

Chapter XXVIII.

OF TITLE BY CUSTOM.

422-430.

A fourth method of acquiring property in things personal, or chattels, is by *custom*: whereby a right vests in some particular persons, either by the local usage of some particular place, or by the almost general and universal usage of the kingdom. I shall content myself with making some observations on three sorts of customary interests, which obtain pretty generally throughout most parts of the nation, and are therefore of more universal concern; viz., *heriots*, *mortuaries*, and *heir-looms*.

Heriots.

I. Heriots are usually divided into two sorts, *heriot-service*, and *heriot-custom*. The former are such as are due upon a special reservation in a grant or lease of lands, and therefore amount to little more than a mere rent; the latter arise upon no special reservation whatsoever, but depend merely upon immemorial usage and custom. They are defined to be a customary tribute of goods and chattels, payable to the lord of the fee on the decease of the owner of the land.

This heriot is sometimes the best live beasts, or *averium*, which the tenant dies possessed of; sometimes the best inanimate good, under which a jewel or piece of plate may be included: but it is always a *personal* chattel, which, immediately on the death of the tenant who was the owner of it, being ascertained by the option of the lord, becomes vested in him as his property; and is no charge upon the lands, but merely on the goods and chattels.

Mortuaries.

2. Mortuaries are a sort of ecclesiastical heriots, being a customary gift claimed by and due to the minister in very many parishes, on the death of his parishioners.

Heir-Looms.

3. Heir-looms are such goods and personal chattels as, contrary to the nature of chattels, shall go by special custom to the heir along with the inheritance, and not to the executor of the last proprietor. They are generally such things as cannot be taken away without damaging or dismembering the freehold: otherwise the general rule is, that no chattel interest whatsoever shall go to the heir, notwithstanding it be expressly limited to a man and his heirs, but shall vest in the executor. *Charters* and deeds, court-rolls, and other evidences of the land, together with the chests in which they are contained, shall pass together with the land to the heir, in the nature of heir-looms, and shall not go to the executor. By special custom also, in some places, carriages, utensils, and other household implements, may be heir-looms, but such custom must be strictly proved. On the other hand by almost general custom, whatever is strongly affixed to the freehold or inheritance, and cannot be severed from thence without violence or damage, is become a member of the inheritance, and shall thereupon pass to the heir; as chimney-pieces, pumps, old, fixed or dormant tables, benches, and the like.

These, though they be mere chattels, yet cannot be devised away from the heir by will; but such a devise is void, even by a tenant in fee-simple. For though the owner might during his life have sold or disposed of them, as he might of the timber of the estate, since, as the inheritance was his own, he might mangle or dismember it as he pleased; yet they being at his death instantly vested in the heir, the devise (which is subsequent and not to take effect till *after* his death) shall be postponed to the custom where-by they have already descended.

Chapter XXIX.
**OF TITLE BY SUCCESSION, MARRIAGE, AND
JUDGMENT.**
430-440.

In the present chapter we shall take into consideration three other species of title to goods and chattels.

Title by Succession.

V. The fifth method therefore of gaining a property in chattels either personal or real, is by *succession*; which is, in strictness

of law, only applicable to *corporations aggregate*; in which one set of men may, by succeeding another set, acquire a property in all the goods, movables, and other chattels of the corporation. The true reason whereof is, because in judgment of law a corporation never dies; and therefore the predecessors who lived a century ago, and their successors now in being, are one and the same body corporate. Which identity is a property so inherent in the nature of a body politic, that, even when it is meant to give anything to be taken in succession by such a body, that succession need not be expressed; but the law will of itself imply it. So that a gift to such a corporation, either of lands or of chattels, without naming their successors vests an absolute property in them so long as the corporation subsists.

But, with regard to sole corporations, a considerable distinction must be made. For if such sole corporation be the representative of a number of persons; as the master of an hospital, who is a corporation for the benefit of the poor brethren; an abbot, or prior, by the old law before the reformation, who represented the whole convent; or the dean of some ancient cathedral, who stands in the place of and represents, in his corporate capacity, the chapter; such sole corporations as these have, in this respect, the same powers as corporations aggregate have, to take personal property or chattels in succession. And therefore a bond of such a master, abbot, or dean and his successors, is good law; and the successor shall have the advantage of it, for the benefit of the aggregate society of which he is in law the representative. Whereas, in the case of sole corporations which represent no others but themselves, as bishops, parsons, and the like, no chattel interest can regularly go in succession; and therefore, if a lease for years be made to the bishop of Oxford and his successors, in such case his executors or administrators, and not his successor, shall have it. For the word *successors* when applied to a person in his political capacity, is equivalent to the word *heirs* in his natural, and as such a lease for years, if made to John and his heirs, would not vest in his heirs but his executors; so if it be made to John, bishop of Oxford, and his successors, who are the heirs of his body politic, it shall still vest in his executors and not in such his successors.

This is not the case in corporations aggregate, where the right is never in suspense, nor in the other sole corporations before mentioned, who are rather to be considered as heads of an aggregate body than subsisting merely in their own right. The chattel interest, therefore, in such a case is really and substantially vested in the hospital, convent, chapter, or other aggregate body, though the head is the visible person in whose name every act is carried on, and in whom every interest is therefore said, in point of form, to vest. But the general rule with regard to corporations merely

sole, is this, that no chattel can go to or be acquired by them in right of succession.

Yet to this rule there are two exceptions. - One in the case of the king, in whom a chattel may vest by a grant of it formerly made to a preceding king and his successors. The other exception is where, by a *particular* custom, some *particular* corporation sole have acquired a power of taking *particular* chattel interests in succession. Wherefore, upon the whole, we may close this head with laying down this general rule: that such right of succession to chattels is universally inherent by the common law in all aggregate corporations, in the king, and in such single corporations as represent a number of persons; and may, by special custom, belong to certain other sole corporations for some particular purposes; although generally, in sole corporations, no such right can exist.

Title by Marriage.

VI. A sixth method of acquiring property in goods and chattels is by *marriage*; whereby those chattels, which belonged formerly to the wife, are by act of law vested in the husband, with the same degree of property and the same powers as the wife, when sole, had over them.

This depends entirely on the notion of a unity of person between the husband and wife; it being held that they are one person in law, so that the very being and existence of the woman is suspended during the coverture, or entirely merged or incorporated in that of the husband. And hence it follows, that whatever personal property belonged to the wife before marriage, is by marriage absolutely vested in the husband. In a *real* estate, he only gains the title to the rents and profits during coverture; for that depending upon feudal principles, remains entire to the wife after the death of her husband, or to her heirs, if she dies before him; unless, by the birth of a child, he becomes tenant for life by the curtesy. But, in *chattel interests*, the sole and absolute property vests in the husband, to be disposed of at his pleasure, if he chooses to take possession of them; for unless he reduce them to possession, by exercising some act of ownership upon them, no property vests in him, but they shall remain to the wife, or to her representatives, after the coverture is determined. There is therefore a very considerable difference in the acquisition of these species of property by the husband, according to the subject matter, viz., whether it be a chattel *real* or chattel *personal*; and, of chattels personal, whether it be in *possession* or in action only. A *chattel real* vests in the husband, not absolutely, but *sub modo*. As, in case of a lease for years, the husband shall receive all the rents and profits of it, and may, if he pleases, sell, surrender, or dispose of it during the coverture; if he be outlawed or attainted,

it shall be forfeited to the king; it is liable to execution for his debts; and, if he survives his wife, it is to all intents and purposes his own. Yet, if he has made no disposition thereof in his lifetime, and dies before his wife, he cannot dispose of it by will for, the husband having made no alteration in the property during his life, it never was transferred from the wife, but after his death she shall remain in her ancient possession, and it shall not go to his executors. So it is also of chattels personal (or *choses*) in *action*; as debts upon bond, contracts, and the like; these the husband may have if he pleases; that is, if he reduces them into possession by receiving or recovering them at law. And upon such receipt or recovery they are absolutely and entirely his own; and shall go to his executors or administrators, or as he shall bequeath them by will, and shall not revert in the wife. But if he dies before he has recovered or reduced them into possession, so that at his death they still continue *choses in action*, they shall survive to the wife; for the husband never exerted the power he had of obtaining an exclusive property in them. Thus in both these species of property the law is the same in case the wife survives the husband; but, in case the husband survives the wife, the law is very different with respect to *chattels real* and *choses in action*; for he shall have the *chattel real* by survivorship, but not the *choses in action*; except in the case of arrears of rent due to the wife before her coverture, which in case of her death are given to the husband by statute 32 Hen. VIII. c. 37. And the reason for the general law is this: that the husband is in absolute possession of the *chattel real* during the coverture, by a kind of joint tenancy with his wife; wherefore the law will not wrest it out of his hands, and give it to her representatives; though, in case he had died first, it would have survived to the wife, unless he thought proper in his lifetime to alter the possession. But a *choses in action* shall not survive to him, because he never was in possession of it at all during the coverture; and the only method he had to gain possession of it was by suing in his wife's right; but as after her death he cannot (as husband) bring an action in her right, because they are no longer one and the same person in law, therefore he can never (as such) recover the possession. But he still will be entitled to be her administrator, and may in that capacity, recover such things in action as became due to her before or during the coverture.

Thus, and upon these reasons, stands the law between husband and wife with regard to *chattels real* and *choses in action*; but as to *chattels personal* (or *choses*) in *possession*, which the wife hath in her own right, as ready money, jewels, household goods, and the like, the husband hath therein an immediate and absolute property devolved to him by the marriage, not only potentially but in fact, which never can again revert in the wife or her representatives.

Wife's Paraphernalia.

And, as the husband may thus generally acquire a property in all the personal substance of the wife, so in one particular instance the wife may acquire a property in some of her husband's goods: which shall remain to her after his death and not go to his executors. These are called her *paraphernalia*, which is a term borrowed from the civil law, and is derived from the Greek language, signifying something over and above her dower. Our law uses it to signify the apparel and ornaments of the wife, suitable to her rank and degree; and therefore even the jewels of a peeress usually worn by her have been held to be *paraphernalia*. These she becomes entitled to at the death of her husband, over and above her jointure, or dower, and preferably to all other representatives. Neither can the husband devise by his will such ornaments and jewels of his wife; though during his life perhaps he hath the power (if unkindly inclined to exert it) to sell them or give them away. But if she continues in the use of them till his death, she shall afterwards retain them against his executors and administrators, and all other persons except creditors where there is a deficiency of assets. And her necessary apparel is protected even against the claim of creditors.

Title by Judgment.

VII. A judgment, in consequence of some suit or action in a court of justice, is frequently the means of vesting the right and property of chattel interests in the prevailing party. And here we must be careful to distinguish between property, the *right* of which is before vested in the party, and of which only *possession* is recovered by suit or action; and property to which a man before had no determinate title or certain claim, but he gains as well the right as the possession by the process and the judgment of the law. Of the former sort are all debts and *choses in action*; as if a man gives bond for 20*l.*, or agrees to buy a horse at a stated sum, or takes up goods of a tradesman upon an implied contract to pay as much as they are reasonably worth: in all these cases the right accrues to the creditor, and is completely vested in him, at the time of the bond being sealed, or the contract or agreement made; and the law only gives him a remedy to recover the possession of that right which already in justice belongs to him. But there is also a species of property to which a man, has not any claim or title whatsoever till after suit commenced and judgment obtained in a court of law: where the right and the remedy do not follow each other, as in common cases, but accrue at one and the same time; and where, before judgment had, no man can say that he has any absolute property, either in possession or in action. Of this nature are,

1. Such penalties as are given by particular statutes, to be recovered on an action *popular*; or, in other words, to be recovered by him or them that will sue for the same.

2. Another species of property that is acquired and lost by suit and judgment at law, is that of *damages* given to a man by a jury, as a compensation and satisfaction for some injury sustained; as for battery, for imprisonment, for slander, or for trespass. Here the plaintiff has no certain demand till after the verdict; but, when the jury has assessed his damages, and judgment is given thereupon, whether they amount to twenty pounds or twenty shillings, he instantly acquires, and the defendant loses at the same time, a right to that specific sum.

3. Hither also may be referred, upon the same principle, all title to costs and expenses of suit; which are often arbitrary, and rest entirely on the determination of the court, upon weighing all circumstances, both as to the *quantum*, and also (in the courts of equity especially, and upon motions in the courts of law) whether there shall be any costs at all. These costs, therefore, when given by the court to either party, may be looked upon as an acquisition made by the judgment of law.

Chapter XXX.

OF TITLE BY GIFT, GRANT, AND CONTRACT.

440-471.

We are now to proceed according to the order marked out, to the discussion of two of the remaining methods of acquiring a title to property in things personal, which are much connected together, and answer in some measure to the conveyances of real estates; being those by *gift* or *grant*, and by *contract*; whereof the former vests a property in *possession*, the latter a property in *action*.

Gifts and Grants.

VIII. Gifts, then, or *grants*, which are the eighth method of transferring personal property, are thus to be distinguished from each other, that *gifts* are always *gratuitous*, *grants* are upon some *consideration* or equivalent; and they may be divided, with regard to their subject-matter, into gifts or grants of chattels *real* and gifts or grants of chattels *personal*.

Grants of Chattels Real.

Under the head of gifts or grants of chattels *real* may be included all leases for years of land, assignments, and surrenders of those leases; and all the other methods of conveying an estate less than freehold, which were considered in the twentieth chapter

of the present book, and therefore need not be here again repeated: though these very seldom carry the outward appearance of a gift, however freely bestowed, being usually expressed to be made in consideration of blood, or natural affection, or of five or ten shillings nominally paid to the grantor; and in case of leases, always, reserving a rent, though it be but a pepper-corn: any of which considerations, will in the eye of the law, convert the gift, if executed, into a grant; if not executed, into a contract.

Grants of Chattels Personal.

Grants or gifts, of chattels *personal*, are the act of transferring the right and the possession of them; whereby one man renounces, and another man immediately acquires, all title and interest therein; which may be done either in writing, or by word of mouth, attested by sufficient evidence, of which the delivery of possession is the strongest and most essential. But this conveyance when merely voluntary, is somewhat suspicious; and is usually construed to be fraudulent, if creditors or others become sufferers thereby. And, particularly, by statute 3 Hen. VII. c. 4, all deeds of gift of goods, made in trust to the use of the donor, shall be void: because otherwise persons might be tempted to commit treason or felony, without danger of forfeiture; and the creditors of the donor might also be defrauded of their rights. And by statute 13 Eliz. c. 5, every grant or gift of chattels, as well as lands, with an intent to defraud creditors or others, shall be void as against such persons to whom such fraud would be prejudicial; but, as against the grantor himself, shall stand good and effectual; and all persons partakers in, or privy to, such fraudulent grants, shall forfeit the whole value of the goods, one moiety to the king, and another moiety to the party grieved; and also on conviction shall suffer imprisonment for half a year.

A true and proper gift or grant is always accompanied with delivery of possession, and takes effect immediately. But if the gift does not take effect, by delivery of immediate possession, it is then not properly a gift but a contract; and this a man cannot be compelled to perform but upon good and sufficient consideration.

A Contract.

IX. A contract which usually conveys an interest merely in action, is thus defined: "an agreement upon sufficient consideration to do or not to do a particular thing." From which definition there arise three points to be contemplated in all contracts: 1, The *agreement*; 2, the *consideration*; and 3, the *thing* to be done or omitted, or the different species of contracts.

The Agreement.

First, then it is an *agreement*, a mutual bargain or convention: and therefore there must at least be two contracting parties of

sufficient ability to make a contract: as where A contracts with B to pay him 100*l.* and thereby transfers a property in such sum to B; which property is, however, not in possession, but in action merely, and recoverable by suit at law; wherefore it could not be transferred to another person by the strict rules of the ancient common law; for no *chose* in action could be assigned or granted over, because it was thought to be a great encouragement to litigiousness if a man were allowed to make over to a stranger his right of going to law. But this nicety is now disregarded: though in compliance with the ancient principle, the form of assigning a *chose* in action is in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor, in order to recover the possession. And therefore, when in common acceptance a debt or bond is said to be assigned over, it must still be sued in the original creditor's name; the person to whom it is transferred being rather an attorney than an assignee.

Express and Implied.

This contract or agreement may be either express or implied. *Express* contracts are where the terms of the agreement are openly uttered and avowed at the time of the making. *Implied* are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform. As, if I employ a person to do any business for me, or perform any work; the law implies that I undertook, or contracted, to pay him as much as his labour deserves: If I take up wares from a tradesman, without any agreement of price, the law concludes that I contracted to pay their real value. And there is also one species of implied contracts, which runs through and is annexed to all other contracts, conditions and covenants, viz., that if I fail in my part of the agreement I shall pay the other party such damages as he has sustained by such my neglect or refusal. In short, almost all the rights of personal property (when not in actual possession) do in great measure depend upon contracts, of one kind or other, or at least might be reduced under some of them: which indeed is the method taken by the civil law; it having referred the greatest part of the duties and rights, which it treats of, to the head of obligations *ex contractu* and *quasi ex contractu*.

Executed and Executory.

A contract may also be either *executed*, as if A agrees to change horses with B. and they do it immediately; in which case the possession and the right are transferred together: or it may be *executory*, as if they agree to change next week; here the right only vests, and their reciprocal property in each other's horse is not in possession but in action; for a contract *executed* (which

differs nothing from a grant) conveys a *chose in possession*; a contract *executory* conveys only a *chose in action*.

The Consideration.

Having thus shown the general nature of a contract, we are, *secondly*, to proceed to the *consideration* upon which it is founded; or the reason which moves the contracting party to enter into the contract. "It is an agreement, upon *sufficient consideration*." The civilians hold, that in all contracts, either express or implied, there must be something given in exchange, something that is mutual or reciprocal. This thing, which is the price or motive of the contract, we call the consideration; and it must be a thing lawful in itself, or else the contract is void. A *good* consideration, we have before seen, is that of blood or natural affection between near relations; the satisfaction accruing from which the law esteems an equivalent for whatever benefit may move from one relation to another. This consideration may sometimes, however, be set aside, and the contract become void, when it tends in its consequences to defraud creditors, or other third persons, of their just rights. But a contract for any *valuable* consideration, as for marriage, for money, for work done, or for other reciprocal contract, can never be impeached at law; and, if it be of a sufficient adequate value, is never set aside in equity; for the person contracted with has then given an equivalent in recompense, and is therefore as much an owner, or a creditor, as any other person.

Nudum Pactum.

A consideration of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum*, or agreement to do or pay anything on one side, without any compensation on the other, is totally void in law; and a man cannot be compelled to perform it. But any degree of reciprocity will prevent the pact from being nude; nay, even if the thing be founded on a prior moral obligation (as a promise to pay a just debt, though barred by the statute of limitations), it is no longer *nudum pactum*. And as this rule was principally established to avoid the inconvenience that would arise from setting up mere verbal promises, for which no good reason could be assigned, it therefore does not hold in some cases, where such promise is authentically proved by written documents. For if a man enters into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of a consideration in order to evade the payment; for every bond from the solemnity of the instrument, and every note from the subscription of the drawer, carries with it an internal evidence of a good consideration. Courts of justice

will therefore support them both, as against the contractor himself; but not to the prejudice of creditors, or strangers to the contract.

The Thing to be Done or Omitted.

We are next to consider, thirdly, the thing agreed to be done or omitted. "A contract is an agreement, upon sufficient consideration, to do or not to do a particular thing." The most usual contracts, whereby the right of chattels personal may be acquired in the laws of England are, 1, That of *sale or exchange*. 2, That of *bailment*. 3, That of *hiring and borrowing*. 4, That of *debt*.

Sale, or Exchange.

1. Sale, or *exchange*, is a transmission of property from one man to another in consideration of some price or recompense in value; for there is no sale without a recompense; there must be *quid pro quo*. If it be a commutation of goods for goods, it is more properly an *exchange*; but if it be a transferring of goods for money, it is called a *sale*.

Where the vendor hath in himself the property of the goods sold, he hath the liberty of disposing of them to whomsoever he pleases, at any time and in any manner, unless judgment has been obtained against him for a debt or damages, and the writ of execution is actually delivered to the sheriff. For then, by the statute of frauds, the sale shall be looked upon as fraudulent, and the property of the goods shall be bound to answer the debt from the time of delivering the writ. Formerly it was bound from the *teste*, or issuing of the writ, and any subsequent sale was fraudulent; but the law was thus altered in favor of *purchasers*, though it still remains the same between the *parties*. And therefore if a defendant dies after the awarding and before the delivery of the writ, his goods are bound by it in the hands of his executors.

If a man agrees with another for goods at a certain price, he may not carry them away before he hath paid for them; for it is no sale without payment, unless the contrary be expressly agreed. But if neither the money be paid, nor the goods delivered, nor tender made, nor any subsequent agreement be entered into, it is no contract and the owner may dispose of the goods as he pleases. But if any part of the price is paid down, if it be but a penny, or any portion of the goods delivered by way of *earnest*, the property of the goods is absolutely bound by it; and the vendee may recover the goods by action, as well as the vendor may the price of them. And such regard does the law pay to earnest as an evidence of a contract, that, by the same statute, 29 Car. II. c. 3, no contract for the sale of goods, to the value of 10*l.* or more, shall be valid, unless the buyer actually receives part of the goods sold by way of earnest on his part: or unless he gives part of the price to the vendor by

way of earnest to bind the bargain, or in part of payment; or unless some note in writing be made and signed by the party, or his agent, who is to be charged with the contract. And with regard to goods under the value of 10*l.* no contract or agreement for the sale of them shall be valid, unless the goods are to be delivered within one year, or unless the contract be made in writing, and signed by the party, or his agent, who is to be charged therewith.

As soon as the bargain is struck, the property of the goods is transferred to the vendee, and that of the price to the vendor; but the vendee cannot take the goods until he tenders the price agreed on. But if he tenders the money to the vendor, and he refuses it, the vendee may seize the goods, or have an action against the vendor for detaining them. And by a regular sale, without delivery, the property is so absolutely vested in the vendee, that if A sells a horse to B for 10*l.*, and B pays him earnest, or signs a note in writing of the bargain, and afterwards, before the delivery of the horse, or money paid, the horse dies in the vendor's custody, still he is entitled to the money, because by the contract the property was in the vendee. Thus may property in goods be transferred by sale where the vendor *hath* such property in himself.

Market Overt.

But property may also in some cases be transferred by sale, though the vendor *hath none at all* in the goods; for it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise all commerce between man and man must soon be at an end. And therefore the general rule of law is, that all sales and contracts of any thing vendible, in fairs or markets *overt* (that is, open), shall not only be good between the parties, but also be binding on all those that have any right or property therein. Our Saxon ancestors prohibited the sale of any thing above the value of twenty pence, unless in open market, and directed every bargain and sale to be contracted in the presence of credible witnesses. Market overt in the country is only held on the special days provided for particular towns by charter or prescription; but in London every day, except Sunday, is market-day. The market-place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market overt; but in London every shop in which goods are exposed publicly to sale, is market overt, for such things only as the owners profess to trade in. But if my goods are stolen from me, and sold, out of market overt, my property is not altered, and I may take them wherever I find them. And even in market overt, if the goods be the property of the king, such sale (though regular in all other respects) will in no case bind him, though it binds infants, *feme-coverts*, idiots, or lunatics, and men beyond sea or in prison;

or if the goods be stolen from a common person, and then taken by the king's officer from the felon, and sold in open market; still, if the owner has used due diligence in prosecuting the thief to conviction he loses not his property in the goods. So likewise, if the buyer knoweth the property not to be in the seller; or there be any other fraud in the transaction; if he knoweth the seller to be an infant, or feme-covert not usually trading for herself; if the sale be not originally and wholly made in the fair or market, or not at the usual hours; the owner's property is not bound thereby. If a man buys his own goods in a fair or market, the contract of sale shall not bind him so that he shall render the price; unless the property had been previously altered by a former sale. And notwithstanding any number of intervening sales, if the original vendor, who sold without having the property, comes again into possession of the goods, the original owner may take them, when found in his hands who is guilty of the first breach of justice. By which wise regulations the common law has secured the right of the proprietor in personal chattels from being divested, so far as was consistent with that other necessary policy, that purchasers, *bona fide*, in a fair, open, and regular manner, shall not be afterwards put to difficulties by reason of the previous knavery of the seller.

By the civil law an implied warranty was annexed to every sale, in respect to the title of the vendor: and so too, in our law, a purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own and the title proves deficient, without any express warranty for that purpose. But with regard to the goodness of the wares so purchased, the vendor is not bound to answer: unless he expressly warrants them to be sound and good, or unless he knew them to be otherwise, and hath used any art to disguise them, or unless they turn out to be different from what he represented to the buyer.

Bailment.

2. Bailment from the French *bailleur*, to deliver, is a delivery of goods in trust, upon a contract, expressed or implied, that the trust shall be faithfully executed on the part of the bailee. If a pawnbroker receives plate or jewels as a pledge, or security, for the repayment of money lent thereon at a day certain, he has them upon an expressed contract or condition to restore them, if the pledgor performs his part by redeeming them in due time. And so if a landlord distrains goods for rent, or a parish officer for taxes, these for a time are only a pledge in the hands of the distreiners, and they are bound by an implied contract in law to restore them on payment of the debt, duty, and expenses, before the time of sale; or, when sold, to render back the overplus. If a

friend delivers anything to his friend to keep for him, the receiver is bound to restore it on demand. Such a general bailment will not charge the bailee with any loss, unless it happens by gross neglect, which is an evidence of fraud: but, if he undertakes specially to keep the goods safely and securely, he is bound to take the same care of them as a prudent man would take of his own.

In all these instances there is a special qualified property transferred from the bailor to the bailee, together with the possession. It is not an absolute property, because of his contract for restitution; the bailor having still left in him the right to a *chase* in action, grounded upon such contract. And on account of this qualified property of the bailee, he may (as well as the bailor) maintain an action against such as injure or take away these chattels. The inn-keeper, the pawnbroker, and the general bailee, may all of them vindicate, in their own right, this their possessory interest, against any stranger or third person. For, being responsible to the bailor, if the goods are lost or damaged by his willful default or gross negligence, or if he do not deliver up the chattels on lawful demand, it is therefore reasonable that he should have a right of action against all other persons who may have purloined or injured them; that he may always be ready to answer the call of the bailor.

Hiring and Borrowing.

3. Hiring and *borrowing* are also contracts by which a qualified property may be transferred to the hirer or borrower: in which there is only this difference, that hiring is always for a price, or stipend, or additional recompense; borrowing is merely gratuitous. But the law in both cases is the same. They are both contracts, whereby the possession and a transient property is transferred for a particular time or use, on condition to restore the goods so hired or borrowed as soon as the time is expired or use performed; together with the price or stipend (in case of hiring) either expressly agreed on by the parties, or left to be implied by law according to the value of the service. By this mutual contract, the hirer or borrower gains a temporary property in the thing hired, accompanied with an implied condition to use it with moderation, and not to abuse it; and the owner or lender retains a reversionary interest in the same, and acquires a new property in the price or reward.

Interest and Usury.

There is one species of this price or reward, the most usual of any, but concerning which many good and learned men have in former times very much perplexed themselves and other people, by raising doubts about its legality *in foro conscientiae*. That is, when money is lent on a contract to receive not only the principal

sum again, but also an increase by way of compensation for the use; which generally is called *interest* by those who think it lawful, and *usury* by those who do not so. For the enemies to interest in general make no distinction between that and usury, holding any increase of money to be indefensibly usurious. But when men's minds began to be more enlarged, when true religion and real liberty revived, commerce grew again into credit: and again introduced with itself its inseparable companion, the doctrine of loans upon interest. The necessity of individuals will make borrowing unavoidable. Without some profit allowed by law, there will be but few lenders; and those principally bad men, who will break through the law, and take a profit; and then will endeavor to indemnify themselves from the danger of the penalty, by making that profit exorbitant. A capital distinction must therefore be made between a moderate and exorbitant profit; to the former of which we usually give the name of interest, to the latter the truly odious appellation of usury; the former is necessary in every civil state, if it were but to exclude the latter, which ought never to be tolerated in any well-regulated society.

We see that the exorbitance or moderation of interest, for money lent, depends upon two circumstances: the inconvenience of parting with it for the present, and the hazard of losing it entirely. The inconvenience to individual lenders can never be estimated by laws; the rate therefore of general interest must depend upon the usual or general inconvenience.

So also the hazard of an entire loss has its weight in the regulation of interest; hence the better the security the lower will the interest be: the rate of interest being generally in a compound *ratio*, formed out of the inconvenience and the hazard.

But sometimes the hazard may be greater than the rate of interest allowed by law will compensate. And this gives rise to the practice of 1. *Bottomry*, or *respondentia*. 2. Policies of insurance. 3. Annuities upon lives.

Bottomry.

And first, *bottomry* (which originally arose from permitting the master of a ship, in a foreign country, to hypothecate the ship in order to raise money to refit) is in the nature of a mortgage of a ship when the owner takes up money to enable him to carry on his voyage, and pledges the keel or *bottom* of the ship (*pariem pro toto*) as a security for the repayment. In which case it is understood, that if the ship be lost, the lender loses also his whole money; but, if it returns in safety, then he shall receive back his principal, and also the premium or interest agreed upon, however it may exceed the legal rate of interest. And this is allowed to be a valid contract in all trading nations, for the benefit of commerce, and by reason of the extraordinary hazard run by the lender.

Insurance.

Secondly, a policy of *insurance* is a contract between A and B, that upon A's paying a premium equivalent to the hazard run, B will indemnify or insure him against a particular event. This is founded upon one of the same principles as the doctrine of interest upon loans, that of hazard; but not that of inconvenience. But, as upon an insurance, I am never out of possession of my money till the loss actually happens, nothing is therein allowed upon the principle of inconvenience, but all upon the principle of hazard. And in this manner may any extraordinary or particular hazard be provided against, which the established rate of interest will not reach; that being calculated by the state to answer only the ordinary and general hazard, together with the lender's inconvenience in parting with his specie for the time. But in order to prevent these insurances from being turned into a mischievous kind of gaming, it is enacted, by statute 14 Geo. III. c. 48, that no insurance shall be made on lives, or on any other event, wherein the party insured hath no interest; that in all policies the name of such interested party shall be inserted; and nothing more shall be recovered thereon than the amount of the interest of the insured.

This does not, however, extend to marine insurances, which were provided for by a prior law of their own.

Annuities.

Thirdly, the practice of purchasing *annuities for lives* at a certain price or premium, instead of advancing the same sum on an ordinary loan, arises usually from the inability of the borrower to give the lender a permanent security for the return of the money borrowed, at any one period of time. He therefore stipulates (in effect) to repay annually, during his life, some part of the money borrowed; together with legal interest for so much of the principal as annually remains unpaid, and an additional compensation for the extraordinary hazard run of losing that principal entirely by the contingency of the borrower's death: all which considerations, being calculated and blended together, will constitute the just proportion or *quantum* of the annuity which ought to be granted. The real value of that contingency must depend on the age, constitution, situation, and conduct of the borrower; and therefore the price of such annuities cannot, without the utmost difficulty, be reduced to any general rules.

Upon the two principles of inconvenience and hazard, compared together, different nations have, at different times, established different rates of *interest*. Our law establishes one standard for all alike, where the pledge or security itself is not put in jeopardy; lest, under the general pretense of vague and indeterminate hazards, a door should be open to fraud and usury; leaving specific

hazards to be provided against by specific insurances, by annuities for lives, or by loans upon *respondentia* or bottomry. But as to the rate of legal interest, it has varied and decreased for two hundred years past, according as the quantity of specie in the kingdom has increased by accessions of trade, the introduction of paper credit, and other circumstances. By the statute 12 Anne, st. 2, c. 16, it was brought down to five *per cent.* yearly, which is now the extremity of legal interest that can be taken. But yet, if a contract which carries interest be made in a foreign country, our courts will direct the payment of interest according to the law of that country in which the contract was made. Unless the money lent shall be known at the time to exceed the value of the thing in pledge; in which case also to prevent usurious contracts at home under colour of such foreign securities, the borrower shall forfeit treble the sum so borrowed.

Debt.

4. The last general species of contracts which I have to mention is that of *debt*; whereby a *chose* in action, or right to a certain sum of money, is mutually acquired and lost. This may be the counterpart of, and arise from, any of the other species of contracts. Any contract, in short, whereby a determinate sum of money becomes due to any person, and is not paid, but remains in action merely, is a contract of debt. And, taken in this light, it comprehends a great variety of acquisition; being usually divided into debts of *record*, debts by *special* and debts by *simple* contract.

Debt of Record.

A debt of *record* is a sum of money which appears to be due by the evidence of a court of record. Thus, when any specific sum is adjudged to be due from the defendant to the plaintiff, on an action or suit at law, this is a contract of the highest nature, being established by the sentence of a court of judicature. Debts upon recognizance are also a sum of money, recognized or acknowledged to be due to the crown or a subject, in the presence of some court or magistrate, with a condition that such acknowledgment shall be void upon the appearance of the party, his good behavior, or the like.

Debt by Specialty.

Debts by *specialty*, or special contract, are such whereby a sum of money becomes, or is acknowledged to be, due by deed or instrument under seal. Such as by deed of covenant, by deed of sale, by lease reserving rent, or by bond or obligation.

Debt by Simple contract.

Debts by *simple contract* are such, where the contract upon which the obligation arises is neither ascertained by matter of record nor yet by deed or special instrument, but by mere oral evi-

dence, the most simple of any; or by notes unsealed, which are capable of a more easy proof, and (therefore only) better than a verbal promise. I shall only observe at present that by the statute 29 Car. II. c. 3, no executor or administrator shall be charged upon any special promise to answer damages out of his own estate, and no person shall be charged upon any promise to answer for the debt or default of another, or upon any agreement in consideration of marriage, or upon any contract or sale of any real estate, or upon any agreement that is not to be performed within one year from the making; unless the agreement or some memorandum thereof be in writing, and signed by the party himself, or by his authority.

But there is one species of debts upon simple contract, which, being a transaction now introduced into all sorts of civil life, under the name of *paper credit*, deserves a more particular regard. These are debts by *bills of exchange*, and *promissory notes*.

Bills of Exchange.

A *bill of exchange* is a security, originally invented among merchants of different countries, for the more easy remittance of money from one to the other, which has since spread itself into almost all pecuniary transactions. It is an open letter of request from one man to another, desiring him to pay a sum named therein to a third person on his account; by which means a man at the most distant part of the world may have money remitted to him from any trading country. In common speech such a bill is frequently called a *draft*, but a *bill of exchange* is the more legal as well as mercantile expression. The person, however, who writes this letter is called in law the *drawer*, and he to whom it is written the *drawee*; and the third person or negotiator, to whom it is payable (whether especially named, or the *bearer* generally) is called the *payee*.

These bills are either *foreign* or *inland*; *foreign* when drawn by a merchant residing abroad upon his correspondent in England, or *vice versa*; and *inland*, when both the drawer and drawee reside within the kingdom. Formerly foreign bills of exchange were much more regarded in the eye of the law than inland ones, as being thought of more public concern in the advancement of trade and commerce. But now, by two statutes, the one 9 and 10 W. III. c. 17, the 3 and 4 Anne, c. 9, inland bills of exchange are put upon the same footing as foreign ones; what was the law and custom of merchants with regard to the one, and taken notice of merely as such, being by those statutes expressly enacted with regard to the other. So that now there is not in law any manner of difference between them.

Promissory Notes.

Promissory notes, or notes of hand, are a plain and direct engagement, in writing, to pay a sum specified at the time therein limited to a person therein named, or sometimes to his order, or often to the bearer at large. These also, by the same statute 3 and 4 Anne, c. 9, are made assignable and endorsable in like manner as bills of exchange.

The payee, we may observe, either of a bill of exchange or promissory note, has clearly a property vested in him (not indeed in possession, but in action) by the *express* contract of the drawer in the case of a promissory note, and, in case of a bill of exchange, by his *implied* contract, viz., that, provided the drawee does not pay the bill, the drawer will: for which reason it is usual in bills of exchange to express that the value thereof hath been *received* by the drawer; in order to show the consideration upon which the implied contract of repayment arises. And this property, so vested, may be transferred and assigned from the payee to any other man; contrary to the general rule of the common law, that no *chose* in action is assignable: which assignment is the life of paper credit. It may therefore be of some use to mention a few of the principal incidents attending this transfer or assignment in order to make it regular, and thereby to charge the drawer with the payment of the debt to other persons than those with whom he originally contracted.

Endorsement.

In the first place, then, the payee, or person to whom or whose *order* such bill of exchange or promissory note is payable, may by endorsement, or writing his name in *dorso*, or on the back of it, assign over his whole property to the bearer, or else to another person by name, either of whom is then called the endorsee; and he may assign the same to another, and so on *in infinitum*. And a promissory note, payable to A, or *bearer*, is negotiable without any endorsement, and payment thereof may be demanded by any bearer of it. But in case of a bill of exchange, the payee, or the endorsee (whether it be a general or particular endorsement), is to go to the drawee, and offer his bill for acceptance; which acceptance (so as to charge the drawer with the costs) must be in writing, under or on the back of the bill. If the drawee accepts the bill, either verbally or in writing, he then makes himself liable to pay it; this being now a contract on his side, grounded on an acknowledgment that the drawer has effects in his hands, or at least credit, sufficient to warrant the payment.

Protest.

If the drawee refuses to accept the bill, and it be of the value of 20*l.* or upwards, and expressed to be for value received, the

payee or endorsee may protest it for *non-acceptance*; which protest must be made in writing, under a copy of such bill of exchange, by some notary public; or, if no such notary be resident in the place, then by any other substantial inhabitant, in the presence of two credible witnesses; and notice of such protest must, within fourteen days after, be given to the drawer.

But, in case such bills be accepted by the drawee, and after acceptance he fails or refuses to pay it within three days after it becomes due (which three days are called days of grace), the payee or endorsee is then to get it protested for *non-payment*, in the same manner, and by the same persons who are to protest it in case of non-acceptance; and such protest must also be notified, within fourteen days after, to the drawer. And he, on producing such protest, either of non-acceptance or non-payment, is bound to make good to the payee, or endorsee, not only the amount of the said bills (which he is bound to do within a reasonable time after non-payment, without any protest, by the rules of the common law), but also interest and all charges, to be computed from the time of making such protest. But if no protest be made or notified to the drawer, and any damage accrues by such neglect, it shall fall on the holder of the bill. The bill, when refused, must be demanded of the drawer as soon as convenient may be: for though, when one draws a bill of exchange, he subjects himself to the payment if the person on whom it is drawn refuses either to accept or pay, yet that is with this limitation, that if the bill be not paid when due, the person to whom it is payable shall in convenient time give the drawer notice thereof; for otherwise the law will imply it paid; since it would be prejudicial to commerce if a bill might rise up to charge the drawer at any distance of time: when in the meantime all reckonings and accounts may be adjusted between the drawer and drawee.

If the bill be an endorsed bill, and the endorsee cannot get the drawee to discharge it, he may call upon either the drawer or the endorser, or, if the bill has been negotiated through many hands, upon any of the endorsers; for each endorser is a warrantor for the payment of the bill which is frequently taken in payment as much (or more) upon the credit of the endorser as of the drawer. And if such endorser, so called upon, has the names of one or more endorsers prior to his own, to each of whom he is properly an endorsee, he is also at liberty to call upon any of them to make him satisfaction; and so upwards. But the first endorser has nobody to resort to but the drawer only.

What has been said of bills of exchange is applicable also to promissory notes, that are endorsed over, and negotiated from one hand to another; only that in this case, as there is no drawee, there can be no protest for non-acceptance; or rather, the law considers

a promissory note in the light of a bill drawn by a man upon himself, and accepted at the time of drawing. And, in case of non-payment by the drawer, the several endorsees of the promissory note have the same remedy, as upon bills of exchange, against the prior endorsers.

Chapter XXXI.

OF TITLE BY BANKRUPTCY.

471-489.

The chapter treats of 1, Who may become a bankrupt. 2, What acts make a bankrupt. 3, The proceedings on a commission of bankruptcy. 4, How goods may be transferred by bankruptcy. The chapter is mainly historical and of small practical benefit now.

Chapter XXXII.

OF TITLE BY TESTAMENT, AND ADMINISTRATION.

489-518.

There yet remains to be examined, in the present chapter, two other methods of acquiring personal estates, viz., by *testament* and *administration*.

XI, XII. I shall, first, enquire into the original and antiquity of testaments and administrations; shall, secondly, show who is capable of making a last will and testament; shall, thirdly, consider the nature of a testament and its incidents; shall, fourthly, show what an executor and administrator are, and how they are to be appointed; and lastly, shall select some few of the general heads of the office and duty of executors and administrators.

Original of Testaments.

First as to the *original* of testaments and administrations.

Testaments are of very high antiquity.

With us in England, this power of bequeathing is coeval with the first rudiments of the law: for we have no traces or memorials of any time when it did not exist.

But we are not to imagine that this power of bequeathing extended originally to *all* a man's personal estate. On the contrary, Glanvil informs us that by the common law, as it stood in the reign of Henry the Second, a man's goods were to be divided into three equal parts: of which one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal: or if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so *e converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal. The shares of the wife

and children were called their *reasonable* parts, and the writ *de rationabili parte bonorum* was given to recover them.

In the reign of King Edward the Third, this right of the wife and children was still held to be the universal or common law.

But this law is at present altered by imperceptible degrees, and the *deceased* may now, by will, bequeath the whole of his goods and chattels; though we cannot trace out when first this alteration began.

In case a person made no disposition of such of his goods as were testable, whether that were only part or the whole of them, he was, and is, said to die intestate; and in such case it is said, that by the old law the king was entitled to seize upon his goods, as the *parens patrie*, and general trustee of the kingdom. This prerogative the king continued to exercise for some time by his own ministers of justice; and probably in the county court, where matters of all kinds were determined: and it was granted as a franchise to many lords of manors, and others, who have to this day a prescriptive right to grant administration to their intestate tenants and suitors, in their own courts-baron, and other courts, or to have their will, there proved, in case they made any disposition. Afterwards, the crown, in favour of the church, invested the prelates with this branch of the prerogative. The goods, therefore of intestates were given to the ordinary by the crown; and he might seize them, and keep them without wasting, and also might give, aliene, or sell them at his will, and dispose of the money in *pious usus* and, if he did otherwise, he broke the confidence which the law reposed in him. So that properly, the whole interest and power which were granted to the ordinary were only those of being the king's almoner within his diocese; in trust to distribute the intestate's goods in charity to the poor, or in such superstitious uses as the mistaken zeal of the times had denominated pious. And as he had thus the disposition of the intestate's effects, the probate of wills of course followed: for it was thought just and natural, that the will of the deceased should be proved to the satisfaction of the prelate, whose right of distributing his chattels for the good of his soul was effectually superseded thereby.

The goods of the intestate being thus vested in the ordinary upon the most solemn and conscientious trust, the reverend prelates were, therefore, not accountable to any but to God and themselves, for their conduct. Thus the popish clergy, took to themselves (under the name of the church and the poor) the whole residue of the deceased's estate, after the *partes rationabiles*, or two-thirds, of the wife and children were deducted; without paying even his lawful debts, or other charges thereon. For which reason, it was enacted by the statute of Westm. 2, that the ordinary shall be bound to pay the debts of the intestate so far as his

goods will extend, in the same manner that the executors were bound in case the deceased had left a will. This was the first check given to that exorbitant power, which the law had entrusted with ordinaries. But, though they were now made liable to the creditors of the intestate for their just and lawful demands, yet the *residuum*, after payment of debts, remained still in their hands, to be applied to whatever purposes the conscience of the ordinary should approve. The flagrant abuses of which power occasioned the legislature again to interpose, in order to prevent the ordinaries from keeping any longer the administration in their own hands, or those of their immediate dependents: and therefore the statute 31 Edw. III. c. 11, provides that, in case of intestacy, the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods: which administrators are put upon the same footing, with regard to suits and to accounting, as executors appointed by will. This is the original of administrators, as they at present stand; who are only the officers of the ordinary, appointed by him in pursuance of this statute, which singles out the *next and most lawful friend* of the intestate; who is interpreted to be the *next of blood* that is under no legal disabilities. The statute 21 Hen. VIII. c. 5, enlarges a little more the power of the ecclesiastical judge; and permits him to grant administration *either* to the widow, *or* the next of kin, *or* to both of them, at his own discretion; and, where two or more persons are in the same degree of kindred, gives the ordinary his election to accept whichever he pleases.

Who May or May Not Make a Testament.

I proceed now, *secondly*, to inquire who may, or may not, make a testament. Regularly, every person hath full power and liberty to make a will, that is not under some special prohibition by law or custom: which prohibitions are principally upon three accounts: for want of sufficient discretion; for want of sufficient liberty and free will; and on account of their criminal conduct.

1. In the first species are to be reckoned infants, under the age of fourteen if males, and twelve if females. Madmen, or otherwise *non compos*, idiots or natural fools, persons grown childish by reason of old age or distemper, such as have their senses besotted with drunkenness,—all these are incapable, by reason of mental disability, to make any will so long as such disability lasts. To this class also may be referred such persons as are *born* deaf, blind and dumb; who, as they have always wanted the common inlets of understanding, are incapable of having *animus testandi*, and their testaments are therefore void.

2. Such persons as are intestable for want of liberty or freedom of will are, by the civil law, of various kinds: as prisoners,

captives, and the like. But the law of England does not make such persons absolutely intestable; but only leaves it to the discretion of the court to judge, upon the consideration of their particular circumstances of duress, whether or no such persons could be supposed to have *liberum animum testandi*. And, with us a married woman is not only utterly incapable of devising lands, being excepted out of the statute of wills, 34 and 35 Hen. VIII. c. 5, but also she is incapable of making a testament of *chattels*, without the license of her husband. For all her personal chattels are absolutely his; and he may dispose of her chattels real, or shall have them to himself if he survives her; it would be therefore extremely inconsistent to give her a power of defeating that provision of the law, by bequeathing these chattels to another. Yet by her husband's license she may make a testament: and the husband, upon marriage, frequently covenants with her friends to allow her that license; but such license is more properly his assent for, unless it be given to the particular will in question, it will not be a complete testament, even though the husband beforehand hath given her permission to make a will. Yet it shall be sufficient to repel the husband from his general right of administering his wife's effects; and the administration shall be granted to her appointee, with such testamentary paper annexed. So that, in reality, the woman makes no will at all, but only something like a will; operating in the nature of an appointment, the execution of which the husband, by his bond, agreement, or covenant, is bound to allow.

3. Persons incapable of making testaments, on account of their criminal conduct, are, in the first place, all traitors and felons, from the time of conviction: for then their goods and chattels are no longer at their own disposal, but forfeited to the king. Neither can a *felo de se* make a will of goods and chattels, for they are forfeited by the act and manner of his death; but he may make a devise of his lands, for they are not subjected to any forfeiture. Outlaws also, though it be but for debt, are incapable of making a will, so long as the outlawry subsists, for their goods and chattels are forfeited during that time. As for persons guilty of other crimes short of felony, who are by the civil law precluded from making testaments (as usurers, libellers, and others of worse stamp), by common law their testaments may be good.

Nature of a Testament.

Let us next, *thirdly*, consider what this last will and testament is, which almost every one is thus at liberty to make. The definition of the old Roman lawyers is, "the legal declaration of a man's intentions, which he wills to perform after his death."

Written and Verbal Wills.

These testaments are divided into two sorts: *written*, and *verbal* or *nuncupative*; of which the former is committed to writing, the latter depends merely upon oral evidence, being declared by the testator *in extremis* before a sufficient number of witnesses, and afterwards reduced to writing. A *codicil*, *codicillus*, a little book or writing, is a supplement to a will, or an addition made by the testator, and annexed to, and to be taken as part of, a testament: being for its explanation, or alteration, or to make some addition to, or else some subtraction from, the former disposition of the testator. This may also be either written or nuncupative.

Nuncupative Wills and Codicils.

But, as *nuncupative* wills and codicils (which were formerly more in use than at present, when the art of writing is become more universal) are liable to great impositions, and may occasion many perjuries, the statute of frauds, 29 Car. II, c. 3, hath laid them under many restrictions; except when made by mariners at sea, and soldiers in actual service. As to all other persons, it enacts: 1. That no written will shall be revoked or altered by a subsequent nuncupative one, except the same be in the lifetime of the testator reduced to writing, and read over to him, and approved; and unless the same be proved to have been so done by the oaths of three witnesses at the least; who by statute 4 and 5 Anne, c. 16, must be such as are admissible upon trials of common law. 2. That no nuncupative will shall in any wise be good, where the estate bequeathed exceeds 30*l.*, unless proved by three such witnesses, present at the making thereof (the Roman law requiring seven), and unless they or some of them were specially required to bear witness thereto by the testator himself; and unless it was made in his last sickness, in his own habitation or dwelling-house, or where he had been previously resident ten days at the least, except he be surprised with sickness on a journey, or from home, and dies without returning to his dwelling. 3. That no nuncupative will shall be proved by the witnesses after six months from the making, unless it were put in writing within six days. Nor shall it be proved till fourteen days after the death of the testator, nor till process hath first issued to call in the widow or next of kin, to contest it, if they think proper. The testamentary words must be spoken with an intent to bequeath, not any loose, idle discourse in his illness; for he must require the bystanders to bear witness of such his intention: the will must be made at home, or among his family or friends, unless by unavoidable accident; to prevent imposition from strangers: it must be in his *last* sickness; for, if he recovers, he may alter his dispositions, and has time to make a written will; it must not be proved at too long a distance

from the testator's death, lest the words should escape the memory of the witnesses: nor yet too hastily and without notice, lest the family of the testator should be put to inconvenience, or surprised.

Written Wills.

As to *written* wills, they need not any witness of their publication. I speak not here of devises of lands, which are quite of a different nature; being conveyances by statute, unknown to the feudal or common law, and not under the same jurisdiction as personal testaments. But a testament of chattels, written in the testator's own hand, though it has neither his name nor seal to it, nor witnesses present at its publication, is good, provided sufficient proof can be had that it is his handwriting. And though written in another man's hand, and never signed by the testator, yet, if proved to be according to his instructions and approved by him, it hath been held a good testament of the personal estate. Yet it is the safer and more prudent way, and leaves less in the breast of the ecclesiastical judge, if it be signed or sealed by the testator, and published in the presence of witnesses.

No testament is of any effect till after the death of the testator. And therefore, if there be many testaments, the last overthrows all the former: but the republication of a former will revokes one of a later date, and establishes the first again.

How Avoided.

Hence it follows, that testaments may be avoided in three ways: 1, If made by a person labouring under any of the incapacities before mentioned; 2, by making another testament of a later date, and 3, By canceling or revoking it. For, though I make a last will and testament irrevocable in the strongest words, yet I am at liberty to revoke it: because my own act or words cannot alter the disposition of law, so as to make that irrevocable which is in its own nature revocable. It hath also been held, that without an express revocation, if a man, who hath made his will, afterwards marries and hath a child, this is a presumptive or implied revocation of his former will, which he made in his state of celibacy. The Romans were also wont to set aside testaments as being *inofficiosa*, deficient in natural duty, if they disinherited or totally passed by (without assigning a true and sufficient reason) any of the children of the testator. But, if the child had any legacy, though ever so small, it was a proof that the testator had not lost his memory or his reason, which otherwise the law presumed; but was then supposed to have acted thus for some substantial cause; and in such case no *querela inofficiosi testamenti* was allowed. Hence probably has arisen that groundless vulgar error, of the necessity of leaving the heir a shilling, or some other express legacy,

in order to disinherit him effectually: whereas the law of England makes no such constrained suppositions of forgetfulness or insanity; and therefore, though the heir or next of kin be totally omitted, it admits no *querela inofficiosi* to set aside such a testament.

We are next to consider, *fourthly*, what is an executor, and what an administrator, and how they are both to be appointed.

Executor.

An executor is he to whom another man commits by will the execution of that his last will and testament. And all persons are capable of being executors, that are capable of making wills, and many others besides; as feme-coverts and infants: nay, even infants unborn, or *in ventre sa mere*, may be made executors. But no infant can act as such till the age of seventeen years; till which time administration must be granted to some other, *durante minore aetate*. In like manner as it may be granted *durante absentia*, or *pendente lite*; when the executor is out of the realm, or when a suit is commenced in the ecclesiastical court touching the validity of the wills. This appointment of an executor is essential to the making of a will: and it may be performed either by express words, or such as strongly imply the same. But if the testator makes an incomplete will, without naming any executors, or if he names incapable persons, or if the executors named refuse to act; in any of these cases the ordinary must grant administration *cum testamento annexo* to some other person; and then the duty of the administrator, as also when he is constituted only *durante minore aetate*, etc., of another, is very little different from that of an executor.

Administrator.

But if the deceased died wholly intestate, without making either will or executors, then general letters of administration must be granted by the ordinary to such administrator as the statutes of Edward the Third and Henry the Eighth before mentioned, direct. In consequence of which we may observe: 1, That the ordinary is compellable to grant administration of the goods and chattels of the wife, to the husband or his representatives: and of the husband's effects, to the widow, or the next of kin; but he may grant it to either or both at his discretion. 2, That among the kindred, those are to be preferred that are the nearest in degree to the intestate; but, of persons in equal degree, the ordinary may take which he pleases. 3, That this *nearness* or propinquity of degree shall be reckoned according to the computation of the civilians; and not of the canonists, which the law of England adopts in the descent of real estates: because in the civil computation the intestate himself is the *terminus a quo* the several degrees are numbered, and not the common ancestor, according to the rule of the canonists. And therefore in the first place the children, or (on failure of children)

the parents, of the deceased, are entitled to the administration; both which are indeed in the first degree; but with us the children are allowed the preference. Then follow brothers, grandfathers, uncles and nephews (and the females of each class respectively), and lastly cousins. 4, The half-blood is admitted to the administration as well as the whole; for they are of the kindred of the intestate, and only excluded from inheritances of land upon feodal reasons. 5, If none of the kindred will take out administration, a creditor may, by custom, do it. 6, If the executor refuses or dies intestate, the administration may be granted to the residuary legatee, in exclusion of the next of kin. 7, And lastly, the ordinary may, in defect of all these, commit administration (as he might have done before the statute of Edward III.) to such discreet person as he approves of: or may grant letters *ad colligendum bona defuncti*, which neither makes him executor nor administrator; his only business being to keep the goods in his safe custody, and to do other acts for the benefit of such as are entitled to the property of the deceased. If a bastard, who has no kindred, being *nullius filius*, or any one else that has no kindred, dies intestate and without wife or child, it hath formerly been held that the ordinary might seize his goods and dispose of them *in pios usus*. But the usual course now is for some one to procure letters-patent, or other authority from the king; and then the ordinary of course grants administration to such appointee of the crown.

The interest vested in the executor by the will of the deceased may be continued and kept alive by the will of the same executor: so that the executor of A's executor is to all intents and purposes the executor and representative of A himself; but the executor of A's administrator, or the administrator of A's executor, is not the representative of A. For the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another in whom he has equal confidence: but the administrator of A is merely the officer of the ordinary, prescribed to him by act of parliament, in whom the deceased has reposed no trust at all; and therefore, on the death of that officer, it results back to the ordinary to appoint another. And, with regard to the administrator of A's executor, he has clearly no privity or relation to A, being only commissioned to administer the effects of the intestate executor, and not of the original testator. Wherefore in both these cases, and whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the ordinary to commit administration afresh *of the goods* of the deceased *not* administered by the former executor or administrator. And this administrator *de bonis non* is the only legal representative of the deceased in matters of personal property. But he may, as well as

an original administrator, have only a *limited* or *special* administration committed to his care, viz., of certain specific effects, such as a term of years, and the like; the rest being committed to others.

Office and Duty of Executor and Administrator.

Having thus shown what is and who may be an executor or administrator, I proceed now, *fifthly* and lastly, to enquire into some few of the principal points of their office and duty. These, in general, are very much the same in both executors and administrators; excepting, first, that the executor is bound to perform a will, which an administrator is not, unless where a testament is annexed to his administration, and then he differs still less from an executor: and secondly, that an executor may do many acts before he proves the will, but an administrator may do nothing till letters of administration are issued; for the former derives his power from the will and not from the probate; the latter owes his entirely to the appointment of the ordinary. If a stranger takes upon him to act as executor, without any just authority (as by intermeddling with the goods of the deceased, and many other transactions), he is called in law an executor of his own wrong (*de son tort*), and is liable to all the trouble of an executorship without any of the profits or advantages. But merely doing acts of necessity or humanity, as locking up the goods or burying the corpse of the deceased, will not amount to such an intermeddling as will charge a man as executor of his own wrong. Such a one cannot bring an action himself in right of the deceased, but actions may be brought against him. And, in all actions by creditors against such an officious intruder, he shall be named an executor, generally; for the most obvious conclusion which strangers can form from his conduct is, that he hath a will of the deceased wherein he is named executor, but hath not yet taken probate thereof. He is chargeable with the debts of the deceased so far as assets come to his hands, and, as against creditors in general, shall be allowed all payments made to any other creditor in the same or a superior degree, himself only excepted. And though, as against the rightful executor and administrator, he cannot plead such payment, yet it shall be allowed him in mitigation of damages; unless perhaps upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt. But let us now see what are the power and duty of a rightful executor and administrator.

Power and Duty of Executor and Administrator.

1. He must *bury* the deceased in a manner suitable to the estate which he leaves behind him. Necessary funeral expenses are allowed previous to all other debts and charges; but if the executor

or administrator be extravagant, it is a species of *devastation* or waste of the substance of the deceased, and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased.

2. The executor or administrator *durante minore aetate*, or *durante absentia*, or *cum testamento annexo*, must *prove the will* of the deceased: which is done either in *common form*, which is only upon his own oath before the ordinary or his surrogate; or *per testes* in more solemn form of law, in case the validity of the will be disputed. When the will is so proved, the original must be deposited in the registry of the ordinary; and a copy thereof in parchment is made out under the seal of the ordinary, and delivered to the executor or administrator, together with a certificate of its having been proved before him: all which together is usually styled the probate. In defect of any will, the person entitled to be administrator, must also, at this period, take out letters of administration under the seal of the ordinary, whereby an executorial power to collect and administer, that is, dispose of the goods of the deceased, is vested in him: and he must, by statute 22 and 23 Car. II. c. 10. enter into a bond with sureties faithfully to execute his trust.

3. The executor or administrator is to make an *inventory* of all the goods and chattels, whether in possession or action of the deceased; which he is to deliver in to the ordinary upon oath if thereunto lawfully required.

4. He is to *collect* all the goods and chattels so inventoried; and to that end he has very large powers and interests conferred on him by law; being the representative of the deceased and having the same property in his goods as the principal had when living, and the same remedies to recover them. And if there be two or more executors, a sale or release by one of them shall be good against all the rest; but in case of administrators it is otherwise. Whatever is so recovered, that is of a salable nature and may be converted into ready money, is called *assets* in the hands of the executor or administrator; that is, sufficient or enough (from the French *asses*) to make him chargeable to a creditor or legatee, so far as such goods and chattels extend. Whatever assets so come to his hands he may convert into ready money, to answer the demands that may be made upon him: which is the next thing to be considered; for,

5. The executor or administrator must *pay* the *debts* of the deceased. In payment of debts he must observe the rules of priority; otherwise, on deficiency of assets, if he pays those of a lower degree first, he must answer those of a higher out of his own estate. And, first, he may pay all funeral charges, and the expense of proving the will, and the like. Secondly, debts due to the king on record or specialty. Thirdly, such debts as are by particular statutes to be preferred to all others: as the forfeitures for not burying in woolen,

money due upon poor rates, for letters to the postoffice, and some others. Fourthly, debts of record; as judgments (docketed according to the statute 4 and 5 W. and M. c. 20) statutes and recognizances. Fifthly, debts due on special contracts; as for rent (for which the lessor has often a better remedy in his own hands by distraining), or upon bonds, covenants, and the like, under seal. Lastly, debts on simple contracts, viz., upon notes unsealed, and verbal promises. Among these simple contracts, servants' wages are by some with reason preferred to any other. Among debts of equal degree, the executor or administrator is allowed to pay himself first, by retaining in his hands so much as his debt amounts to. But an executor of his own wrong is not allowed to retain: for that would tend to encourage creditors to strive who should first take possession of the goods of the deceased; and would besides be taking advantage of his own wrong, which is contrary to the rule of law. If a creditor constitutes his debtor his executor, this is a release or discharge of the debt, whether the executor acts or no; provided there be assets sufficient to pay the testator's debts: for though this discharge of the debt shall take place of all legacies, yet it were unfair to defraud the testator's creditors of their just debts by a release which is absolutely voluntary. Also, if no suit is commenced against him, the executor may pay any one creditor in equal degree his whole debt, though he has nothing left for the rest: for without a suit commenced, the executor has no legal notice of the debt.

6. When the debts are all discharged, the *legacies* claim the next regard; which are to be paid by the executor so far as his assets will extend; but he may not give himself the preference herein as in the case of debts.

Legacy.

A legacy is a bequest, or gift, of goods and chattels by testament; and the person to whom it was given is styled the legatee: which every person is capable of being unless particularly disabled by the common law or statutes, as traitors, papists, and some others. This bequest transfers an inchoate property to the legatee; but the legacy is not perfect without the assent of the executor. For in him all the chattels are vested, and it is his business first of all to see whether there is a sufficient fund left to pay the debts of the testator; the rule of equity being, that a man must be just before he is permitted to be generous. And in case of a deficiency of assets, all the *general* legacies must abate proportionately, in order to pay the debts; but a *specific* legacy (of a piece of plate, a horse, or the like) is not to abate at all, or allow anything by way of abatement, unless there be not sufficient without it. Upon the same principle, if the legatees had been paid their legacies, they are afterwards

bound to refund a ratable part, in case debts come in, more than sufficient to exhaust the *residuum* after the legacies paid.

If a legatee dies before the testator, the legacy is a lost or *lapsed* legacy, and shall sink into the *residuum*. And if a *contingent* legacy be left to any one, as, *when* he attains, or *if* he attains, the age of twenty-one, and he dies before that time, it is a lapsed legacy. But a legacy to one, *to be paid* when he attains the age of twenty-one years, is a *vested* legacy: an interest which commences *in praesenti*, although it be *solvendum in futuro*: and if the legatee dies before that age, his representative shall receive it out of the testator's personal estate at the same time that it would have become payable in case the legatee had lived. But, if such legacies be charged upon a real estate, in both cases they shall lapse for the benefit of the heir; for with regard to devises affecting lands, the ecclesiastical court hath no concurrent jurisdiction. And in case of a vested legacy, due immediately, and charged on land or money in the funds, which yield an immediate profit, interest shall be payable thereon from the testator's death; but if charged only on the personal estate, which cannot be immediately got in, it shall carry interest only from the end of the year after the death of the testator.

Donatio Causa Mortis.

Besides these formal legacies, contained in a man's will and testament, there is also permitted another death-bed disposition of property; which is called a donation *causa mortis*. And that is, when a person in his last sickness, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods (under which have been included bonds, and bills drawn by the deceased upon his banker), to keep in case of his decease. This gift, if the donor dies, needs not the assent of his executor: yet it shall not prevail against creditors; and is accompanied with this implied trust, that, if the donor lives, the property thereof shall revert to himself, being only given in contemplation of death, or *mortis causa*.

Residuum and Residuary Legatee.

7. When all the debts and particular legacies are discharged, the surplus, or residuum, must be paid to the residuary legatee, if any be appointed by the will; and if there be none, it was long a settled notion that it devolved to the executor's own use, by virtue of his executorship. But whatever ground there might have been formerly for this opinion, it seems now to be understood with this restriction: that although where the executor had no legacy at all the *residuum* shall in general be his own, yet wherever there is sufficient on the face of a will (by means of a competent legacy or

otherwise) to imply that the testator intended this executor should not have the residue, the undivided surplus of the estate shall go to the next of kin, the executor then standing upon the same footing as an administrator, concerning whom indeed there formerly was much debate, whether or no he could be compelled to make any distribution of the intestate's estate. But now these controversies are quite at an end; for by the statute 22 and 23 Car. II. c. 10, explained by 29 Car. II. c. 30, it is enacted, that the surplusage of intestates' estates (except of feme-coverts, which are left as at the common law) shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner: One-third shall go to the widow of the intestate, and the residue in equal proportions to his children; or if dead, to their representatives; that is, their lineal descendants: if there are no children or legal representatives subsisting, then a moiety shall go to the widow, and a moiety to the next of kindred in equal degree and their representatives: if no widow, the whole shall go to the children; if neither widow nor children, the whole shall be distributed among the next of kin in equal degree and their representatives; but no representatives are admitted, among collaterals, further than the children of the intestate's brothers and sisters. The next of kindred, here referred to, are to be investigated by the same rules of consanguinity as those who are entitled to letters of administration; of whom we have sufficiently spoken. And therefore by this statute the mother, as well as the father, succeeded to all the personal effects of their children, who died intestate, and without wife or issue; in exclusion of the other sons and daughters, the brothers and sisters of the deceased. And so the law still remains with respect to the father; but by statute 1 Jac., II. c. 17, if the father be dead, and any of the children die intestate, without wife or issue, in the lifetime of the mother, she and each of the remaining children or their representatives, shall divide his effects in equal portions.

Advancement.

So, likewise, there is another part of the statute of distribution, where directions are given that no child of the intestate (except his heir-at-law) on whom he settled in his lifetime any estate in lands, or pecuniary portion, equal to the distributive shares of the other children, shall have any part of the surplusage with their brothers and sisters; but, if the estates so given them, by way of advancement, are not quite equivalent to the other shares, the children so advanced shall now have so much as will make them equal. This just and equitable provision hath been also said to be derived from the *collatio bonorum* of the imperial law; which it certainly resembles in some points, though it differs widely in

others. But it may not be amiss to observe, that, with regard to goods and chattels, this is part of the ancient custom of London, of the province of York, and of our sister kingdom of Scotland: and with regard to land descending in coparcenary, that it hath always been and still is, the common law of England, under the name of *hoitchpot*.

Before I quit this subject, I must, however, acknowledge that the doctrine and limits of representation laid down in the statute of distributions seems to have been principally borrowed from the civil law: whereby it will sometimes happen that personal estates are divided *per capita* and sometimes *per stirpes*; whereas the common law knows no other rule of succession but that of *per stirpes* only. They are divided *per capita* to every man an equal share, when all the claimants claim in their own rights, as in an equal degree of kindred, and not *jure representationis*, in the right of another person. As, if the next of kin be the intestate's three brothers, A, B, and C; here his effects are divided into three equal portions, and distributed *per capita* one to each: but if one of these brothers, A, had been dead, leaving three children, and another, B, leaving two, then the distribution must have been *per stirpes*; viz., one-third to A's three children, another third to B's two children, and the remaining third to C, the surviving brother: yet if C had also been dead without issue, then A's and B's five children, being all in equal degree to the intestate, would take in their own rights *per capita*; viz., each of them one-fifth part.

THE END OF BOOK THE SECOND.

SYNOPSIS OF BOOK III.

<p>1. Mere act of the parties. 2. Mere operation of law.</p>		<p>1. Nature. 2. Distinctions</p>		<p>1. Public jurisdiction 2. Private jurisdiction.</p>		<p>1. Courts of common law and equity. 2. Ecclesiastical courts. 3. Courts military. 4. Courts maritime.</p>	
<p>1. Of courts</p>		<p>1. Ecclesiastical. 2. Military. 3. Maritime.</p>		<p>1. Rights of private parties 2. Absolute 3. Relative</p>		<p>1. Personal by 2. Disposition. 3. Damage.</p>	
<p>2. Of cognizance of wrongs in the courts</p>		<p>1. Remedies for injuries affecting 2. Rights of property 3. Rights of the crown.</p>		<p>1. Personal 2. Real by</p>		<p>1. Ouster 2. Trespass. 3. Nuisance. 4. Waste. 5. Subtraction. 6. Disturbance. of freeholds. of chattels real.</p>	
<p>3. Suits in courts wherein</p>		<p>4. Common law.</p>		<p>1. Original. 2. Process. 3. Pleading. 4. Demurrer and issue.</p>		<p>1. Record. 2. Inspection. 3. Witnesses. 4. Certificate. 5. Wager of battil. 6. Wager of law. 7. Jury.</p>	
<p>PRIVATE WRONGS. For which redress by</p>		<p>2. Pursuit of Remedies</p>		<p>1. By action at common law wherein of 2. Judgment. 3. Appeal. 4. Execution.</p>		<p>2. By proceedings in the courts of equity.</p>	

BOOK THE THIRD. OF PRIVATE WRONGS.

Chapter I.

OF THE REDRESS OF PRIVATE WRONGS BY THE MERE ACT OF THE PARTIES.

1-18.

Definitions and Divisions.

A wrong is a privation of right. Wrongs are divisible into two sorts or species: *private wrongs* and *public wrongs*. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries*: the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes* and *misdemeanors*. To investigate the first of these species of wrongs, with their legal remedies, will be our employment in the present book; and the other species will be reserved till the next or concluding one.

The more effectually to accomplish the redress of private injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws, by which rights are defined and wrongs prohibited. This remedy is therefore *principally* to be sought by application to these courts of justice; that is, by civil suit or action. For which reason our chief employment in this book will be to consider the redress of private wrongs by *suit* or *action* in courts. But as there are certain injuries of such a nature that some of them furnish and others require a more speedy remedy than can be had in the ordinary forms of justice, there is allowed in those cases an extrajudicial or eccentric kind of remedy; of which I shall first of all treat, before I consider the several remedies by suit: and, to that end, shall distribute the redress of private wrongs into three several species: first, that which is obtained by the *mere act* of the *parties* themselves; secondly, that which is effected by the *mere act* and operation of *law*; and, thirdly, that which arises from *suit* or *action* in courts, which consists in a conjunction of the other two, the act of the parties co-operating with the act of law.

And *first* of that redress of *private* injuries which is obtained by the *mere* act of the *parties*. This is of two sorts: first, that which arises from the act of the injured party only; and secondly, that which arises from the joint act of all the parties together: both of which I shall consider in their order.

Self-Defense.

Of the first sort, or that which arises from the sole act of the injured party, is: I. The *defense* of one's self, or the mutual and reciprocal defense of such as stand in the relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or *any* of these his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of the peace which happens is chargeable upon him only who began the affray. Self-defense therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society. In the English law particularly it is held an excuse for breaches of the peace, nay, even for homicide itself: but care must be taken that the resistance does not exceed the bounds of mere defense and prevention, for then the defender would himself become an aggressor.

Reprisal.

II. Recaption or *reprisal* is another species of remedy by the mere act of the party injured. This happens when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant; in which case the owner of the goods, and the husband, parent, or master, may lawfully claim and retake them wherever he happens to find them, so it be not in a riotous manner, or attended with a breach of the peace. The reason for this is obvious; since it may frequently happen that the owner may have this only opportunity of doing himself justice: his goods may be afterwards conveyed away or destroyed; and his wife, children, or servants concealed or carried out of his reach; if he had no speedier remedy than the ordinary process of law. But as the public peace is a superior consideration to any one man's private property; and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided that this natural right of recaption shall never be exerted where such exertion must occasion strife and bodily contention, or endanger the peace of society.

Entry.

III. As recaption is a remedy given to the party himself for an injury to his *personal* property, so, thirdly, a remedy of the

same kind for injuries to *real* property is by *entry* on lands and tenements when another person without any right has taken possession thereof. This depends in some measure on like reasons with the former; and like that, too, must be peaceable and without force.

Abatement of Nuisances.

IV. A fourth species of remedy by the mere act of the party injured is the *abatement* or removal of *nuisances*. At present I shall only observe, that whatsoever unlawfully annoys or doth damage to another is a nuisance; and such nuisance may be abated, that is, taken away or removed, by the party aggrieved thereby, so as he commits no riot in the doing of it. If a house or wall is erected so near to mine that it stops my ancient lights, which is a *private* nuisance, I may enter my neighbor's land and peaceably pull it down. Or if a new gate be erected across the public highway, which is a *common* nuisance, any of the king's subjects passing that way may cut it down and destroy it.

Distress.

V. A fifth case in which the law allows a man to be his own avenger, or to minister redress to himself, is that of *distraining* cattle or goods for the non-payment of rent, or other duties; or distraining another's cattle *damage-feasant*, that is, doing damage or trespassing upon his land. The former intended for the benefit of landlords, to prevent tenants from secreting or withdrawing their effects to his prejudice; the latter arising from the necessity of the thing itself, as it might otherwise be impossible at a future time to ascertain whose cattle they were that committed the trespass or damage.

As the law of distresses is a point of great use and consequence, I shall consider it with some minuteness:

For What Distress May be Taken.

1. And first it is necessary to premise that a distress, *districcio*, is the taking a personal chattel out of the possession of the wrong-doer into the custody of the party injured, to procure a satisfaction for the wrong committed. 1. The most usual injury for which a distress may be taken is that of non-payment of rent. We may lay it down as a universal principle, that a distress may be taken for any kind of rent in arrear; the detaining whereof beyond the day of payment is an injury to him that is entitled to receive it. 2. For neglecting to do suit at the lord's court, or other certain personal service, the lord may distrain of common right. 3. For ameracements in a court-leet a distress may be had of common right; but not for ameracements in a court-baron, without a special prescription to warrant it. 4. Another injury for which distresses

may be taken is where a man finds beasts of a stranger wandering in his grounds *damage-feasant*; that is, doing him hurt or damage by treading down his grass or the like; in which case the owner of the soil may distrain them till satisfaction be made him for the injury he has thereby sustained. 5. Lastly, for several duties and penalties inflicted by special acts of parliament (as for assessments made by commissioners of sewers, or for the relief of the poor), remedy by distress and sale is given.

What May be Distrained.

2. Secondly, as to the things which may be distrained, or taken in distress, we may lay it down as a general rule, that all chattels personal are liable to be distrained, unless particularly protected or exempted. And, 1. As everything which is distrained is presumed to be the property of the wrong-doer, it will follow that such things wherein no man can have an absolute and valuable property (as dogs, cats, rabbits, and all animals *ferae naturae*) cannot be distrained. 2. Whatever is in the personal use or occupation of any man is for the time privileged and protected from any distress; as an axe with which a man is cutting wood, or a horse while a man is riding him. But horses drawing a cart may (cart and all) be distrained for rent-arrere; and also if a horse, though a man be riding him, be taken *damage-feasant*, or trespassing in another's grounds, the horse (notwithstanding his rider) may be distrained and led away to the pound. 3. Valuable things in the way of trade shall not be liable to distress; as a horse standing in a smith-shop to be shod, or in a common inn; or cloth at a tailor's house; or corn sent to a mill or market. For all these are protected and privileged for the benefit of trade, and are supposed in common presumption not to belong to the owner of the house, but to his customers. But, generally speaking, whatever goods and chattels the landlord finds upon the premises, whether in fact they belong to the tenant or a stranger, are distrainable by him for rent: and the stranger has *his* remedy over by action on the case against the tenant, if by the tenant's default the chattels are distrained so that he cannot render them when called upon. With regard to a stranger's beasts which are found on the tenant's land, the following distinctions are, however, taken. If they are put in by consent of the owner of the beasts, they are distrainable immediately afterwards for rent-arrere by the landlord. So also if the stranger's cattle break the fences and commit a trespass by coming on the land, they are distrainable immediately by the lessor for the tenant's rent, as a punishment to the owner of the beasts for the wrong committed through his negligence. But if the lands were not sufficiently fenced so as to keep out cattle, the landlord cannot distrain them till they have been *levant and couchant* (le-

vantes et cubantes) on the land; that is, have been long enough there to have lain down and risen up to feed; which in general is held to be one night at least: and then the law presumes that the owner may have notice whether his cattle have strayed, and it is his own negligence not to have taken them away. Yet, if the lessor or his tenant were bound to repair the fences and did not, and thereby the cattle escaped into their grounds without the negligence or default of the owner; in this case, though the cattle may have been *levant* and *couchant*, yet they are not distrainable for rent till actual notice is given to the owner that they are there, and he neglects to remove them; for the law will not suffer the landlord to take advantage of his own or his tenant's wrong.

4. There are also other things privileged by the ancient common law; as a man's tools and utensils of his trade, the axe of a carpenter, the books of a scholar, and the like. So, beasts of the plow, *averia carucae*, and sheep, are privileged from distresses at common law; while dead goods, or other sort of beasts, which Bracton calls *catalla otiosa*, may be distrained. But as beasts of the plow may be taken in execution for debt, so they may be for distresses by statute, which partake of the nature of executions.

5. Nothing shall be distrained for rent, which may not be rendered again in as good plight as when it was distrained; for which reason milk, fruit, and the like cannot be distrained, a distress at common law being only in the nature of a pledge or security, to be restored in the same plight when the debt is paid. So, anciently, sheaves or shocks of corn could not be distrained, because some damage must needs accrue in their removal; but a cart loaded with corn might, as that could be safely restored. But now, by statute 2 W. and M. c. 5, corn in sheaves or cocks, or loose in the straw, or hay in barns or ricks, or otherwise, may be distrained, as well as other chattels.

6. Lastly, things fixed to the freehold may not be distrained; and caldrons, windows, doors and chimney-pieces; for they savour of the realty. For this reason also corn growing could not be distrained, till the statute 11 Geo. II. c. 19, empowered landlords to distrain corn, grass, or other products of the earth, and to cut and gather them when ripe.

The law of distresses is greatly altered within a few years last past. Formerly they were looked upon in no other light than as a mere pledge or security for payment of rent or other duties, or satisfaction for damage done. And so the law still continues with regard to distresses of beasts taken *damage-feasant*, and for other causes, not altered by act of parliament, over which the distrainor has no other power than to retain them till satisfaction is made. But, distresses for rent-arrere being found by the legislature to be the shortest and most effectual method of compelling the payment of such rent, many beneficial laws for this purpose have been made

in the present century, which have much altered the common law as laid down by our ancient writers.

In pointing out therefore the methods of distraining, I shall in general suppose the distress to be made for rent, and remark where necessary the differences between such distress and one taken for other causes.

How Distresses May be Taken.

In the first place then, all distresses must be made *by day*, unless in the case of *damage-feasant*; an exception being there allowed, lest the beasts should escape before they are taken. And, when a person intends to make a distress, he must by himself or his bailiff, enter on the demised premises; formerly during the continuance of the lease, but now, if the tenant holds over, the landlord may distrain within six months after the determination of the lease; provided his own title or interest, as well as the tenant's possession continue at the time of the distress. If the lessor does not find sufficient distress on the premises, formerly he could resort nowhere else; and therefore tenants who were knavish made a practice to convey away their goods and stocks fraudulently from the house or lands demised, in order to cheat their landlords. But now the landlord may distrain any goods of his tenant carried off the premises clandestinely, wherever he finds them within thirty days after, unless they have been *bona fide* sold for a valuable consideration; and all persons privy to or assisting in such fraudulent conveyance forfeit double the amount to the landlord. The landlord may also distrain the beasts of his tenant feeding upon any commons or wastes appendant or appurtenant to the demised premises. The landlord might not formerly break open a house to make a distress; for that is a breach of the peace. But when he was in the house, it was held that he might break open an inner door; and now he may, by assistance of the peace-officers of the parish, break open in the day time any place whither the goods have been fraudulently removed and locked up to prevent a distress; oath being first made, in case it be a dwelling house, of a reasonable ground to suspect that such goods are concealed therein.

Where a man is entitled to distrain for an entire duty, he ought to distrain for the whole at once, and not for part at one time and part at another. But if he distrains for the whole, and there is not sufficient on the premises, or he happens to mistake in the value of the thing distrained, and so takes an insufficient distress, he may take a second distress to complete his remedy.

Distresses must be proportioned to the thing distrained for. By the statute of Marlbridge, 52 Hen. III. c. 4, if any man takes a great or unreasonable distress for rent-arriere, he shall be heavily amerced for the same.

How Disposed of.

When the distress is thus taken, the next consideration is the disposal of it. For which purpose the things distrained must in the first place be carried to some pound, and there impounded by the taker. But in their way thither they may be *rescued* by the owner, in case the distress was taken without cause or contrary to law: as if no rent be due, if they were taken upon the highway, or the like; in these cases the tenant may lawfully make rescue. But if they be once impounded, even though taken without any cause, the owner may not break the pound and take them out; for they are then in the custody of the law.

Pound.

A pound (*parcus*, which signifies any enclosure) is either pound-*overt*, that is, open overhead; or pound-*covert*, that is, close. By the statute 1 and 2 P. and M. c. 12, no distress of cattle can be driven out of the hundred where it is taken, unless to a pound-overt within the same shire and within three miles of the place where it was taken. This is for the benefit of the tenants, that they may know where to find and replevy the distress. And by statute 11 Geo. II. c. 19, which was made for the benefit of landlords, any person distraining for rent may turn any part of the premises upon which a distress is taken into a pound, *pro hac vice*, for securing of such distress. If a live distress of animals be impounded in a *common* pound-overt, the owner must take notice of it at his peril: but if in any *special* pound-overt, so constituted for this particular purpose, the distrainer must give notice to the owner: and in both these cases the owner, and not the distrainer, is bound to provide the beasts with food and necessaries. But if they are put in a pound-covert, as in a stable, or the like, the landlord or distrainer must feed and sustain them. A distress of household goods, or other dead chattels, which are liable to be stolen or damaged by weather, ought to be impounded in a pound-covert; else the distrainer must answer for the consequences.

When impounded, the goods were formerly, as was before observed, only in the nature of a pledge or security to compel the performance of satisfaction, and upon this account it hath been held that the distrainer is not at liberty to work or use a distrained beast. And thus the law still continues with regard to beasts taken damage-feasant, and distresses for suit or services; which must remain impounded till the owner makes satisfaction, or contests the right of distraining by replevyng the chattels. To *replevy* (*replegiare*, that is, to take back the pledge) is when a person distrained upon applies to the sheriff or his officers, and has the distress returned into his own possession, upon giving good security to try the right of taking it in a suit at law, and, if that be determined

against him, to return the cattle or goods once more into the hands of the distrainor. This is called a replevin, of which more will be said hereafter. At present I shall only observe that, as a distress is at common law only in nature of a security for the rent or damages done, a replevin answers the same end to the distrainor as the distress itself; since the party replevying gives security to return the distress if the right be determined against him.

This kind of distress, though it puts the owner to inconvenience, and is therefore a punishment to *him*, yet if he continues obstinate and will make no satisfaction or payment, it is no remedy at all to the distrainor. But for a debt due to the crown, unless paid within forty days, the distress was always salable at the common law. And for an amercement imposed at a court-leet, the lord may also sell the distress: partly because, being the king's court of record, its process partakes of the royal prerogative; but principally because it is in the nature of an execution to levy a legal debt. And so, in the several statute-distresses before mentioned, which are also in the nature of executions, the power of sale is likewise usually given, to effectuate and complete the remedy. And in like manner by several acts of parliament, in all cases of distress for rent, if the tenant or owner does not, within five days after the distress is taken, and notice of the case thereof given him, replevy the same with sufficient security, the distrainor, with the sheriff or constable, shall cause the same to be appraised by two sworn appraisers, and sell the same towards satisfaction of the rent and charges; rendering the overplus, if any, to the owner himself. And by this means a full and entire satisfaction may now be for rent in arriere by the mere act of the party himself, viz., by distress, the remedy given at common law; and sale consequent thereon, which is added by act of parliament.

Before I quit this article, I must observe, that the many particulars which attend the taking of a distress used formerly to make it a hazardous kind of proceedings: for if any one irregularity was committed it vitiated the whole and made the distrainors trespassers *ab initio*. But now, by the statute 11 Geo. II. c. 19, it is provided, that for any unlawful act done the whole shall not be unlawful, or the parties trespassers *ab initio*: but that the party grieved shall only have an action for the real damage sustained, and not even that if tender of amends is made before any action is brought.

Seizing of Heriots.

VI. The seizing of heriots, when due on the death of a tenant, is also another species of self-remedy, not much unlike that of taking cattle or goods in distress. The like speedy and effectual remedy of seizing is given with regard to many things that are said to lie in franchise; as waifs, wrecks, strays, deodands, and the

like; all of which the person entitled thereto may seize without the formal process of a suit or action.

I shall next briefly mention such as arise from the *joint act of all the parties* together. And these are only two, *accord* and *arbitration*.

Accord.

I. Accord is a satisfaction agreed upon between the party injuring and the party injured; which, when performed, is a bar of all actions upon this account. As if a man contract to build a house or deliver a horse, and fail in it; this is an injury for which the sufferer may have his remedy by action; but if the party injured accept a sum of money or other thing as a satisfaction, this is a redress of that injury, and entirely takes away the action. By several late statutes, even *tender* of sufficient amends to the party injured is a bar of all actions, whether he thinks proper to accept such amends or no.

Arbitration.

II. Arbitration is where the parties, injuring and injured, submit all matters in dispute, concerning any personal chattels or personal wrong, to the judgment of two or more *arbitrators*, who are to decide the controversy; and if they do not agree, it is usual to add, that another person be called in as *umpire* (*imperator* or *impar*), to whose sole judgment it is then referred: or frequently there is only one arbitrator originally appointed. This decision, in any of these cases, is called an *award*. And thereby the question is as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties or the judgment of a court of justice. But the right of real property cannot thus pass by a mere award: which subtilty in point of form had its rise from feudal principles; for if this had been permitted the land might have been aliened collusively without the consent of the superior. Yet doubtless an arbitrator may now award a conveyance or a release of land; and it will be a breach of the arbitration-bond to refuse compliance. For though originally the submission to arbitration used to be by word, or by deed, yet, both of these being revocable in their nature, it is now become the practice to enter into mutual bonds with condition to stand to the award or arbitration of the arbitrators or umpire therein named. And experience having shown the great use of these peaceable and domestic tribunals, especially in settling matters of account, and other mercantile transactions, which are difficult and almost impossible to be adjusted on a trial at law, the legislature has now established the use of them as well in controversies where causes are depending, as in those where no action is brought: enacting, by statute 9 and 10 W. III. c. 15, that all merchants and others who desire

to end any controversy, suit, or quarrel (for which there is no other remedy but by personal action or suit in equity), may agree that their submission of the suit to arbitration or umpirage shall be made a rule of any of the king's courts of record, and may insert such agreement in their submission or promise, or condition of the arbitration-bond: which agreement being proved upon oath by one of the witnesses thereto, the court shall make a rule that such submission and award shall be conclusive: and after such rule made, the parties disobeying the award shall be liable to be punished as for a contempt of the court; unless such award shall be set aside for corruption or other misbehavior in the arbitrators or umpire, proved on oath to the court within one term after the award is made. And, in consequence of this statute, it is now become a considerable part of the business of the superior courts to set aside such awards when partially or illegally made; or to enforce their execution, when legal, by the same process of contempt as is awarded for disobedience to those rules and orders which are issued by the courts themselves.

Chapter II.

OF REDRESS BY THE MERE OPERATION OF LAW.

18-22.

The remedies for private wrongs which are effected by the mere operation of the law will fall within a very narrow compass; there being only two instances of this sort that at present occur to my recollection: the one that of *retainer*, where a creditor is made executor or administrator to his debtor; the other in the case of what the law calls a *remitter*.

Retainer.

I. If a person indebted to another makes his creditor or debtee his executor, or if such a creditor obtains letters of administration to his debtor; in these cases the law gives him a remedy for his debt by allowing him to *retain* so much as will pay himself, before any other creditors whose debts are of equal degree. This is a remedy by the mere act of law, and grounded upon this reason: that the executor cannot, without an apparent absurdity, commence a suit against himself, as a representative of the deceased, to recover that which is due to him in his own private capacity: but, having the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose. Else, by being made executor he would be put in a worse condition than all the rest of the world besides. For though a ratable payment of all the debts of the deceased, in equal degree, is clearly the most equitable method, yet, as every

scheme for a proportionate distribution of the assets among all the creditors hath been hitherto found to be impracticable, and productive of more mischiefs than it would remedy, so that the creditor who first commences his suit is entitled to a preference in payment; it follows that, as the executor can commence no suit, he must be paid the last of any, and of course must lose his debt, in case the estate of his testator should prove insolvent, unless he be allowed to retain it. The doctrine of *retainer* is therefore the necessary consequence of that other doctrine of the law, the priority of such creditor who first commences his action. But the executor shall not retain his own debt, in prejudice to those of a higher degree; for the law only puts him in the same situation as if he had sued himself as executor and recovered his debt; which he never could be supposed to have done while debts of a higher nature subsisted. Neither shall one executor be allowed to retain his own debt in prejudice to that of his co-executor in equal degree; but both shall be discharged in proportion. Nor shall an executor of his own wrong be in any case permitted to retain.

Remitter.

II. Remitter is where he who hath the true property or *jus proprietatis* in lands, but is out of possession thereof, and hath no right to enter without recovering possession in an action, hath afterwards the freehold cast upon him by some subsequent, and of course defective title; in this case he is remitted, or sent back by operation of law, to his ancient and more certain title. The right of entry, which he hath gained by a bad title, shall be *ipso facto* annexed to his own inherent good one: and his defeasible estate shall be utterly defeated and annulled, by the instantaneous act of law, without his participation or consent.

Chapter III.

OF COURTS IN GENERAL.

22-30.

Courts—Their Nature.

A court is defined to be a place wherein justice is judicially administered. All courts of justice, which are the medium by which the king administers the laws, are derived from the power of the crown. In all these courts the king is supposed in contemplation of law to be always present; but as that is in fact impossible, he is there represented by his judge, whose power is only an emanation of the royal prerogative.

For the more speedy, universal, and impartial administration of justice between subject and subject, the law hath appointed a prodigious variety of courts, some with a more limited, others with

a more extensive jurisdiction. I shall therefore here only mention one distinction, that runs throughout them all; viz., that some of them are courts *of record*, others *not of record*. A court of record is that where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony: which rolls are called the records of the court, and are of such high and supereminent authority that their truth is not to be called in question. For it is a settled rule and maxim that nothing shall be averred against a record, nor shall any plea, or even proof, be admitted to the contrary. And if the existence of a record be denied, it shall be tried by nothing but itself; that is, upon bare inspection whether there be any such record or no; else there would be no end of disputes. But if there appear any mistake of the clerk in making up such record, the court will direct him to amend it. All courts of record are the king's courts, in right of his crown and royal dignity, and therefore no other court hath authority to fine or imprison; so that the very erection of a new jurisdiction with the power of fine or imprisonment makes it instantly a court of record. A court not of record is the court of a private man; whom the law will not intrust with any discretionary power over the fortune or liberty of his fellow subjects. Such are the courts-baron incident to every manor, and other inferior jurisdictions; where the proceedings are not enrolled or recorded; but as well their existence as the truth of the matters therein contained shall, if disputed, be tried and determined by a jury. These courts can hold no plea of matters cognizable by the common law, unless under the value of 40s., nor of any forcible injury whatsoever, not having any process to arrest the person of the defendant.

Three Constituents.

In every court there must be at least three constituent parts, the *actor*, *reus*, and *judex*, the actor or plaintiff, who complains of an injury done; the *reus*, or defendant who is called upon to make satisfaction for it; and the *judex*, or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and if any injury appears to have been done, to ascertain, and by its officers to apply the remedy. It is also usual in the superior courts to have attorneys, and advocates or counsel as assistants.

An attorney at law answers to the *procurator*, or proctor, of the civilians and canonists. And he is one who is put in the place, stead, or *turn* of another, to manage his matters of law. Formerly every suitor was obliged to appear in person, to prosecute or defend his suit (according to the old Gothic constitution), unless by special license under the king's letters-patent. This is still the law in criminal cases. And an idiot cannot to this day appear by at-

torney, but in person; for he hath not discretion to enable him to appoint a proper substitute: and upon his being brought before the court in so defenseless a condition, the judges are bound to take care of his interests, and they shall admit the best plea in his behalf that any one present can suggest. But, it is now permitted in general, by divers ancient statutes, that attorneys may be made to prosecute or defend any action in the absence of the parties to the suit. These attorneys are now formed into a regular corps: they are admitted to the execution of their office by the superior courts of Westminster hall, and are in all points officers of the respective courts in which they are admitted; and, as they have many privileges on account of their attendance there, so they are peculiarly subject to the censure and animadversion of the judges. No man can practice as an attorney in any of those courts, but such as is admitted and sworn an attorney of that particular court: an attorney of the court of king's bench cannot practice in the court of common pleas; nor *vice versa*. To practice in the court of chancery it is also necessary to be admitted a solicitor therein. So early as the statute 4 Hen. IV. c. 18, it was enacted, that attorneys should be examined by the judges, and none admitted but such as were virtuous, learned, and sworn to do their duty. And many subsequent statutes have laid them under further regulations.

Of advocates, or (as we generally call them) counsel, there are two species or degrees; barristers, and serjeants. The former are admitted after a considerable period of study, or at least standing, in the inns of court; and are in our old books styled apprentices, *apprenticii ad legem*, being looked upon as merely learners, and not qualified to execute the full office of an advocate till they were sixteen years standing; at which time, according to Fortesque, they might be called to the state and degree of serjeants. I shall only observe, that serjeants at law are bound by a solemn oath to do their duty to their clients; and that by custom the judges of the courts of Westminster are always admitted into this venerable order before they are advanced to the bench.

From both these degrees some are usually selected to be his majesty's counsel, the two principal being his attorney and solicitor-general. All serjeants and barristers, except in the Court of Common Pleas where only serjeants are admitted, may take up the defense of suitors, called clients. These practiced *gratis*; and so it was established that a counsel can maintain no action for his fees. To encourage freedom of speech in the lawful defense of their clients, it was held that a counsel is not answerable for any matter by him spoken relative to the cause, even if groundless, if suggested in his client's instructions; but if the untruth is his own invention, or if upon suggestion but not pertinent to the cause in hand, he is liable to an action from the party injured. Counsel guilty of deceit or collusion are punishable by statute.

Chapter IV.
OF THE PUBLIC COURTS OF COMMON LAW AND
EQUITY.

30-61.

Kinds of Courts.

We are next to consider the several species and distinctions of courts of justice which are acknowledged and used in the kingdom. And these are, either such as are of public and general jurisdiction throughout the whole realm, or such as are only of a private and special jurisdiction in some particular parts of it. Of the former there are four sorts: the universally established courts of common law and equity; the ecclesiastical courts; the courts military; and courts maritime. And, first, of such public courts as are courts of common law and equity.

Courts of Common Law and Equity.

The policy of our ancient constitution, as regulated and established by the great Alfred, was to bring justice home to every man's door, by constituting as many courts of judicature as there are manors and townships in the kingdom, wherein injuries were redressed in an easy and expeditious manner by the suffrage of neighbors and friends. These little courts, however, communicated with others of a larger jurisdiction, and those with others of a still greater power; ascending gradually from the lowest to the supreme courts, which were respectively constituted to correct the errors of the inferior ones, and to determine such causes as by reason of their weight and difficulty demanded a more solemn discussion.

Court of Piepoudre, Curia Pedis Pulverizati.

I. The lowest, and at the same time the most expeditious, court of justice known to the law of England, is the court of *piepoudre, curia pedis pulverizati*; so called from the dusty feet of the suitors; or, according to Sir Edward Coke, because justice is there done as speedily as dust can fall from the foot; it being derived, according to him, from *pied pudreaux* (a peddler, in old French), and therefore signifying the court of such petty chapmen as resort to fairs or markets. It is a court of record, incident to every fair and market, of which the steward of him who owns or has the toll of the market is the judge; and its jurisdiction extends to administer justice for all commercial injuries done in that very fair or market, and not in any preceding one. So that the injury must be done, complained of, heard and determined within the compass of one and the same day, unless the fair continues longer. The court has cognizance of all matters of contract that can possibly arise within the precinct of that fair or market; and the

plaintiff must make oath that the cause of action arose there. From this court a writ of error lies, in the nature of an appeal, to the courts of Westminster.

The Court-Baron.

II. The *court-baron* is a court incident to every manor in the kingdom, to be holden by the steward within the said manor. This court-baron is of two natures: the one is a customary court, of which we formerly spoke, appertaining entirely to the copyholders, in which their estates are transferred by surrender and admittance and other matters transacted relative to their tenures only. The other, of which we now speak, is a court of common law, and it is the court of the barons, by which name the freeholders were sometimes anciently called: for that it is held before the freeholders who owe suit and service to the manor, the steward being rather the registrar than the judge. These courts, though in their nature distinct, are frequently confounded together. The court we are now considering, viz., the freeholders' court, was composed of the lord's tenants, who were the *pares* of each other, and were bound by their feudal tenure to assist their lord in the dispensation of domestic justice. This was formerly held every three weeks; and its most important business is to determine, by writ of right, all controversies relating to the right of lands within the manor. It may also hold plea of any personal actions of debt, trespass on the case, or the like, where the debt or damages do not amount to forty shillings. But the proceedings on a writ of right may be removed into the county-court by a precept from the sheriff called a *tolt*. And the proceedings in all other actions may be removed into the superior courts. After judgment given, a writ also of *false judgment* lies to the courts at Westminster to rehear and review the cause, and not a writ of *error*; for this is not a court of record: and therefore, in some of these writs of removal, the first direction given is to cause the plaint to be recorded.

Hundred-Court.

III. A hundred-court is only a larger court-baron, being held for all the inhabitants of a particular hundred instead of a manor. The free suitors are here also the judges, and the steward the registrar, as in the case of a court-baron. It is likewise no court of record; resembling the former in all points, except that in point of territory it is of greater jurisdiction. But this court is fallen into equal disuse with regard to the trial of actions.

County-Court.

IV. The county-court is a court incident to the jurisdiction of the sheriff. It is not a court of record, but may hold pleas of debt or damages under the value of forty shillings. And, in modern times, as proceedings are removable into the king's su-

perior courts, by writ of *pone* or *recordare*, in the same manner as from hundred-courts and courts-baron; and as the same writ of false judgment may be had, in nature of a writ of error; this has occasioned the same disuse of bringing actions therein.

Court of Common Pleas.

V. The court of *common pleas* is frequently called in law the court of *common bench*.

By the ancient Saxon constitution, there was only one superior court of justice in the kingdom; and that court had cognizance both of civil and spiritual causes: viz., the *wittenagemote*, or general council, which assembled annually or oftener, wherever the king kept his Christmas, Easter, or Whitsuntide, as well to do private justice as to consult upon public business. At the conquest the ecclesiastical jurisdiction was diverted into another channel and the Conqueror, fearing danger from these annual parliaments, contrived also to separate their ministerial power, as judges, from their deliberative, as counsellors to the crown. He therefore established a constant court in his own hall. This court was composed of the king's great officers of state resident in his palace, and usually attendant on his person; such as the lord high constable and lord mareschal, who chiefly presided in matters of honour and of arms; determining according to the law military and the law of nations. Besides these, there were the lord high steward, and lord great chamberlain; the steward of the household; the lord chancellor, whose peculiar business it was to keep the king's seal, and examine all such writs, grants and letters as were to pass under that authority; and the lord high treasurer, who was the principal adviser in all matters relating to the revenue. These high officers were assisted by certain persons learned in the laws, who were called the king's justiciars or justices, and by the greater barons of parliament, all of whom had a seat in the *aula regia*, and formed a kind of court of appeal, or rather of advice, in matters of great moment and difficulty. All these in their several departments transacted all secular business both criminal and civil, and likewise the matters of the revenue; and over all presided one special magistrate, called the chief justiciar, or *capitalis justiciarius totius Angliæ*; who was also the principal minister of state, the second man in the kingdom, and by virtue of his office guardian of the realm in the king's absence. And this officer it was who principally determined all the vast variety of causes that arose in this extensive jurisdiction, and from the plentitude of his power grew at length both obnoxious to the people, and dangerous to the government which employed him.

This great universal court being bound to follow the king's household in all his progresses and expeditions, the trial of com-

mon causes therein was found very burdensome to the subject. Wherefore, King John, who dreaded also the power of the justiciar, very readily consented to that article which now forms the eleventh chapter of *magna charta*, and enacts, that "*communicata placita non sequantur curiam regis, sed teneantur in aliquo loco certo.*" This certain place was established in Westminster hall, the place where the *aula regis* originally sat, when the king resided in that city; and there it hath ever since continued. And the court being thus rendered fixed and stationary, the judges became so, too, and a chief with other justices of the common pleas was thereupon appointed; with jurisdiction to hear and determine all pleas of land, and injuries merely civil, between subject and subject. Which critical establishment of this principal court of common law, at that particular juncture and that particular place, gave rise to the inns of court in its neighborhood; and thereby collecting together the whole body of the common lawyers, enabled the law itself to withstand the attacks of the canonists and civilians, who laboured to extirpate and destroy it.

The *aura regia* being thus stripped of so considerable a branch of its jurisdiction and the power of the chief justiciar being also considerably curbed by many articles in the great charter, the authority of both began to decline apace under the long and troublesome reign of King Henry III. And in further pursuance of this example, the other several officers of the chief justiciar were, under Edward the First (who new modelled the whole frame of our judicial polity), subdivided and broken into distinct courts of judicature. A court of chivalry was erected, over which the constable and mareschal presided; as did the steward of the household over another, constituted to regulate the king's domestic servants. The high steward, with the barons of parliament, formed an august tribunal for the trial of delinquent peers: and the barons reserved to themselves in parliament the right of reviewing the sentences of other courts in the last resort. The distribution of common justice between man and man was thrown into so provident an order, that the great judicial officers were made to form a check upon each other: the court of chancery issuing all original writs under the great seal to the other courts; the common pleas being allowed to determine all causes between private subjects; the exchequer managing the king's revenue; and the court of king's bench retaining all the jurisdiction which was not cantoned out to other courts, and particularly the superintendence of all the rest by way of appeal; and the sole cognizance of pleas of the crown or criminal causes. For pleas or suits are regularly divided into two sorts: *pleas of the crown*, which comprehend all crimes and misdemeanors, wherein the king (on be-

half of the public) is the plaintiff; and *common pleas*, which include all civil actions depending between subject and subject. The former of these were the proper object of the jurisdiction of the court of king's bench; the latter of the court of common pleas, which is a court of record, and is styled by Sir Edward Coke the lock and key of the common law; for herein only can real actions, that is, actions which concern the right of freehold or the realty, be originally brought: and all other, or personal, pleas between man and man, are likewise here determined; though in some of *them* the king's bench has also a concurrent authority.

The judges of this court are at present four in number, one chief and three *puisne* justices, created by the king's letters-patent, who sit every day in the four terms to hear and determine all matters of law arising in civil causes, whether real, personal, or mixed and compounded of both. These it takes cognizance of, as well originally as upon removal from the inferior courts before mentioned. But a writ of error, in the nature of an appeal, lies from this court into the court of king's bench.

Court of King's Bench.

VI. The court of king's bench (so called because the king used formerly to sit there in person) is the supreme court of common law in the kingdom; consisting of a chief justice and three *puisne* justices, who are by their office the sovereign conservators of the peace and supreme coroners of the land. Yet, though the king himself used to sit in this court, and still is supposed so to do, he did not, neither by law is he empowered to, determine any cause or motion, but by the mouth of his judges, to whom he hath committed his whole judicial authority.

This court, which (as we have said) is the remnant of the *aula regia*, is not, nor can be, from the very nature and constitution of it, fixed to any certain place, but may follow the king's person wherever he goes: for which reason all process issuing out of this court in the king's name is returnable "*ubicunque fuerimus in Anglia.*" It hath, indeed, for some centuries past, usually sat at Westminster, being an ancient palace of the crown, but might remove with the king to York or Exeter, if he thought proper to command it.

The jurisdiction of this court is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below. It superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires in every case where there is no other specific remedy. It protects the liberty of the subject, by speedy and summary interposition. It takes cognizance both of criminal and civil causes: the former in what is called the crown

side, or crown office; the latter in the pleas side of the court. The jurisdiction of the crown side is not our present business to consider: that will be more properly discussed in the ensuing book. But on the plea side, or civil branch, it hath an original jurisdiction and cognizance of all actions of trespass or other injury alleged to be committed *vi et armis*; of actions for forgery of deeds; maintenance, conspiracy, deceit, and actions on the case which allege any falsity or fraud; all of which savour of a criminal nature, although the action is brought for a civil remedy; and make the defendant liable in strictness to pay a fine to the king, as well as damages to the injured party. The same doctrine is also now extended to all actions on the case whatsoever: but no action of debt or detinue, or other mere civil action, can by the *common law* be prosecuted by any subject in this court by *original* writ out of chancery; though an action of debt given by *statute* may be brought in the king's bench as well as in the common pleas. And yet this court might always have held plea of any civil action (other than actions real), provided the defendant was an officer of the court; or in the custody of the marshal, or prison-keeper, of this court, for a breach of the peace or any other offense. And in process of time, it began by a fiction to hold plea of all personal actions whatsoever, and has continued to do so for ages: it being surmised that the defendant is arrested for a supposed trespass which he never has in reality committed; and being thus in the custody of the marshal of the court, the plaintiff is at liberty to proceed against him for any other personal injury; which surmise, of being in the marshal's custody, the defendant is not at liberty to dispute. And these fictions of law, though at first they may startle the student, he will find upon further consideration to be highly beneficial and useful; especially as this maxim is ever invariably observed, that no fiction shall extend to work an injury; its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law. So true it is that *in fictione juris semper subsistit aequitas*. In the present case it gives the suitor his choice of more than one tribunal before which he may institute his action; and prevents the circuitry and delay of justice, by allowing that suit to be originally, and in the first instance, commenced in that court, which after a determination in another, might ultimately be brought before it on a writ of error.

For this court is likewise a court of appeal, into which may be removed by writ of error all determinations of the court of common pleas, and of all inferior courts of record in England; and to which a writ of error lies also from the court of king's bench in Ireland. Yet even this so high and honorable court is not the *dernier resort* of the subject; for, if he be not satisfied

with any determination here, he may remove it by writ of error into the house of lords, or the court of exchequer chamber, as the case may happen, according to the nature of the suit and the manner in which it has been prosecuted.

Court of Exchequer.

VII. The court of exchequer is inferior in rank not only to the court of king's bench, but to the common pleas also; but I have chosen to consider it in this order on account of its double capacity as a court of law and a court of equity also. It is a very ancient court of record, set up by William the Conqueror as a part of the *aula regia*, though regulated and reduced to its present order by King Edward I., and intended principally to order the revenues of the crown, and to recover the king's debts and duties. It is called the exchequer *saccharium*, from the checked cloth, resembling a chess board, which covers the table there, and on which, when certain of the king's accounts are made up, the sums are marked and scored with counters. It consists of two divisions; the receipt of the exchequer, which manages the royal revenue, and with which these commentaries have no concern; and the court or judicial part of it, which is again subdivided into a court of equity and a court of common law.

The court of equity is held in the exchequer chamber before the lord treasurer, the chancellor of the exchequer, the chief baron and three *puisne* ones. The primary and original business of this court is to call the king's debtors to account, by bill filed by the attorney-general; and to recover any lands, tenements, or hereditaments, any goods, chattels, or other profits or benefits belonging to the crown. So that by their original constitution the jurisdiction of the courts of common pleas, king's bench and exchequer was entirely separate and distinct: the common pleas being intended to decide all controversies between subject and subject; the king's bench to correct all crimes and misdemeanors that amount to a breach of the peace; the king being then plaintiff, as such offenses are in open derogation of the *jura regalia* of his crown; and the exchequer to adjust and recover his revenue, wherein the king also is plaintiff, as the withholding and non-payment thereof is an injury to his *jura fiscalia*. But, as by a fiction almost all sorts of civil actions are now allowed to be brought in the king's bench, in like manner by another fiction all kinds of personal suits may be prosecuted in the court of exchequer.

The writ upon which all proceedings here are grounded is called a *quo minus*; in which the plaintiff suggests that he is the king's farmer or debtor, and that the defendant hath done him the injury or damage complained of; *quo minus sufficiens existit*, by which he is less able to pay the king his debt or rent. But now by the suggestion of privilege, any person may be admitted to sue in

the exchequer as well as the king's accomptant. The surmise, of being debtor to the king, is therefore become matter of form and mere words of course, and the court is open to all the nation equally. The same holds with regard to the equity side of the court: for there any person may file a bill against another upon a bare suggestion that he is the king's accomptant; but whether he is so, or not, is never controverted.

An appeal from the equity side of this court lies immediately to the house of peers; but from the common law side, in pursuance of the statute 31 Edw. III. c. 12, a writ of error must be first brought into the court of exchequer chamber. And from the determination there had, there lies, in the *dernier resort*, writ of error to the house of lords.

High Court of Chancery.

VIII. The high court of chancery is the only remaining, and in matters of civil property by much the most important of any, of the king's superior and original courts of justice. It has its name of chancery, *cancellaria*, from the judge who presides here, the lord chancellor, or *cancellarius*; who Sir Edward Coke tells us, is so termed a *cancellando*, from cancelling the king's letters-patent when granted contrary to law, which is the highest point of his jurisdiction. To him belongs the appointment of all justices of the peace throughout the kingdom. Being formerly usually an ecclesiastic (for none else were then capable of an office so conversant in writings), and presiding over the royal chapel, he became keeper of the king's conscience; visitor, in right of the king, of all hospitals and colleges of the king's foundation; and patron of all the king's livings under the value of twenty marks *per annum* in the king's books. He is the general guardian of all infants, idiots, and lunatics; and has the general superintendence of all charitable uses in the kingdom. And all this over and above the vast and extensive jurisdiction which he exercises in his *judicial* capacity in the court of chancery: wherein, as in the exchequer, there are two distinct tribunals: the one ordinary, being a court of common law; the other extraordinary, being a court of equity.

The ordinary legal court is much more ancient than the court of equity. Its jurisdiction is to hold plea upon a *scire facias* to repeal and cancel the king's letters-patent, when made against law or upon untrue suggestions; and to hold plea of petitions *monstrans de droit*, traverses of offices, and the like; when the king hath been advised to do any act, or is put in possession of any lands or goods in prejudice of a subject's right. On proof of which, as the king can never be supposed intentionally to do any wrong, the law questions not but he will immediately redress the injury, and refers that conscientious task to the chancellor, the

keeper of his conscience. It also appertains to this court to hold plea of all personal actions, where any officer or minister of the court is a party. It might likewise hold plea (by *scire facias*) of partitions of lands in coparcenary, and of dower, where any ward of the crown was concerned in interest so long as the military tenures subsisted: as it now may also do of the tithes of forest land, where granted by the king, and claimed by a stranger against the grantee of the crown; and of executions on statutes, or recognizances in nature thereof, by the statute 23 Henry VIII. c. 6. But if any cause comes to issue in this court, that is if any fact be disputed between the parties, the chancellor cannot try it, having no power to summon a jury; but must deliver the record *propria manu* into the court of king's bench, where it shall be tried by the country, and judgment shall be there given thereon. And when judgment is given in chancery upon demurrer or the like, a writ of error in nature of an appeal lies out of this ordinary court into the court of king's bench: though so little is usually done on the common-law side of the court, that I have met with no traces of any writ of error being actually brought, since the fourteenth year of Queen Elizabeth, A. D. 1572.

In this ordinary or legal court is also kept the *officina justitiae*: out of which all original writs that pass under the great seal, all commissions of charitable uses, sewers, bankruptcy, idiocy, lunacy, and the like, do issue; and for which it is always open to the subject, who may there at any time demand and have, *ex debito justitiae*, any writ that his occasions may call for.

But the extraordinary court, or court of equity, is now become the court of the greatest judicial consequence. This distinction between law and equity, as administered in different courts, is not at present known, nor seems to have ever been known, in any other country at any time; and yet the difference of one from the other, when administered by the same tribunal, was perfectly familiar to the Romans; *jus praetorium*, or discretion of the praetor, being distinct from the *leges* or standing laws, but the power of both centered in one and the same magistrate, who was equally entrusted to pronounce the rule of law, and to apply it to particular cases by the principles of equity. With us, too, the *aula regia*, which was the supreme court of judicature, undoubtedly administered equal justice according to the rules of both or either, as the case might chance to require; and when that was broken to pieces, the idea of a court of equity, as distinguished from a court of law, did not subsist in the original plan of partition. It seems therefore probable, that when the courts of law, proceeding merely upon the ground of the king's original writs, and confining themselves strictly to that bottom, gave a harsh or imperfect judgment, the application for redress used to be to the king in person assisted

by his privy-council, and they were wont to refer the matter either to the chancellor and a select committee, or by degrees to the chancellor only, who mitigated the severity or supplied the defects of the judgments pronounced in the courts of law, upon weighing the circumstances of the case. This was the custom not only among our Saxon ancestors, before the institution of the *aula regia*, but also after its dissolution, in the reign of King Edward I.; and perhaps during its continuance, in that of Henry II.

In these early times the chief judicial employment of the chancellor must have been in devising new writs, directed to the courts of common law, to give remedy in cases where none was before administered. And to quicken the diligence of the clerks in the chancery, who were too much attached to ancient precedents, it is provided by statute Westm. 2, 13 Edw. I. c. 24, that "whensoever from thenceforth in one case a writ shall be found in the chancery, and in a like case falling under the same right and requiring like remedy, no precedent of a writ can be produced, the clerks in chancery shall agree in forming a new one; and, if they cannot agree, it shall be adjourned to the next parliament, where a writ shall be framed by consent of the learned in the law, lest it happen for the future that the court of our lord the king be deficient in doing justice to the suitors." And this accounts for the very great variety of writs of trespass on the case to be met with in the register, whereby the suitor had ready relief, according to the exigency of his business, and adapted to the specialty, reason, and equity of his very case.

But when about the end of the reign of King Edward III. uses of land were introduced, though totally discountenanced by courts of common law, were considered as fiduciary deposits and binding in conscience by the clergy, the separate jurisdiction of the chancery as a court of equity began to be established: and John Waltham, who was bishop of Salisbury and chancellor to King Richard II., by a strained interpretation of the above-mentioned statute of Westm. 2, devised the writ of *subpoena*, returnable in the court of chancery, only, to make the feoffee to uses accountable to his *cestui que use*; which process was afterwards extended to other matters wholly determinable at the common law, upon false and fictitious suggestions; for which therefore the chancellor himself is, by statute 17 Ric. II. c. 6, directed to give damages to the party unjustly aggrieved.

From this court of equity in chancery, as from the other superior courts, an appeal lies to the house of peers. But there are these differences between appeals from a court of equity, and writs of error from a court of law: 1. That the former may be brought upon any interlocutory matter: the latter upon nothing but only a definite judgment. 2. That on writs of error the house

of lords pronounces the judgment: on appeals it gives direction to the court below to rectify its own decree.

Court of Exchequer Chamber.

IX. The next court that I shall mention is one that hath no original jurisdiction, but is only a court of appeal, to correct the errors of other jurisdictions. This is the court of exchequer chamber; which was first erected by statute 31 Edw. III. c. 12, to determine causes on writs of error from the common-law side of the court of exchequer. And to that end it consists of the lord chancellor and lord treasurer, taking unto them the justices of the king's bench and common pleas.

From all the branches of this court of exchequer chamber a writ of error lies to

The House of Peers.

X. The house of peers is the supreme court of judicature in the kingdom, having at present no original jurisdiction over causes, but only upon appeals and writs of error, to rectify any injustice or mistake of the law committed by the courts below. To this authority this august tribunal succeeded of course upon the dissolution of the *aula regia*. They are in all causes the last resort, from whose judgment no further appeal is permitted; but every subordinate tribunal must conform to their determinations.

Courts of Assize and Nisi Prius.

XI. Before I conclude this chapter, I must also mention an eleventh species of courts of general jurisdiction and use, which are derived out of, and act as collateral auxiliaries to, the foregoing. I mean the courts of assize and *nisi prius*.

These are composed of two or more commissioners, who are twice in every year sent by the king's special commission all around the kingdom (except London and Middlesex, where courts of *nisi prius* are holden in and after every term, before the chief or other judge of the several superior courts; and except the four northern counties, where the assizes are holden only once a year), to try by a jury of the respective counties the truth of such matters of fact as are then under dispute in the courts of Westminster hall.

The judges upon their circuits now sit by virtue of five several authorities: 1. The commission of the *peace*. 2. A commission of *oyer and terminer*. 3. A commission of general *gaol-delivery*. The consideration of all which belongs properly to the subsequent book of these commentaries. But the fourth commission is, 4. A commission of *assize*, directed to the justices and serjeants therein named, to take (together with their associates) assizes in the several counties,—that is, to take the verdict of a

peculiar species of jury, called an assize, and summoned for the trial of *landed* disputes of which hereafter. The other authority is, 5. That of *nisi prius*, which is a consequence of the commission of *assize*, being annexed to the office of those justices by the statute of Westm. 2, 13 Edw. I. c. 30, and it empowers them to try all questions of fact issuing out of the courts at Westminster that are then ripe for trial by jury. These, by the course of the courts, are usually appointed to be tried at Westminster in some Easter or Michaelmas Term, by a jury returned from the county wherein the cause of action arises; but with this proviso, *nisi prius*, *unless before* the day prefixed the judges of assize come into the county in question. This they are sure to do in the vacations preceding each Easter and Michaelmas Term, which saves much expense and trouble.

Chapter V. OF COURTS ECCLESIASTICAL, MILITARY, AND MARITIME.

61-71.

The chapter treats of courts ecclesiastical, military, and maritime.

Originally in England there was no distinction between lay and ecclesiastical jurisdiction. The separation took place shortly after the Norman conquest. King Henry the First restored the union, which again was broken upon his death. It was about this time that the contest began between the laws of England and those of Rome—the temporal courts adopting the former and the spiritual courts the latter.

Courts ecclesiastical.

The lowest to the highest.

- | | |
|----|-----------------------|
| 1. | Archdeacon's Court. |
| 2. | Consistory. |
| 3. | Court of Arches. |
| 4. | Court of Peculiars. |
| 5. | Prerogative Court. |
| 6. | Court of Delegates. |
| 7. | Commission of Review. |

As to courts military, the only court of this kind known to and established by the permanent laws of the land is the Court of Chivalry.

As to courts maritime, these were courts having jurisdiction in determining maritime injuries arising upon the seas, or in parts out of the reach of the Common Law. These are the court of admiralty and its courts of appeal.

Their proceedings, like that of the ecclesiastical courts, are according to the method of the Civil Law.

Chapter VI. OF COURTS OF SPECIAL JURISDICTION.

71-86.

The courts treated of in this chapter are the forest court, courts of regard, court of sweinmote, court of justice seat, commissioners of sewers, court of policies of insurance, court of marshalsea, palace court, courts of Wales, court of the duchy chamber of Lancaster, court of the counties pala-

tine of Chester, Lancaster, Durham, and the royal franchise of Ely, the stannary courts of Devonshire and Cornwall, courts of London and other cities and corporations held by prescription, charter or act of parliament, the chancellor's courts in the two universities.

Chapter VII.

OF THE COGNIZANCE OF PRIVATE WRONGS.

86-115.

We now proceed to the cognizance of private wrongs; that is, to consider in which of the vast variety of courts, mentioned in the three preceding chapters, every possible injury that can be offered to a man's person or property is certain of meeting with redress.

The common law of England is the one uniform rule to determine the jurisdiction of our courts: and, if any tribunals whatsoever attempt to exceed the limits so prescribed them, the king's courts of common law may and do prohibit them; and in some cases punish their judges.

The order in which I shall pursue this inquiry will be by showing: 1. What actions may be brought, or what injuries remedied, in the ecclesiastical courts. 2. What in the military. 3. What in the maritime. And, 4. What in the courts of common law.

Wrongs Cognizable by the Ecclesiastical Courts.

I. The wrongs or injuries cognizable by the ecclesiastical courts. I mean such as are offered to private persons or individuals; which are cognizable by the ecclesiastical court, not for reformation of the offender himself or party *injuring*, but for the sake of the party *injured*, to make him a satisfaction and redress for the damage which he has sustained. And these I shall reduce under three general heads: of causes *pecuniary*, causes *matrimonial*, and causes *testamentary*.

Pecuniary Causes.

1. Pecuniary causes, cognizable in the ecclesiastical courts, are such as arise either from the withholding ecclesiastical dues, or the doing or neglecting some act relating to the church, whereby some damage accrues to the plaintiff; towards obtaining a satisfaction for which he is permitted to institute a suit in the spiritual court.

The principal of these is the subtraction or withholding of *tithes* from the parson or vicar, whether the former be a clergyman or a lay appropriator.

Another pecuniary injury, cognizable in the spiritual courts, is the *non-payment* of other ecclesiastical *dues* to the clergy; as pensions, mortuaries compositions, offerings.

Under the head of pecuniary injuries may also be reduced the several matters of spoliation, dilapidations, and neglect of repairing the church and things thereunto belonging; for which a satisfaction may be sued for in the ecclesiastical court.

Matrimonial Causes.

2. Matrimonial causes, or injuries respecting the rights of marriage, are another and a much more undisturbed branch of the ecclesiastical jurisdiction. Though if we consider marriages in the light of mere civil contracts, they do not seem to be properly of spiritual cognizance.

Of matrimonial causes, one of the first and principal is, 1. *Causa jactitationis matrimonii*; when one of the parties boasts or gives out that he or she is married to the other, whereby a common reputation of their matrimony may ensue. On this ground the party injured may libel the other in the spiritual court; and, unless the defendant undertakes and makes out a proof of the actual marriage, he or she is enjoined perpetual silence upon that head; which is the only remedy the ecclesiastical court can give for this injury. 2. Another species of matrimonial causes was, when a party contracted to another brought a suit in the ecclesiastical court to compel a celebration of the marriage in pursuance of such contract. 3. The suit for *restoration of conjugal rights* is also another species of matrimonial causes; which is brought whenever either the husband or wife is guilty of the injury of subtraction, or lives separate from the other without any sufficient reason; in which case the ecclesiastical jurisdiction will compel them to come together again, if either party be weak enough to desire it, contrary to the inclination of the other. 4. *Divorces* also, of which, and their several distinctions, we treated at large in a former book, are causes thoroughly matrimonial, and cognizable by the ecclesiastical judge. If it becomes improper, through some supervenient cause arising *ex post facto*, that the parties should live together any longer; as through intolerable cruelty, adultery, a perpetual disease, and the like; this unfitness or inability for the marriage state may be looked upon as an injury to the suffering party; and for this the ecclesiastical law administers the remedy of separation, or a divorce *a mensa et thoro*. But if the cause existed previous to the marriage, and was such a one as rendered the marriage unlawful *ab initio*, as consanguinity, corporal imbecility, or the like; in this case the law looks upon the marriage to have been always null and void, being contracted *in fraudem legis*, and decrees not only a separation from bed and board, but a *vinculo matrimonii* itself. 5. The last species of matrimonial causes is a consequence drawn from one of the species of divorce, that a *mensa et thoro*; which is the suit for *alimony*, a

term which signifies maintenance, which suit the wife, in case of separation, may have against her husband, if he neglects or refuses to make her an allowance suitable to their station in life. This is an injury to the wife, and the court Christian will redress it by assigning her a competent maintenance, and compelling the husband by ecclesiastical censures to pay it. But no alimony will be assigned in case of a divorce for adultery on her part; for as that amounts to a forfeiture of her dower after his death, it is also a sufficient reason why she should not be a partaker of his estate when living.

Testamentary Causes.

3. Testamentary causes are the only remaining species belonging to the ecclesiastical jurisdiction. They were originally cognizable in the king's courts of common law, viz., the county-courts; and afterwards transferred to the jurisdiction of the church.

At what period of time the ecclesiastical jurisdiction of testaments and intestacies began in England, is not ascertained by any ancient writer.

This jurisdiction is principally exercised with us in the consistory courts of every diocesan bishop, and in the prerogative court of the metropolitan, originally; and in the arches court and court of delegates by way of appeal. It is divisible into three branches; the probate of wills, the granting of administrations, and the suing for legacies. The two former of which, when no opposition is made, are granted merely *ex officio et debito justitiæ*, and are then the object of what is called the *voluntary*, and not the *contentious* jurisdiction. But when a *caveat* is entered against proving the will or granting administration, and a suit thereupon follows to determine either the validity of the testament, or who hath a right to administer; this claim and obstruction by the adverse party are an injury to the party entitled, and as such are remedied by the sentence of the spiritual court, either by establishing the will or granting the administration. Subtraction, the withholding or detaining of legacies, is also still more apparently injurious, by depriving the legatees of that right with which the laws of the land and the will of the deceased have invested them: and therefore, as a consequential part of testamentary jurisdiction, the spiritual court administers redress herein, by compelling the executor to pay them. But in this last case the courts of equity exercise a concurrent jurisdiction with the ecclesiastical courts, as incident to some other species of relief prayed by the complainant; as to compel the executor to account for the testator's effects, or assent to the legacy, or the like.

Method of Proceeding.

It may not be improper to add a short word concerning the

method of proceeding in these tribunals, with regard to the redress of injuries.

The proceedings in the ecclesiastical courts are regulated according to the practice of the civil and canon laws; or rather according to a mixture of both, corrected and new modeled by their own particular usages and the interposition of the courts of *citation*, to call the party injuring before them. Then, by *libel*, common law. Their ordinary course of proceeding is: First, by *libellus*, a little book, or by articles drawn out in a formal *allegation*, to set forth the complainant's ground of complaint. To this succeeds the *defendant's answer* upon oath, when, if he denies or extenuates the charge, they proceed to *proofs* by witnesses examined, and their depositions taken down in writing, by an officer of the court. If the defendant has any circumstances to offer in his defense, he must also propound them in what is called his *defensive allegation*, to which he is entitled in his turn to the *plaintiff's answer* upon oath, and may from thence proceed to *proofs* as well as his antagonist. When all the pleadings and proofs are concluded, they are referred to the consideration, not of a jury, but of a single judge; who *takes information* by hearing advocates on both sides, and thereupon forms his *interlocutory decree* or *definitive sentence* at his own discretion: from which there generally lies an *appeal*.

But the point in which these jurisdictions are the most defective, is that of enforcing their sentences when pronounced; for which they have no other process but that of *excommunication*; which is described to be two-fold: the less, and the greater excommunication. The less is an ecclesiastical censure, excluding the party from the participation of the sacraments: the greater proceeds further, and excludes him not only from these, but also from the company of all Christians.

Wrongs Cognizable in Courts Military.

II. I am next to consider the injuries cognizable in the *court military* or court of *chivalry*. The jurisdiction of which is declared by statute 13 Ric. II. c. 2, to be this: "that it hath cognizance of contracts touching deeds of arms or of war, out of the realm, and also of things which touch war within the realm, which cannot be determined or discussed by the common law; together with other usages and customs to the same matters appertaining."

The proceedings in this court are by petition, in a summary way; and the trial not by a jury of twelve men, but by witnesses, or by combat. But as it cannot imprison, not being a court of record, and as by the resolutions of the superior courts it is now confined to so narrow and restrained a jurisdiction, it has fallen into contempt and disuse.

Injuries Cognizable by Courts Maritime.

III. Injuries cognizable by the courts maritime, or admiralty courts, are the next object of our inquiries. These courts have jurisdiction and power to try and determine all maritime causes; or such injuries which, though they are in their nature of common law cognizance, yet being committed on the high seas, out of the reach of our ordinary courts of justice, are therefore to be remedied in a peculiar court of their own. All admiralty causes must be therefore causes arising wholly upon the sea, and not within the precincts of any county.

The proceedings of the courts of admiralty bear much resemblance to those of the civil law, but are not entirely founded thereon; and they likewise adopt and make use of other laws, as occasion requires; such as the Rhodian laws and the laws of Oleron.

Wrongs Cognizable by Courts of Common Law.

IV. I am next to consider such injuries as are cognizable by the courts of the common law. And herein I shall for the present only remark, that all possible injuries whatsoever that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are, for that very reason, within the cognizance of the common law courts of justice. For it is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury its proper redress. I shall just mention two species of injuries, which will properly fall now within our immediate consideration: and which are, either when justice is delayed by an inferior court which has proper cognizance of the cause; or, when such inferior court takes upon itself to examine a cause and decide the merits without a legal authority.

Writ of *Procedendo*.

I. The first of these injuries, refusal or neglect of justice, is remedied either by writ of *procedendo*, or of *mandamus*. A writ of *procedendo ad iudicium* issues out of the court of chancery, where judges of any subordinate court do delay the parties; for that they will not give judgment either on the one side or the other, when they ought so to do. In this case a writ of *procedendo* shall be awarded, commanding them in the king's name to proceed to judgment; but without specifying any particular judgment, for that (if erroneous) may be set aside in the course of appeal, or by writ of error or false judgment: and upon further neglect or refusal, the judges of the inferior court may be punished for their contempt by writ of attachment returnable in the king's bench or common pleas.

Writ of *Mandamus*.

A writ of *mandamus* is, in general, a command issuing in

the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some *particular* thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice. It is a high prerogative writ, of a most extensively remedial nature; and may be issued in some cases where the injured party has also another more tedious method of redress, as in the case of admission or restitution to an office, but it issues in all cases, where the party hath a right to have anything done, and hath no other specific means of compelling its performance. A *mandamus* therefore lies to compel the admission or restoration of the party applying, to any office or franchise of a public nature, whether spiritual or temporal; to academical degrees; to the use of a meeting-house, etc.: it lies for the production, inspection, or delivery of public books and papers; for the surrender of the *regalia* of a corporation; to oblige bodies corporate to affix their common seal; to compel the holding of a court; and for an infinite number of other purposes, which it is impossible to recite minutely. But at present we are more particular to remark that it issues to the judges of any inferior court, commanding them to do justice according to the powers of their office, whenever the same is delayed. For it is the peculiar business of the court of king's bench to superintend all inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers with which the crown or legislature have invested them: and this, not only by restraining their excesses, but also by quickening their negligence, and obviating their denial of justice. This writ is grounded on a suggestion, by the oath of the party injured, of his own right, and the denial of justice below: whereupon, in order more fully to satisfy the court that there is a probable ground for such interposition, a rule is made (except in some general cases where the probable ground is manifest), directing the party complained of to show cause why a writ of *mandamus* should not issue: and, if he shows no sufficient cause, the writ itself is issued, at first in the alternative, either, to do thus, or signify some reason to the contrary; to which a return, or answer, must be made at a certain day. And, if the inferior judge, or other person to whom the writ is directed, returns or signifies an insufficient reason, then there issues in the second place a *peremptory mandamus*, to do the thing absolutely; to which no other return will be admitted, but a certificate of perfect obedience and due execution of the writ. If the inferior judge or other person makes no return, or fails in his respect and obedience, he is punishable for his contempt by attachment. But if he, at the first, returns a sufficient cause, although it should be false in fact, the

court of king's bench will not try the truth of the fact upon affidavits; but will for the present believe him, and proceed no further on the *mandamus*. But then the party injured may have an action against him for his false return, and (if found to be false by the jury) shall recover damages equivalent to the injury sustained; together with a *peremptory mandamus* to the defendant to do his duty. Thus much for the injury of neglect or refusal of justice.

Writ of Prohibition.

2. The other injury, which is that of encroachment of jurisdiction, or calling one *coram non iudice*, to answer in a court that has no legal cognizance of the cause, is also a grievance for which the common law has provided a remedy by the writ of *prohibition*.

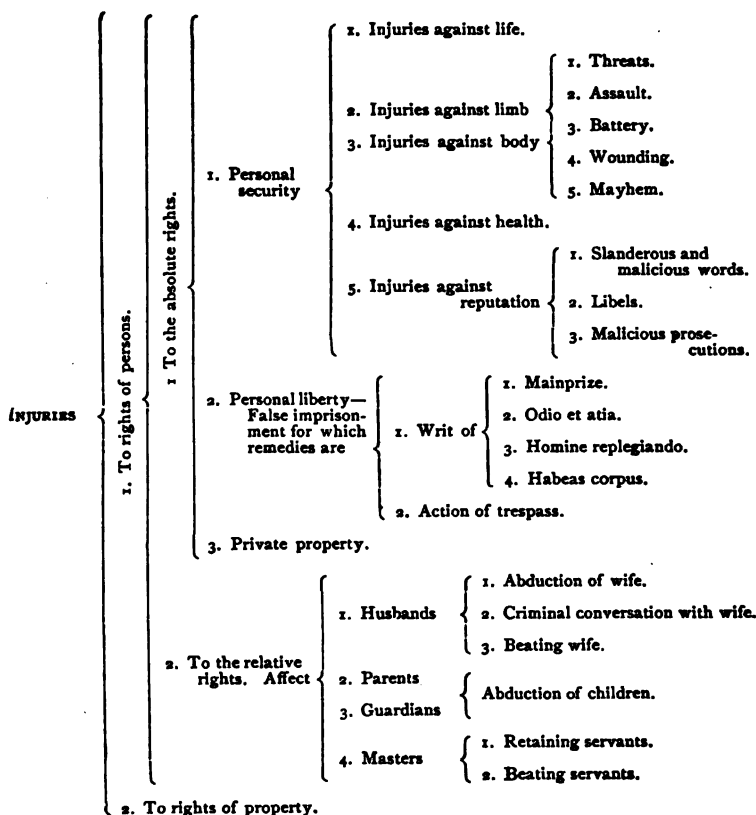
A prohibition is a writ issuing properly only out of the court of king's bench, being the king's prerogative writ; but for the furtherance of justice, it may now also be had in some cases out of the court of chancery, common pleas or exchequer: directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court. And if either the judge or the party shall proceed after such prohibition, an attachment may be had against them, to punish them for the contempt at the discretion of the court that awarded it; and an action will lie against them, to repair the party injured in damages.

Method of Proceeding.

A short summary of the method of proceeding is as follows: The party aggrieved in the court below applies to the superior court, setting forth in a suggestion upon record the nature and cause of his complaint, it being drawn *ad aliud examen*, by a jurisdiction or manner of process disallowed by the laws of the kingdom; upon which if the matter alleged appears to the court to be sufficient, the writ of prohibition immediately issues; commanding the judge not to hold, and the party not to prosecute, the plea. But sometimes the point may be too nice and doubtful to be decided merely upon a motion; and then, for the more solemn determination of the question, the party applying for the prohibition is directed by the court to *declare* a prohibition; that is, to prosecute an action, by filing a declaration, against the other, upon a supposition or fiction (which is not traversable) that he has proceeded in the suit below, notwithstanding the writ of prohibition. And if, upon demurrer and argument, the court shall finally be of opinion that the matter suggested is a good and sufficient ground of prohibition in point of law, then judgment with nominal damages

shall be given for the party complaining and the defendant, and also the inferior court, shall be prohibited from proceeding any further. On the other hand, if the superior court shall think it no competent ground for restraining the inferior jurisdiction, then judgment shall be given against him who applied for the prohibition in the court above, and a writ of *consultation* shall be awarded; so called, because, upon deliberation and consultation had, the judges find the prohibition to be ill founded, and therefore by this writ they return the cause to its original jurisdiction, to be there determined, in the inferior court. And, even in ordinary cases, the writ of prohibition is not absolutely final and conclusive. For though the ground be a proper one in point of *law*, for granting the prohibition, yet if the *fact* that gave rise to it be afterwards falsified, the cause shall be remanded to the prior jurisdiction.

SYNOPSIS OF SUBJECT OF INJURIES, CHAPTER VIII.



Chapter VIII.

OF WRONGS AND THEIR REMEDIES, RESPECTING
THE RIGHTS OF PERSONS.

115-144.

Since all wrongs may be considered as merely a privation of right, the plain natural remedy for every species of wrong is the being put in possession of that right whereof the party injured is deprived. This may either be effected by a specific delivery or restoration of the subject-matter in dispute to the legal owner, as when lands or personal chattels are unjustly withheld or invaded; or where that is not a possible, or at least not an adequate remedy, by making the sufferer a pecuniary satisfaction in damages, as in case of assault, breach of contract, etc., to which damages the party injured has acquired an incomplete or inchoate right the instant he receives the injury, though such right be not fully ascertained till they are assessed by the intervention of the law. The instruments whereby this remedy is obtained are a diversity of suits and actions, which are defined by the mirror to be "the lawful demand of one's right."

With us in England the several suits, or remedial instruments of justice, are from the subject of them distinguished into three kinds: actions *personal*, *real* and *mixed*.

Personal Actions.

Personal actions are such whereby a man claims a debt, or personal duty, or damages in lieu thereof; and, likewise, whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon *torts* or wrongs. Of the former nature are all actions upon debt or promises; of the latter all actions for trespasses, nuisances, assaults, defamatory words, and the like.

Real Actions.

Real actions, which concern real property only, are such whereby the plaintiff, here called the demandant, claims title to have any lands or tenements, rents, commons, or other hereditaments, in fee-simple, fee-tail, or for term of life. By these actions formerly all disputes concerning real estates were decided; but they are now pretty generally laid aside in practice, upon account of the great nicety required in their management, and the inconvenient length of their process: a much more expeditious method of trying titles being since introduced, by other actions personal and mixed.

Mixed Actions.

Mixed actions are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal

damages for a wrong sustained. As for instance an action of waste: which is brought by him who hath the inheritance in remainder or reversion, against the tenant for life who hath committed waste therein to recover not only the land wasted, which would make it merely a *real* action; but also treble damages, in pursuance of a statute of Gloucester, which is a *personal* recompense; and so both, being joined together, denominate it a *mixed* action.

Divisions of Private Wrongs.

Under these three heads may every species of remedy by suit or action in the courts of common law be comprised. But I must first beg leave to premise that all civil injuries are of two kinds, the one *without force* or violence, as slander or breach of contract; the other coupled *with force* and violence, as batteries or false imprisonment. Which latter species savour something of the criminal kind, being always attended with some violation of the peace; for which in strictness of law a fine ought to be paid to the king, as well as a private satisfaction to the party injured. And this distinction of private wrongs, into injuries *with* and *without force*, we shall find to run through all the variety of which we are now to treat.

As therefore we divide all rights into those of *persons* and those of *things*, so we must make the same general distribution of injuries into such as affect the *rights of persons*, and such as affect the *rights of property*.

The rights of *persons*, we may remember, were distributed into *absolute* and *relative*; *absolute*, which were such as appertained and belonged to private men, considered merely as individuals, or single persons; and *relative*, which were incident to them as members of society and connected to each other by various ties and relations. And the absolute rights of each individual were defined to be the right of personal security, the right of personal liberty, and the right of private property, so that the wrongs or injuries affecting them must consequently be of a corresponding nature.

Affecting Personal Security.

I. As to injuries which affect the *personal security* of individuals, they are either injuries against their lives, their limbs, their bodies, their health, or their reputations.

Injuries Affecting Life.

I. With regard to the first subdivision, or injuries affecting the life of man, they do not fall under our present contemplation; being one of the most atrocious species of crimes, the subject of the next book of our commentaries.

Injuries Affecting Limb or Body.

2. The next two species of injuries, affecting the limbs or bodies of individuals, I shall consider in one and the same view. And these may be committed: 1. By *threats* and menaces of bodily hurt through fear of which a man's business is interrupted. A menace alone, without a consequent inconvenience, makes not the injury; but, to complete the wrong there must be both of them together. The remedy for this is in pecuniary damages, to be recovered by action of *trespass vi et armis*; this being an inchoate, though not an absolute, violence.

Assault.

2. By *assault*; which is an attempt or offer to beat another, without touching him: as if one lifts up his cane, or his fist, in a threatening manner at another; or strikes at him but misses him; this is an assault, *insultus*, which Finch describes to be "an unlawful settling upon one's person." This also is an inchoate violence, amounting considerably higher than bare threats: and therefore, though no actual suffering is proved, yet the party injured may have redress by action of *trespass vi et armis*; wherein he shall recover damages as a compensation for the injury.

Battery, Wounding.

3. By *battery*; which is the unlawful beating of another. The least touching of another's person wilfully, or in anger, is a battery: for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it in any the slightest manner. But battery is, in some cases, justifiable or lawful; as where one who hath authority, a parent, or master, gives moderate correction to his child, his scholar, or his apprentice. So also on the principle of self-defense: for if one strikes me first, or even only assaults me, I may strike in my own defense; and, if sued for it, may plead *son assault demesne*, or that it was the plaintiff's own original assault that occasioned it. So likewise in defense of my goods or possession, if a man endeavors to deprive me of them I may justify laying hands upon him to prevent him; and in case he persists with violence, I may proceed to beat him away. On account of these causes of justification, battery is defined to be the *unlawful* beating of another; for which the remedy is, as for assault, by action of *trespass vi et armis*: wherein the jury will give adequate damages.

4. By *wounding*; which consists in giving another some dangerous hurt, and is only an aggravated species of battery.

Mayhem.

5. By *mayhem*; which is an injury still more atrocious, and consists in violently depriving another of the use of a member proper for his defense in fight. This is a battery attended with this aggravating circumstance, that thereby the party injured is forever disabled from making so good a defense against future external injuries, as he otherwise might have done. Among these defensive members are reckoned not only arms and legs, but a finger, an eye, and a foretooth, and also some others. But the loss of one of the jaw-teeth, the ear, or the nose, is no mayhem at common law, as they can be of no use in fighting. The same remedial action of *trespass vi et armis* lies also to recover damages for this injury, an injury which (when willful) no motive can justify but necessary self-preservation. And here I must observe that for these four last injuries, assault, battery, wounding, and mayhem, an indictment may be brought as well as an action.

Injuries Affecting Health.

4. Injuries affecting a man's *health* are where, by any unwholesome practices of another, a man sustains any apparent damage in his vigor or constitution. As by selling him bad provisions, or wine; by the exercise of a noisome trade, which infects the air in his neighborhood; or by the neglect or unskillful management of his physician, surgeon, or apothecary.

Trespass Upon the Case.

These are wrongs or injuries unaccompanied by force, for which there is a remedy in damages by a special action of *trespass upon the case*. This action of *trespass*, or transgression *on the case*, is a universal remedy, given for all personal wrongs and injuries without force; so called because the plaintiff's whole case or cause of complaint is set forth at length in the original writ. For though in general there are methods prescribed, and forms of actions previously settled, for redressing those wrongs which most usually occur, and in which the very act itself is immediately prejudicial or injurious to the plaintiff's person or property, as battery, non payment of debts, detaining one's goods, or the like; yet where any special consequential damage arises, which could not be foreseen and provided for in the ordinary course of justice, the party injured is allowed, both by common law and the statute of Westm. 2, c. 24, to bring a special action on his own case, by writ formed according to the peculiar circumstances of his own particular grievance. For wherever the common law gives a right or prohibits an injury, it also gives a remedy by action; and, therefore, wherever a new injury is done, a new method of remedy must be pursued. And it is a settled distinction, that where an act is done which is in itself an *immediate* injury to another's person

or property, there the remedy is usually by an action of trespass *vi et armis*; but where there is no act done but only a culpable omission; or where the act is not immediately injurious, but only by *consequence* and collaterally; there no action of trespass *vi et armis* will lie, but an action on the special case, for the damages consequent on such omission or act.

Injury to Reputation—Slander.

5. Lastly; injuries affecting a man's *reputation* or good name are, first, by malicious, scandalous, and slanderous *words*, tending to his damage and derogation. As if a man maliciously and falsely utter any slander or false tale of another; which may either endanger him in law, by impeaching him of some heinous crime, as to say that a man hath poisoned another, or is perjured; or which may exclude him from society, as to charge him with having an infectious disease; or which may impair or hurt his trade or livelihood, as to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave. Words also tending to scandalize a magistrate, or person in a public trust, are reputed more highly. It is said, that formerly no actions were brought for words, unless the slander was such as (if true) would endanger the life of the object of it. But, too great encouragement being given by this lenity to false and malicious slanderers, it is now held that for scandalous words of the several species before mentioned (that may endanger a man by subjecting him to the penalties of the law, may exclude him from society, may impair his trade, or may affect a peer of the realm, a magistrate, or one in public trust), an action on the case may be had, without proving any particular damage to have happened, but merely upon the probability that it might happen. But with regard to words that do not thus apparently, and upon the face of them, import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened; which is called laying his action with a *per quod*. In like manner, to *slander another man's title*, by spreading such injurious reports as, if true, would deprive him of his estate (as to call the issue in tail, or one who hath land by descent, a bastard), is actionable, provided any special damage accrues to the proprietor thereby; as if he loses an opportunity of selling the land. But merely scurrility, opprobrious words, which neither in themselves import, nor are in fact attended with, any injurious effects, will not support an action. So scandals, which concern matters merely spiritual, as to call a man a heretic or adulterer, are cognizable only in the ecclesiastical court; unless any temporal damage ensues, which may be a foundation for a *per quod*. Words of heat and passion, as to call a man

rogue and rascal, if productive of no ill consequence, and not of any of the dangerous species before mentioned, are not actionable; neither are words spoken in a friendly manner, as by way of advice, admonition or concern, without any tincture or circumstances of ill will: for, in both these cases, they are not *maliciously* spoken, which is a part of the definition of slander. Neither (as was formerly hinted) are any reflecting words made use of in legal proceedings, and pertinent to the cause in hand, a sufficient cause of action for slander. Also, if the defendant be able to justify, and prove the words to be true, no action will lie, even though special damage hath ensued: for then it is no slander or false tale. As if I can prove the tradesman a bankrupt, the physician a quack, the lawyer a knave, and the divine a heretic; this will destroy their respective actions; for though there may be damage sufficient accruing from it, yet, if the fact be true, it is *damnum absque injuria*; and where there is no injury the law gives no remedy.

Libel.

A second way of affecting a man's reputation is by printed or written libels, pictures, signs and the like; which set him in an odious or ridiculous light, and thereby diminish his reputation. With regard to libels in general, there are as in many other cases, two remedies; one by indictment, and the other by action. -The former for the *public* offense; for every libel has a tendency to the breach of the peace, by provoking the person libeled to break it: which offense is the same (in point of law) whether the matter contained be true or false; and therefore the defendant, on an indictment for publishing a libel, is not allowed to allege the truth of it by way of justification. But in the remedy by action on the case which is to repair the *party* in damages for the injury done him, the defendant may, as for words *spoken*, justify the truth of the facts, and show that the plaintiff has received no injury at all. What was said with regard to words spoken will also hold in every particular with regard to libels by writing or printing, and the civil actions consequent thereupon; but as to signs or pictures, it seems necessary always to show by proper *innuendoes* and averments of the defendant's meaning, the import and application of the scandal, and that some special damage has followed; otherwise it cannot appear that such libel by picture was understood to be leveled at the plaintiff, or that it was attended with any actionable consequences.

Malicious Prosecutions.

A third way of destroying or injuring a man's reputation is by preferring malicious indictments or prosecutions against him; which under the mask of justice and public spirit, are sometimes

made the engines of private spite and enmity. For this, however, the law has given a very adequate remedy in damages, either by an action of *conspiracy*, which cannot be brought but against two at least; or, which is the more usual way, by a special action on the case for a false and malicious prosecution. In order to carry on the former (which gives a recompense for the danger to which the party has been exposed), it is necessary that the plaintiff should obtain a copy of the record of his indictment and acquittal; but, in prosecution for felony, it is usual to deny a copy of the indictment, where there is any the least probable cause to found such prosecution upon. For it would be a very great discouragement to the public justice of the kingdom, if prosecutors who had a tolerable ground of suspicion, were liable to be sued at law whenever their indictments miscarried. But an action on the case for malicious prosecution may be founded upon an indictment whereon no acquittal can be had; as if it be rejected by the grand jury, or be *coram non iudice*, or be insufficiently drawn. For it is not the danger of the plaintiff, but the scandal, vexation, and expense, upon which this action is founded. However, any probable cause for preferring it is sufficient to justify the defendant.

Affecting Personal Liberty.

II. We are next to consider the violation of the right of personal liberty. This is effected by the injury of false imprisonment, for which the law has not only decreed a punishment, as a heinous public crime, but has also given a private reparation to the party.

False Imprisonment.

To constitute the injury of false imprisonment there are two points requisite: 1. The detention of the person; and, 2. The unlawfulness of such detention. Every confinement of the person is an imprisonment whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets. Unlawful, or false, imprisonment consists in such confinement or detention without sufficient authority: which authority may arise either from some process from the courts of justice, or from some warrant from a legal officer having power to commit, under his hand and seal, and expressing the cause of such commitment; or from some other special cause warranted, for the necessity of the thing, either by common law or act of parliament; such as the arresting of a felon by a private person without warrant, the impressing of mariners for the public service, or the apprehending of wagoners for misbehavior in the public highways. False imprisonment also may arise by executing a lawful warrant or process at an unlawful time, as on Sunday: for the statute hath declared that such service or process shall be void.

This is the injury. Let us next see the remedy: which is of two sorts; the one *removing* the injury, the other *making satisfaction* for it.

Means of Removing the Injury.

The means of *removing* the actual injury of false imprisonment are fourfold. 1. By writ of *mainprize*. 2. By writ *de odio et atia*. 3. By writ *de homine replegiando*. 4. By writ of *habeas corpus*,

1. The writ of *mainprize*, *mauucaptio*, is a writ directed to the sheriff (either generally, when any man is imprisoned for a bailable offense and bail has been refused; or specially, when the offense or cause of commitment is not properly bailable below), commanding him to take sureties for the prisoner's appearance, usually called *mainpernors*, and to set him at large.

2. The writ *de odio et atia* was anciently used to be directed to the sheriff, commanding him to inquire whether a prisoner charged with murder was committed upon just causes of suspicion, or merely *propter odium et atiam*, for hatred and ill will; and if upon the inquisition due cause of suspicion did not appear, then there issued another writ for the sheriff to admit him to bail.

3. The writ *de homine replegiando* lies to replevy a man out of prison, or out of the custody of any private person, upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him.

Writ of Habeas Corpus.

4. The writ of *habeas corpus*, the most celebrated writ in English law. Of this there are various kinds made use of by the courts of Westminster, for removing prisoners from one court into another for the more easy administration of justice. Such is the *habeas corpus ad respondendum*, when a man hath a cause of action against one who is confined by the process of some inferior court; in order to remove the prisoner, and charge him with this new action in the court above. Such is that *ad satisfaciendum*, when a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution. Such also are those *ad prosequendum*, *testificandum*, *deliberandum*, etc.; which issue when it is necessary to remove a prisoner, in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed. Such is, lastly, the common writ *ad faciendum et recipiendum*, which issues out of any of the courts of Westminster hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court; commanding the inferior judges to produce the

body of the defendant, together with the day and cause of his caption and detainer (whence the writ is frequently denominated an *habeas corpus cum causa*) to do and receive whatsoever the king's court shall consider in that behalf. This is a writ grantable of common right, without any motion in court, and it instantly supersedes all proceedings in the court below.

But the great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*; directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention *ad faciendum, subjiciendum, et recipiendum*, to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf. This is a high prerogative writ, and therefore by the common law issuing out of the court of king's bench not only in term-time, but also during the vacation, by a *fiat* from the chief justice or any other of the judges, and running into all parts of the king's dominions; for the king is at all times entitled to have an account why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted. If it issues in vacation, it is usually returnable before the judge himself who awarded it, and he proceeds by himself thereon; unless the term shall intervene, and then it may be returned in court.

In the king's bench and common pleas it is necessary to apply for it by motion to the court, as in the case of all other prerogative writs (*certiorari*, prohibition, *mandamus*, etc.) which do not issue as of mere course, without showing some probable cause why the extraordinary power of the crown is called in to the party's assistance.

The *satisfactory* remedy for this injury of false imprisonment, is by an action of trespass *vi et armis*, usually called an action of false imprisonment; which is generally, and almost unavoidably, accompanied with a charge of assault and battery also: and therein the party shall recover damages for the injury he has received; and also the defendant is, as for all other injuries committed with force, or *vi et armis*, liable to pay a fine to the king for the violation of the public peace.

Injuries Affecting Domestic Relations.

We are next to contemplate such injuries as may be done to persons under the four following relations: husband and wife, parent and child, guardian and ward, master and servant.

Injuries to Husband and Wife. Abduction.

I. Injuries that may be offered to a person, considered as a *husband*, are principally three: *abduction*, or taking away a man's

wife; *adultery*, or criminal conversation with her; and *beating* or otherwise abusing her. 1. As to the first sort, *abduction*, or taking her away, this may either be by fraud and persuasion or open violence; though the law in both cases supposes force and constraint, the wife having no power to consent; and therefore gives a remedy by writ of *ravishment*, or action of *trespass vi et armis, de uxore rapta et abducta*. This action lay at the common law; and thereby the husband shall recover, not the possession of his wife, but damages for taking her away; and by statute Westm. 1, 3 Edw. I. c. 13, the offender shall also be imprisoned two years, and be fined at the pleasure of the king. Both the king and the husband may therefore have this action; and the husband is also entitled to recover damages in an action on the case against such as persuade and entice the wife to live separate from him without a sufficient cause. The old law was so strict in this point that if one's wife missed her way upon the road, it was not lawful for another man to take her into his house, unless she was benighted and in danger of being lost or drowned; but a stranger might carry her behind him on horseback to market, to a justice of the peace for a warrant against her husband, or to the spiritual court to sue for a divorce.

Adultery.

2. *Adultery*, or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the coercion of the spiritual courts; yet, considered as a civil injury (and surely there can be no greater), the law gives a satisfaction to the husband for it by action of trespass *vi et armis* against the adulterer, wherein the damages recovered are usually very large and exemplary. But these are properly increased and diminished by circumstances; as the rank and fortune of the plaintiff and defendant; the relation or connection between them; the seduction or otherwise of the wife, founded on her previous behavior and character; and the husband's obligation, by settlement or otherwise, to provide for those children, which he cannot but suspect to be spurious. In this case, and upon indictments for polygamy, a marriage *in fact* must be proved: though generally, in other cases, reputation and cohabitation are sufficient evidence of marriage.

Beating.

3. The third injury is that of *beating* a man's wife, or otherwise ill-using her; for which, if it be a common assault, battery or imprisonment, the law gives the usual remedy to recover damages, by action of trespass *vi et armis*, which must be brought in the names of the husband and wife *jointly*; but if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of his wife, the

law then gives him a *separate* remedy by an action of trespass, in nature of an action upon the case, for this ill-usage, *per quod consortium amisit*; in which he shall recover a satisfaction in damages.

Injuries to Parents. Abduction.

II. Injuries that may be offered to a person considered in the relation of a *parent* were likewise of two kinds: 1. *Abduction*, or taking his children away; and, 2. *Marrying* his son and heir without the father's consent, whereby during the continuance of the military tenures he lost the value of his marriage. But this last injury is now ceased, together with the right upon which it was grounded; for, the father being no longer entitled to the value of the marriage, the marrying his heir does him no sort of injury for which a civil action will lie. As to the other, of abduction, or taking away the children from the father, that is also a matter of doubt whether it be a civil injury or no; for, before the abolition of the tenure in chivalry, it was equally a doubt whether an action would lie for taking and carrying away any other child besides the heir: some holding that it would not, upon the supposition that the only ground or cause of action was losing the value of the heir's marriage; and others holding that an action would lie for taking away *any* of the children, for that the parent hath an interest in them all, to provide for their education. If, therefore, before the abolition of these tenures, it was an injury to the father to take away the rest of his children, as well as his heir (as I am inclined to think it was), it still remains an injury, and is remediable by writ of *ravishment* or action of *trespass vi et armis, de filio, vel filia, rapto vel abducto*; in the same manner as the husband may have it on account of the abduction of his wife.

Injuries to Guardian.

III. Of a similar nature to the last is the relation of *guardian* and *ward*; and the like actions *mutatis mutandis*, as are given to fathers, the guardian also has for recovery of damages, when his ward is stolen or ravished away from him. It is expressly provided by statute 12 Car. II. c. 24, that testamentary guardians may maintain an action of ravishment or trespass, for recovery of any of their wards, and also for damages to be applied to the use and benefit of the infants.

Injuries to Master.

IV. To the relation between *master* and *servant* and the rights accruing therefrom, there are two species of injuries incident. The one is, retaining a man's hired servant before his time is expired; the other is, beating or confining him in such a manner that he is not able to perform his work. As to the first, the re-

taining another person's servant during the time he has agreed to serve his present master; this, as it is an ungentlemanlike, so it is also an illegal act. For every master has by his contract purchased for a valuable consideration the service of his domestics for a limited time; the inveigling or hiring his servant, which induces a breach of this contract, is therefore an injury to the master; and for that injury the law has given him a remedy by a special action on the case: and he may also have an action against the servant for the non-performance of his agreement. But, if the new master was not apprised of the former contract, no action lies against *him*, unless he refuses to restore the servant, upon demand. The other point of injury is that of beating, confining or disabling a man's servant, which depends upon the same principle as the last; viz., the property which the master has by his contract acquired in the labour of the servant. In this case, besides the remedy of an action of battery or imprisonment, which the servant himself as an individual may have against the aggressor, the master also, as a recompense for *his* immediate loss, may maintain an action of trespass *vi et armis*; in which he must allege and prove the special damage he has sustained by the beating of his servant, *per quod servitium amisit*; and then the jury will make him a proportionable pecuniary satisfaction.

We may observe that in these relative injuries, notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom; while the loss of the inferior by such injuries is totally unregarded. One reason for which may be this: that the inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury. The wife cannot recover damages for beating her husband, for she hath no separate interest in anything during her coverture. The child hath no property in his father or guardian: as they have in him, for the sake of giving him education and nurture. Yet the wife or the child, if the husband or parent be slain, hath a peculiar species of criminal prosecution allowed them, in the nature of a civil satisfaction; which is called an *appeal*, and which will be considered in the next book. And so the servant, whose master is disabled, does not thereby lose his maintenance or wages. He had no property in his master; and if he receives his part of the stipulated contract, he suffers no injury, and is therefore entitled to no action, for any battery or imprisonment which such master may happen to endure.

SYNOPSIS OF CHAPTER IX.

INJURIES TO PERSONAL PROPERTY.	1. In possession.	1. By Disposition.	1. By unlawful taking—the remedy	1. Restitution by replevin.	
			2. By unlawful detaining—the remedy	2. Damages by	1. Action on case. 2. Trespass or trover.
		2. By damage		1. Restitution	1. Replevin.
	2. Damages by action for trover and conversion.		2. Detinue.		
	2. In action, arise by breach of contracts	1. Express	1. Non-payment of debt—remedy	1. Action of debt.	
			2. Non-performance of covenants—Remedy by action	2. Action on case—for damages	
			3. Non-performance of promises—action on the case for damages.	1. Of covenant. 2. To compel performance in covenants real.	
		2. Implied, arise from	3. Reason and construction of law—Assumpsits	1. Nature of government—remedy	1. Action of debt. 2. Action on the case.
				2. Quantum meruit. 3. Quantum valebat. 4. Money had and received. 5. Money paid for another's use 6. Account stated. 6. Performance of one's duty.	

Chapter IX.
OF INJURIES TO PERSONAL PROPERTY.

144-167.

First, we are to consider the injuries that may be offered to the rights of *personal* property; and, of these, first the rights of personal property in *possession*, and then those that are in *action* only.

Rights of Personal Property in Possession.

I. The rights of personal property in *possession* are liable to two species of injuries: the amotion or deprivation of that possession; and the abuse or damage of the chattels while the possession continues in the legal owner. The former, or deprivation of possession, is also divisible into two branches: the unjust and unlawful *taking* them away; and the unjust *detaining* them, though the original taking might be lawful.

Unlawful Taking.

I. And first of an unlawful *taking*. The right of property

in all external things being solely acquired by occupancy, as has been formerly stated, and preserved and transferred by grants, deeds, and wills, which are a continuation of that occupancy; it follows as a necessary consequence that when I have once gained a rightful possession of any goods or chattels, either by a just occupancy or by a legal transfer, whoever either by fraud or force dispossesses me of them, is guilty of a transgression against the law of society, which is a kind of secondary law of nature.

The wrongful taking of goods being thus most clearly an injury, the next consideration is, what remedy the law of England has given for it. And this is, in the first place, the restitution of the goods themselves so wrongfully taken, with the damages for the loss sustained by such unjust invasion; which is effected by action of replevin. This obtains only in one instance of an unlawful taking, that of a wrongful distress; and this and the action of detinue (of which I shall presently say more) are almost the only actions in which the actual specific possession of the identical personal chattel is restored to the proper owner.

Replevin.

An action of replevin, the regular way of contesting the validity of the transaction, is founded, I said, upon a distress taken wrongfully and without sufficient cause; being a re-delivery of the pledge, or thing taken in distress, to the owner, upon his giving security to try the right of the distress, and to restore it if the right be adjudged against him; after which the distrainer may keep it till tender made of sufficient amends; but must then re-deliver it to the owner. And formerly when the party distrained upon intended to dispute the right of the distress, he had no other process by the old common law than by writ of replevin, *replegiari facias*; which issued out of chancery, commanding the sheriff to deliver the distress to the owner, and afterwards to do justice in respect of the matter in dispute in his own county-court. But this being a tedious method of proceeding, the beasts or other goods were long detained from the owner, to his great loss and damage. For which reason the statute of Marlbridge directs that (without suing a writ out of the chancery) the sheriff immediately upon plaint to him made shall proceed to replevy the goods. Upon application, therefore, either to the sheriff or one of his said deputies, security is to be given. 1. That the party replevying will pursue his action against the distrainer; and 2. That if the right be determined against him he will return the distress again. Besides these pledges, the sufficiency of which is discretionary and at the peril of the sheriff, the statute requires that the officer granting a replevin on a distress for rent shall take a bond with two sureties, in a sum of double the value of the goods distrained, conditioned

to prosecute the suit with effect and without delay, and for the return of the goods; which bond shall be assigned to the avowant or person making cognizance, on request made to the officer; and if forfeited may be sued in the name of the assignee. And certainly as the end of all distresses is only to compel the party distrained upon to satisfy the debt or duty owing from him, this end is as well answered by such sufficient sureties as by retaining the very distress, which might frequently occasion great inconvenience to the owner; and that the law never wantonly inflicts. The sheriff on receiving such security is immediately by his officers, to cause the chattels taken in distress to be restored into the possession of the party distrained upon; unless the distrainer claims a property in the goods so taken. For if by this method of distress the distrainer happens to come again into possession of his own property in goods which before he had lost, the law allows him to keep them, without any reference to the manner by which he thus has regained possession, being a kind of personal *remitter*. If, therefore, the distrainer claims any such property, the party replevying must sue out a writ *de proprietate probanda*, in which the sheriff is to try, by an inquest, in whom the property previous to the distress subsisted. And if it be found to be in the distrainer, the sheriff can proceed no further, but must return the claim of property to the court of king's bench or common pleas, to be there further prosecuted, if thought advisable, and there finally determined.

But if no claim of property be put in, or if (upon trial) the sheriff's inquest determines it against the distrainer, then the sheriff is to replevy the goods (making use of even force, if the distrainer makes resistance) in case the goods be found within his county. But if the distress be carried out of the county, or concealed, then the sheriff may return that the goods, or beasts, are *eloigned*, *elongata*, carried to a distance, to places to him unknown; and thereupon the party replevying shall have a writ of *capias in withernam*, *in vetito* (or more properly *repetito*) *namio*; a term which signifies a second or reciprocal distress, in lieu of the first which was *eloigned*. It is therefore a command to the sheriff to take other goods of the distrainer in lieu of the distress formerly taken, and *eloigned*, or withheld from the owner. So that here is now distress against distress; one being taken to answer the other by way of reprisal, and as a punishment for the illegal behavior of the original distrainer. For which reason goods taken in *withernam* cannot be replevied till the original distress is forthcoming.

But in common cases the goods are delivered back to the party replevying, who is then bound to bring his action of replevin, which may be prosecuted in the county-court, be the distress of

what value it may. But either party may remove it to the superior courts of the king's bench or common pleas, by writ of *recordari* or *pone*; the plaintiff at pleasure, the defendant upon reasonable cause; and also if in the course of proceeding any right of freehold comes in question, the sheriff can proceed no further, so that it is usual to carry it up in the first instance to the courts of Westminster hall. Upon this action brought, and declaration delivered, the distrainer, who is now the defendant, makes *avowry*; that is, he *avows* taking the distress in his own right, or the right of his wife; and sets forth the reason of it, as for rent-arriere, damage done, or other cause: or else, if he justifies in another's right as his bailiff or servant, he is said to make *cognizance*; that is, he *acknowledges* the taking, but insists that such taking was legal, as he acted by the command of one who had a right to distrain; and on the truth and legal merits of this avowry or cognizance the cause is determined. If it be determined for the plaintiff; viz., that the distress was wrongfully taken; he has already got his goods back into his own possession, and shall keep them, and moreover recover damages. But if the defendant prevails, by the default or non-suit of the plaintiff, then he shall have a writ *de retorno habendo*, whereby the goods or chattels (which were distrained and then replevied) are returned again into his custody, to be sold, or otherwise disposed of, as if no replevin had been made.

Other Remedies for Unlawful Takings.

In like manner, other remedies for unlawful takings of a man's goods consist only in recovering a satisfaction in damages. As if a man takes the goods of another out of his actual or virtual possession, without having a lawful title so to do, it is an injury, which though it doth not amount to felony unless it be done *animo furandi*, is nevertheless a transgression for which an action of *trespass vi et armis* will lie; wherein the plaintiff shall not recover the thing itself, but only damages for the loss of it. Or, if committed without force, the party may, at his choice, have another remedy in damages by action of *trover* and *conversion*, of which I shall presently say more.

Unlawful Detainer—Detinue.

2. Deprivation of possession may also be by an unjust detainer of another's goods, though the original *taking* was lawful. As if I distrain another's cattle damage-feasant, and before they are impounded he tenders me sufficient amends; now, though the original taking was lawful, my subsequent detention of them after tender of amends is wrongful, and he shall have an action of *replevin* against me to recover them; in which he shall recover

damages only for the *detention* and not for the *caption*, because the original taking was lawful. Or, if I lend a man a horse, and he afterwards refuses to restore it, this injury consists in the detaining and not in the original taking, and the regular method for me to recover possession is by action of *detinue*. In this action of *detinue* it is necessary to ascertain the thing detained, in such manner as that it may be specifically known and recovered. Therefore it cannot be brought for money, corn, or the like, for that cannot be known from other money or corn unless it be in a bag or sack, for then it may be distinguishably marked. In order, therefore, to ground an action of *detinue*, which is only for the *detaining*, these points are necessary: 1. That the defendant came lawfully into possession of the goods as either by delivery to him, or finding them. 2. That the plaintiff have a property. 3. That the goods themselves be of some value; and 4. That they be ascertained in point of identity. Upon this the jury, if they find for the plaintiff, assess the respective values of the several parcels detained, and also damages for the detention. And the judgment is conditional; that the plaintiff recover the said goods, or (if they cannot be had) their respective values and also the damages for detaining them. But there is one disadvantage which attends this action; viz., that the defendant is herein permitted to wage his law, that is, to exculpate himself by oath, and thereby defeat the plaintiff of his remedy: which privilege is grounded on the confidence originally reposed in the bailee by the bailor, in the borrower by the lender, and the like; from whence arose a strong presumptive evidence that in the plaintiff's own opinion the defendant was worthy of credit. But for this reason, the action itself is of late much disused, and has given place to the action of *trover*.

Trover and Conversion.

This action of *trover* and *conversion* was in its original an action of trespass upon the case, for the recovery of damages against such person as had *found* another's goods and refused to deliver them on demand; but *converted* them to his own use; from which finding and converting it is called an action of *trover* and *conversion*. The freedom of this action from wager of law, and the less degree of certainty requisite in describing the goods, gave it so considerable an advantage over the action of *detinue*, that by a fiction of law actions of *trover* were at length permitted to be brought against any man who had in his possession by any means whatsoever the personal goods of another, and sold them or used them without the consent of the owner, or refused to deliver them when demanded. The injury lies in the conversion: for any man may take the goods of another into possession, if he finds them; but no finder is allowed to acquire a property therein, unless the

owner be forever unknown: and therefore he must not convert them to his own use, which the law presumes him to do if he refuses them to the owner; for which reason such refusal alone is, *prima facie*, sufficient evidence of a conversion. The fact of the finding, or *trouver* is therefore now totally immaterial; for the plaintiff needs only to suggest (as words of form) that he lost such goods, and that the defendant found them; and if he proves that the goods are *his* property and that the defendant had them in his possession, it is sufficient. But a conversion must be fully proved and then in this action the plaintiff shall recover damages, equal to the value of the thing converted, but not the thing itself; which nothing will recover but an action of *detinue* or *replevin*.

As to the damage that may be offered to things personal while in the possession of the owner, or in any wise taking from the value of any of his chattels or making them in a worse condition than before, these are injuries too obvious to need explication. I have only therefore to mention the remedies given by the law to redress them, which are in two shapes.

Trespass vi et Armis—Special Action on the Case.

By action of *trespass vi et armis*, where the act is in itself *immediately* injurious to another's property, and therefore necessarily accompanied with some degree of force; and by special action *on the case*, where the act is in itself indifferent, and the injury only *consequential*, and therefore arising without any breach of the peace. In both of which suits the plaintiff shall recover damages, in proportion to the injury which he proves that his property has sustained. And it is not material whether the damage be done by the defendant himself, or his servants by his direction; for the action will lie against the master as well as the servant.

Injuries Affecting Things in Action.

II. Hitherto of injuries affecting the right of things personal in *possession*. We are next to consider those which regard things in *action* only; or such rights as are founded on, and arise from, *contracts*. The violation, or non-performance, of these contracts might be extended into as great a variety of wrongs, as the rights which we then considered; but I shall now consider them in a more comprehensive view, by here making only a twofold division of contracts; viz., contracts *express*, and contracts *implied*; and pointing out the injuries that arise from the violation of each, with their respective remedies.

As to Express Contracts—Debt.

Express contracts include three distinct species: debts, covenants, and promises.

I. The legal acceptance of *debt* is, a sum of money due by

certain and express agreement, as by a bond for a determinate sum, a bill or note; a special bargain; or a rent reserved on a lease; where the quantity is fixed and specific, and does not depend upon any subsequent valuation to settle it. The non-payment of these is an injury, for which the proper remedy is by action of *debt*, to compel the performance of the contract and recover the specific sum due. This is the shortest and surest remedy; particularly where the debt arises upon a specialty, that is, upon a deed or instrument under seal. So also, if I verbally agree to pay a man a certain price for a certain parcel of goods, and fail in the performance, an action of debt lies against me; for this is also a *determinate* contract; but if I agree for no settled price, I am not liable to an action of debt, but a special action on the case, according to the nature of my contract. And indeed actions of debt are now seldom brought but upon special contracts under seal; wherein the sum due is clearly and precisely expressed: for in case of such an action upon a simple contract, the plaintiff labors under two difficulties. First the defendant has here the same advantage as in an action of *detinue*, that of waging his law, or purging himself of the debt by oath, if he thinks proper. Secondly, in an action of debt the plaintiff must prove the whole debt he claims, or recover nothing at all. For the debt is one single cause of action, fixed and determined; and which therefore, if the proof varies from the claim, cannot be looked upon as the same contract whereof the performance is sued for. If therefore I bring an action of debt for 30*l*, I am not at liberty to prove a debt of 20*l*, and recover a verdict thereon: any more than if I bring in an action of *detinue* for a horse I can thereby recover an ox. For I fail in proof of that contract, which my action or complaint has alleged to be specific, express, and determinate. But in an action on the case, on what is called an *indebitatus assumpsit*, which is not brought to compel a specific performance of the contract, but to recover damages for its non-performance, the implied *assumpsit*, and consequently the damages for the breach of it, are in their nature indeterminate; and will therefore adapt and proportion themselves to the truth of the case which shall be proved, without being confined to the precise demand stated in the declaration. For if *any* debt be proved, however less than the sum demanded, the law will raise a promise *pro tanto*, and the damages will of course be proportioned to the actual debt. So that I may declare that the defendant, *being indebted* to me in 30*l*, *undertook* or promised to pay it, but failed; and lay my damages arising from such failure at what sum I please: and the jury will, according to the nature of my proof, allow me either the whole in damages, or any inferior sum. And, even in actions of *debt*, where the contract is proved or admitted,

if the defendant can show that he has discharged any part of it, the plaintiff shall recover the residue.

Form of Writ of Debt.

The form of the writ of *debt* is sometimes in the *debet* and *detinet*, and sometimes in the *detinet* only: that is, the writ states either that the defendant *owes* and unjustly *detains* the debt or thing in question, or only that he unjustly *detains* it. It is brought in the *debet* as well as *detinet*, when sued by one of the original contracting parties who personally gave the credit against the other who personally incurred the debt, or against his heirs, if they are bound to the payment; as by the obligee against the obligor, the landlord against the tenant, etc. But if it be brought by or against an executor for a debt due to or from the testator, this, not being his own debt, shall be sued for in the *detinet* only. So also if the action be for goods, or corn, or a horse, the writ shall be in the *detinet* only; for nothing but a sum of money, for which I (or my ancestors in my name) have personally contracted, is properly considered as my *debt*. And indeed a writ of debt in the *detinet* only, for goods and chattels, is neither more nor less than a mere writ of *detinue*; and is followed by the very same judgment.

Covenant.

2. A covenant, also contained in a deed, to do a direct act or to omit one, is another species of express contract, the violation or breach of which is a civil injury. The remedy for this is by a writ of *covenant*; which directs the sheriff to command the defendant generally to keep his covenant with the plaintiff (without specifying the nature of the covenant), or show good cause to the contrary; and if he continues refractory, or the covenant is already so broken that it cannot now be specifically performed, then the subsequent proceedings set forth with precision the covenant, the breach, and the loss which has happened thereby; whereupon the jury will give damages in proportion to the injury sustained by the plaintiff, and occasioned by such breach of the defendant's contract.

Covenant Real.

There is one species of covenant of a different nature from the rest; and that is a covenant *real*, to convey or dispose of lands, which seems to be partly of a personal and partly of a real nature, for this the remedy is by a special writ of covenant for a specific performance of the contract concerning certain lands particularly described in the writ. It therefore directs the sheriff to command the defendant, here called the deforciant, to keep the covenant made between the plaintiff and him concerning the identical lands in question: and upon this process it is that fines of land are usually levied at common law, the plaintiff, or person to whom the fine

is levied bringing a writ of covenant, in which he suggests some agreement to have been made between him and the deforciant, touching those particular lands, for the completion of which he brings this action. And moreover, as leases for years were formerly considered only as contracts or covenants for the enjoyment of the rents and profits, and not as the conveyance of any real interest in the land, the ancient remedy for the lessee, if rejected, was by a writ of covenant against the lessor, to recover the term (if in being) and damages, in case the ouster was committed by the lessor himself; or if the term was expired, or the ouster was committed by a stranger claiming by an elder title, then to recover damages only.

No person could at common law take advantage of any covenant or condition, except such as were parties or privies thereto; and, of course, no grantee or assignee of any reversion or rent. To remedy which, the statute 32 Hen. VIII. c. 34, gives the assignee of a reversion (after notice of such assignment) the same remedies against the particular tenant, by entry or action, for waste or other forfeitures, non-payment of rent, and non-performance of conditions, covenants and agreements, as the assignor himself might have had; and makes him equally liable, on the other hand, for acts agreed to be performed by the assignor, except in the case of warranty.

Promise.

3. A promise is in the nature of a verbal covenant, and wants nothing but the solemnity of writing and sealing to make it absolutely the same. If, therefore, it be to do any explicit act, it is an express contract, as much as any covenant; and the breach of it is an equal injury. The remedy, indeed, is not exactly the same: since, instead of an action of covenant, there only lies an action upon the case for what is called the *assumpsit*, or undertaking of the defendant; the failure of performing which is the wrong or injury done to the plaintiff, the damages whereof a jury are to estimate and settle. As if a builder promises, undertakes, or assumes to Caius that he will build and cover his house within a time limited, and fails to do it; Caius has an action on the case against the builder for this breach of his express promise, undertaking or *assumpsit*; and shall recover a pecuniary satisfaction for the injury sustained by such delay. So also in the case before mentioned, of a debt by simple contract, if the debtor promises to pay it and does not, this breach of promise entitles the creditor to his action on the case, instead of being driven to an action of debt. Thus, likewise, a promissory note, or note of hand not under seal, to pay money at a day certain, is an express *assumpsit*; and the payee at common law, or by custom and act of parliament the endorsee, may recover the value of the note in damages, if it remains unpaid. Some

agreements indeed, though never so expressly made, are deemed of so important a nature that they ought not to rest in verbal promise only, which cannot be proved but by memory (which sometimes will induce the perjury) of witnesses.

Statutes of Frauds and Perjuries.

To prevent which, the statute of frauds and perjuries, 29 Car. II. c. 3, enacts, that in the five following cases no verbal promise shall be sufficient to ground an action upon, but at the least some note or *memorandum* of it shall be made in writing and signed by the party to be charged therewith: 1. Where an executor or administrator promises to answer damages out of his own estate. 2. Where a man undertakes to answer for the debt, default, or miscarriage of another. 3. Where any agreement is made upon consideration of marriage. 4. Where any contract or sale is made of lands, tenements, or hereditaments or any interest therein. 5. And lastly, where there is any agreement that is not to be performed within a year from the making thereof. In all these cases a mere verbal *assumpsit* is void.

As to Implied Contracts.

From these *express* contracts the transition is easy to those that are only *implied* by law; which are such as reason and justice dictate, and which therefore the law presumes that every man has contracted to perform, and upon this presumption makes him answerable to such persons as suffer by his non-performance.

Of this nature are, first, such as are necessarily implied by the fundamental constitution of government, to which every man is a contracting party. And thus it is that every person is bound and hath virtually agreed to pay such particular sums of money as are charged on him by the sentence, or assessed by the interpretation, of the law. For it is a part of the original contract, entered into by all mankind who partake the benefits of society, to submit in all points to the municipal constitutions and local ordinances of that state of which each individual is a member. Whatever therefore the laws order any one to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge.

Presumptive Contracts or Assumpsits.

A second class of implied contracts are such as do not arise from the express determination of any court, or the positive direction of any statute; but from natural reason, and just construction of law. Which class extends to all presumptive undertakings or *assumpsits*; which, though never perhaps actually made, yet constantly arise from the general implication and intendment of the courts of judicature, that every man hath engaged to perform what his duty or justice requires.

Quantum Meruit.

1. If I employ a person to transact any business for me, or perform any work, the law implies that I undertook or assumed to pay him so much as his labor deserved. And if I neglect to make him amends, he has a remedy for this injury by bringing his action on the case upon this implied *assumpsit*; wherein he is at liberty to suggest that I promised to pay him as much as he reasonably deserved, and then to aver that his trouble was really worth such a particular sum, which the defendant has omitted to pay. But this valuation of his trouble is submitted to the determination of a jury; who will assess such a sum in damages as they think he really merited. This is called an *assumpsit* on a *quantum meruit*.

Quantum Valebat.

2. There is also an implied *assumpsit* on a *quantum valebat*, which is very similar to the former, being only where one takes up goods or wares of a tradesman, without expressly agreeing for the price. There the law concludes, that both parties did intentionally agree that the real value of the goods should be paid; and an action on the case may be brought accordingly, if the vendee refuses to pay that value.

For Money Had and Received.

3. A third species of implied *assumpsits* is when one has had and received money belonging to another, without any valuable consideration given on the receiver's part; for the law construes this to be money had and received for the use of the owner only; and implies that the person so receiving promised, and undertook, to account for it to the true proprietor. And, if he unjustly detains it, an action on the case lies against him for the breach of such implied promise and undertaking; and he will be made to repay the owner in damages, equivalent to what he has detained in violation of such his promise. This is a very extensive and beneficial remedy, applicable to almost every case where the defendant has received money which *ex aequo et bono* he ought to refund. It lies for money paid by mistake, or on a consideration which happens to fail, or through imposition, extortion, or oppression, or where undue advantage is taken of the plaintiff's situation.

For Money Paid for Use of Another.

4. Where a person has laid out and expended his own money for the use of another, at his request, the law implies a promise of payment, and an action will lie on this *assumpsit*.

Upon Stated Accounts.

5. Likewise, fifthly, upon a stated account between two merchants or other persons, the law implies that he against whom the balance appears has engaged to pay it to the other; though there

be not any actual promise. And from this implication it is frequent for actions on the case to be brought, declaring that the plaintiff and defendant had settled their accounts together, *insimul computassent* (which gives name to the species of *assumpsit*), and that the defendant engaged to pay the plaintiff the balance, but has since neglected to do it. But if no account has been made up, then the legal remedy is by bringing a writ of *account, de computo*, commanding the defendant to render a just account to the plaintiff, or show the court good cause to the contrary. In this action, if the plaintiff succeeds, there are two judgments; the first is, that the defendant do account (*quod computet*) before auditors appointed by the court; and, when such account is finished, then the second judgment is that he do pay the plaintiff so much as he is found in arrear. This action by the old common law, lay only against the parties themselves, and not their executors; because matters of account rested solely on their own knowledge. But this defect, after many fruitless attempts in parliament, was at last remedied by statute 4 Anne, c. 16, which gave an action of account against the executors and administrators. But, however, it is found by experience, that the most ready and effectual way to settle these matters of account is by a bill in a court of equity, where a discovery may be had on the defendant's oath, without relying merely on the evidence which the plaintiff may be able to produce.

Performance of One's Duty.

6. The last class of contracts, implied by reason and construction of law, arises upon this supposition, that every one who undertakes any office, employment, trust, or duty, contracts with those who employ, or intrust him, to perform it with integrity, diligence and skill. And, if by his want of either of those qualities any injury accrues to individuals, they have therefore their remedy in damages by a special action on the case. A few instances will fully illustrate this matter. If an officer of the public is guilty of neglect of duty, or a palpable breach of it, of non-feasance or of misfeasance: as if the sheriff does not execute a writ sent to him, or if he willfully makes a false return thereof; in both these cases the party aggrieved shall have an action *on the case* for damages to be assessed by a jury. If a sheriff or gaoler suffers a prisoner, who is taken upon mesne process (during the pendency of a suit), to escape, he is liable to an action *on the case*. But if after judgment, a gaoler or sheriff permits a debtor to escape, who is charged in execution for a certain sum, the debt immediately becomes his own, and he is compellable by action of *debt*, being for a sum liquidated and ascertained, to satisfy the creditor his whole demand; which doctrine is grounded on the equity of the statute of Westm.

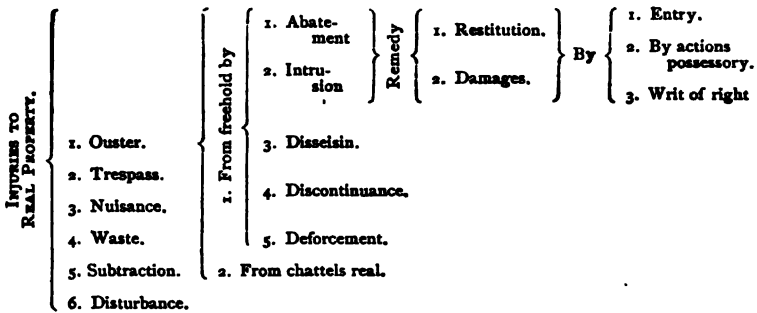
2, 13 Edw. I. c. 11 and 1 Ric. II. c. 12. An advocate or attorney that betray the cause of their client, or, being retained, neglect to appear at the trial, by which the cause miscarries, are liable to an action on the case for a reparation to their injured client. There is also in law always an implied contract with a common inn-keeper to secure his guest's goods in his inn; with a common carrier, or bargemaster, to be answerable for the goods he carries; with a common farrier, that he shoes a horse well, without laming him; with a common tailor, or other workman, that he performs his business in a workmanlike manner; in which if they fail, an action on the case lies to recover damages for such breach of their general undertaking. But if I employ a person to transact any of these concerns, whose common profession and business it is not, the law implies no such *general* undertaking; but in order to charge him with damages, a *special* agreement is required. Also, if an inn-keeper, or other victualler, hangs out a sign and opens his house for travellers, it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages, if he without good reason refuses to admit a traveller. If any one cheats me with false cards or dice, or by false weights and measures, or by selling me one commodity for another, an action on the case also lies against him for damages, upon the contract which the law always implies, that every transaction is fair and honest.

In contracts likewise for sales, it is constantly understood that the seller undertakes that the commodity he sells is his own; and if it proves otherwise, an action on the case lies against him, to exact damages for this deceit. In contracts for provisions, it is always implied that they are wholesome; and if they be not, the same remedy may be had. Also, if he that selleth anything doth upon the sale warrant it to be good, the law annexes a tacit contract to his warranty, that if it be not so, he shall make compensation to the buyer; else it is an injury to good faith, for which an action on the case will lie to recover damages. The warranty must be *upon the sale*; for if it be made *after*, and not *at*, the time of the sale, it is a void warranty: for it is then made without any consideration; neither does the buyer then take the goods upon the credit of the vendor. Also, the warranty can only reach to things in being at the time of the warranty made, and not to things in *futuro*. But if the vendor knew the goods to be unsound, and had used any art to disguise them, or if they are in any shape different from what he represents them to be to the buyer, this artifice shall be equivalent to an express warranty, and the vendor is answerable for their goodness. A general warranty will not extend to guard against defects that are plainly and obviously the object of one's senses.

Action of Deceit.

Besides the special action on the case, there is also a peculiar remedy entitled an action of *deceit*; to give damages in some particular cases of fraud; and principally where one man does anything in the name of another, by which he is deceived or injured; as if one brings an action in another's name, and then suffers a nonsuit, whereby the plaintiff becomes liable to costs. It also lies in the cases of warranty before mentioned, and other personal injuries committed contrary to good faith and honesty. But an action *on the case*, for damages, in nature of a writ of deceit, is more usually brought upon these occasions.

SYNOPSIS OF CHAPTER X



**Chapter X.
OF INJURIES TO REAL PROPERTY, AND FIRST OF
DISPOSSESSION, OR OUSTER OF THE
FREEHOLD.**

167-198.

Division of Real Injuries.

Real injuries, then, or injuries affecting real rights, are principally six: 1. Ouster; 2. Trespass; 3. Nuisance; 4. Waste; 5. Subtraction; 6. Disturbance.

Ouster.

Ouster, or dispossession, is a wrong or injury that carries with it the amotion of possession; for thereby the wrong-doer gets into the actual occupation of the land or hereditament, and obliges him that hath a right, to seek his legal remedy, in order to gain possession and damages for the injury sustained. And such ouster, or dispossession, may either be of the *freehold*, or of *chattels real*.

Ouster of Freehold—Divisions.

Ouster of *freehold* is effected by one of the following meth-

ods: 1. Abatement; 2. Intrusion; 3. Disseisin; 4. Discontinuance; 5. Deforcement. All of which in their order, and afterwards their respective remedies, will be considered in the present chapter.

Abatement.

1. And first, an *abatement* is where a person dies seised of an inheritance, and before the heir or devisee enters, a stranger who has no right makes entry and gets possession of the freehold. This entry of him is called an abatement, and he himself is denominated an abator. It is to be observed that this expression of *abat-ing*, which is derived from the French, and signifies to quash, beat down, or destroy, is used by our law in three senses. The first, which seems to be the primitive sense, is that of abating or beating down a nuisance, in which case it clearly signifies to pull it down and level it with the ground. The second signification of abatement is that of abating a writ or action, of which we shall say more hereafter. The last species of abatement is that we have now before us; which is a figurative expression, to denote that the rightful possession or freehold of the heir or devisee is overthrown by the rude intervention of a stranger.

This abatement of a freehold is somewhat similar to an immediate occupancy in a state of nature, which is effected by taking possession of the land the same instant that the prior occupant by his death relinquishes it. But the law of England for the preservation of public peace, hath prohibited as far as possible all acquisitions by mere occupancy, and hath directed that lands on the death of the present possessor shall immediately either vest in some person expressly named and appointed by the deceased as his devisee, or, on default of such appointment in such of his next relations as the law hath selected and pointed out as his natural representative or heir. Every entry, therefore, of a mere stranger by way of intervention between the ancestor and heir or person next entitled, which keeps the heir or devisee out of possession, is one of the highest injuries to the rights of real property.

Intrusion.

2. The second species of injury by ouster, or amotion of possession from the freehold, is by *intrusion*: which is the entry of a stranger, after a particular estate of freehold is determined, before him in remainder or reversion. And it happens where a tenant for term of life dieth seised of certain lands and tenements, and a stranger entereth thereon, after such death of the tenant, and before any entry of him in remainder or reversion. This entry and interposition of the stranger differ from an abatement in this: that an abatement is always to the prejudice of the heir or immediate devisee; an intrusion is always to the prejudice of him in

remainder or reversion. An intrusion is always immediately consequent upon the determination of a particular estate; an abatement is always consequent upon the descent or devise of an estate in fee-simple. And in either case the injury is equally great to him whose possession is defeated by this unlawful occupancy.

Disseisin.

3. The third species of injury by ouster, or privation of the freehold, is by *disseisin*. Disseisin is a wrongful putting out of him that is seised of the freehold. Disseisin may be effected either in corporeal inheritances or incorporeal. Disseisin of things corporeal, as of houses, lands, etc., must be by entry and actual dispossession of the freehold. Disseisin of incorporeal hereditaments cannot be an actual dispossession; for the subject itself is neither capable of actual bodily possession, or dispossession; but it depends on their respective natures, and various kinds, being in general nothing more than a disturbance of the owner in the means of coming at or enjoying them.

These three species of injury, *abatement*, *intrusion*, and *disseisin*, are such wherein the entry of the tenant, *ab initio*, as well as the continuance of his possession afterwards, is unlawful. But the two remaining species are where the entry of the tenant was at first lawful, but the wrong consists in the detaining of possession afterwards.

Discontinuance.

4. Such is, fourthly, the injury of *discontinuance*; which happens when he who hath an estate tail maketh a larger estate of the land than by law he is entitled to do: in which case the estate is good, so far as his power extends who made it, but no further.

Deforcement.

5. The fifth and last species of injuries by ouster or privation of the freehold, is that of *deforcement*. This, in its most extensive sense, is a much larger and more comprehensive expression than any of the former: it then signifying the holding of any lands or tenements to which another person hath a right. So that this includes as well an abatement, an intrusion, a disseisin, or a discontinuance, as any other species of wrong whatsoever, whereby he that hath right to the freehold is kept out of possession. But as contradistinguished from the former, it is only such a detainer of the freehold from him that hath the right of property, but never had any possession under that right, as falls within none of the injuries which we have before explained.

The Remedy—Methods of Obtaining It.

The several species and degrees of injury by *ouster* being

thus ascertained and defined, the next consideration is the remedy, which is universally, the *restitution* or *delivery of possession* to the right owner; and, in some cases, *damages* also for the unjust amotion. The methods whereby these remedies, or either of them, may be obtained, are various.

Entry.

I. The first is that extrajudicial and summary one, of *entry* by the legal owner; when another person, who hath no right, hath previously taken possession of lands or tenements. In this case the party entitled may make a formal, but peaceable entry thereon, declaring that thereby he takes possession; which notorious act of ownership is equivalent to a feodal investiture by the lord; or he may enter on any part of it in the same county, declaring it to be in the name of the whole; but if it lies in different counties he must make different entries. Also if there be *two* disseisors, the party disseised must make his entry on *both*; or if *one* disseisor has conveyed the lands with livery to *two* distinct feoffees, entry must be made on *both*: for as their seisin is distinct, so also must be the act which divests that seisin. If the claimant be deterred from entering by menaces or bodily fear, he may make *claim* as near to the estate as he can, with the like forms and solemnities; which claim is in force only for a year and a day. And this claim, if it be repeated once in the space of every year and a day, has the same effect with, and in all respects amounts to a legal entry. Such an entry gives a man seisin, or puts into immediate possession him that hath right of entry on the estate, and thereby makes him complete owner, and capable of conveying it from himself by either descent or purchase.

This remedy by entry takes place in three only of the five species of ouster, viz., abatement, intrusion, and disseisin. But, upon a discontinuance, or deforcement, the owner of the estate cannot enter, but is driven to his action; for herein, the original entry being lawful, and thereby an apparent right of possession being gained, the law will not suffer that right to be overthrown by the mere act or entry of the claimant. Yet a man may enter on his tenant by sufferance: for such tenant hath no freehold, but only a bare possession: which may be defeated, like a tenancy at will, by the mere entry of the owner.

This remedy by entry must be pursued, according to statute 5 Ric. II. st. 1, c. 8, in a peaceable and easy manner; and not with force or strong hand. For, if one turns or keeps another out of possession forcibly, this is an injury of both a civil and a criminal nature. The civil is remedied by immediate restitution; which puts the ancient possessor *in statu quo*: the criminal injury, or public

wrong, by breach of the king's peace, is punished by fine to the king. For by the statute 8 Hen. VI. c. 9, upon complaint made to any justice of the peace, of a forcible entry, with strong hand on lands or tenements; or a forcible detainer after a peaceable entry; he shall try the truth of the complaint by jury, and, upon force found, shall restore the possession to the party so put out: and in such case, or if an alienation be made to defraud the possessor of his right (which is likewise declared to be absolutely void), the offender shall forfeit, for the force found, treble damages to the party grieved, and make fine and ransom to the king. But this does not extend to such as endeavor to keep possession *manu forti*, after three years' peaceable enjoyment of either themselves, their ancestors, or those under whom they claim; by a subsequent clause of the same statute, enforced by statute 31 Eliz. c. 11.

When There is the Apparent Right of Possession.

II. Thus far of remedies, when tenant or occupier of the land hath gained only a *mere possession*, and no apparent shadow of right. Next follow another class, which are in use where the title of the tenant or occupier is advanced one step nearer to perfection; so that he hath in him not only a bare possession, which may be destroyed by a bare entry, but also an *apparent right of possession*, which cannot be removed but by orderly course of law; in the process of which it must be shown, that though he hath at present possession, and therefore hath the presumptive right, yet there is a right of possession, superior to his, residing in him who brings the action.

These remedies are either by *writ of entry*, or an *assize*; which are actions merely *possessory*; serving only to regain that possession, whereof the demandant (that is, he who sues for the land) or his ancestors have been unjustly deprived by the tenant or possessor of the freehold, or those under whom he claims. They decide nothing with respect to the *right of property*; only restoring the demandant to that state or situation, in which he was (or by law ought to have been) before the dispossession committed. But this without any prejudice to the right of ownership: for, if the dispossessor has any legal claim, he may afterwards exert it, notwithstanding a recovery against him in these possessory actions. Only the law will not suffer him to be his own judge, and either take or maintain possession of the lands, until he hath recovered them by legal means; rather presuming the right to have accompanied the ancient seisin, than to reside in one who had no such evidence in his favour.

Writ of Entry.

I. The first of these possessory remedies is by *writ of entry*; which is that which disproves the title of the tenant or possessor,

by showing the unlawful means by which he entered or continues possession. The writ is directed to the sheriff, requiring him to "command the tenant of the land that he render to the demandant the land in question, which he claims to be his right of inheritance; and into which, as he saith, the said tenant had not entry but by (or after) a disseisin, intrusion or the like, made to the said demandant, within the time limited by law for such actions; or that upon refusal he do appear in court on such a day, to show wherefore he hath not done it." This is the original process, the *praecipe* upon which all the rest of the suit is grounded: wherein it appears that the tenant is required either to deliver seisin of the lands, or to show cause why he will not. This cause may be either a denial of the fact of having entered by or under such means as are suggested, or a justification of his entry by reason of title in himself or in those under whom he makes claim: whereupon the possession of the land is awarded to him who produces the clearest right to possess it.

This remedial instrument, or writ of entry, is applicable to all the cases of ouster before mentioned, except that of discontinuance by tenant in tail, and some peculiar species of deforcements. But in general the writ of entry is the universal remedy to recover possession, when wrongfully withheld from the owner.

Writ of Assize.

2. As a writ of entry is a real action which *disproves* the title of the tenant by showing the unlawful commencement of his possession, so an *assize* is a real action which *proves* the title of the demandant merely by showing his or his ancestor's possessions; and these two remedies are in all other respects so totally alike that a judgment or recovery in one is a bar against the other; so that when a man's possession is once established by either of these possessory actions it can never be disturbed by the same antagonist in any other of them.

This remedy by writ of assize, is only applicable to two species of injury by ouster, viz., *abatement*, and a recent or *novel disseisin*. This writ directs the sheriff to summon a jury or assize, who shall view the land in question, and recognize whether such ancestor was seised thereof on the day of his death, and whether the demandant be the next heir: soon after which the judges come down by the king's commission to take the recognition of assize: when, if these points are found in the affirmative, the law immediately transfers the possession from the tenant to the demandant.

Limitation of the Action.

In all these possessory actions there is a time of limitation settled, beyond which no man shall avail himself of the possession

of himself or his ancestors, or take advantage of the wrongful possession of his adversary.

This time of limitation by statute was successively dated from particular eras, viz., from the return of King John from Ireland, and from the coronation, etc., and afterwards by limiting a certain period, as fifty years for lands, and the like period for customary and prescriptive rents suits, and services, and enacting that no person should bring any possessory action, to recover possession thereof merely upon the seisin, or dispossession of his ancestors, beyond such certain period. And all writs, grounded upon the possession of the demandant himself, are directed to be sued out within thirty years after the disseisin complained of; for if it be an older date, it can with no propriety be called a fresh, recent or *novel disseisin*.

The Right of Property—the Remedy.

III. By these several possessory remedies the right of possession may be restored to him that is unjustly deprived thereof. But the right of *possession* (though it carries with it a strong presumption) is not always conclusive evidence of the right of *property*, which may still subsist in another man. For, as one man may have the *possession*, and another the *right of possession*, which is recovered by these possessory actions; so one man may have the *right of possession*, and so not be liable to eviction by any possessory action, and another may have the *right of property*, which cannot be otherwise asserted than by the great and final remedy of a writ of right, or such correspondent writs as are in the nature of a writ of right.

Four cases Demanding a Remedy.

This happens principally in four cases: 1. Upon discontinuance by the alienation of the tenant in tail: whereby he who had the right of possession hath transferred it to the alienee; and therefore his issue, or those in remainder or reversion, shall not be allowed to recover by virtue of that possession, which the tenant hath so voluntarily transferred. 2, 3. In case of judgment given against either party, whether by his own default, or upon trial of the merits, in any possessory action: for such judgment, if obtained by him who hath not the true ownership, is held to be a species of *deforcement*; which, however, binds the right of possession, and suffers it not to be ever again disputed, unless the right of property be also proved. 4. In case the demandant, who claims the right, is barred from these possessory actions by length of time and the statute of limitations before mentioned; for an undisturbed possession for fifty years ought not to be divested by anything but a very clear proof of the absolute right of property.

In these four cases the law applies the remedial instrument of either the writ of right itself, or such other writs as are said to be of the same nature.

Chapter XI.

OF DISPOSSESSION, OR OUSTER OF CHATTELS REAL.

198-208.

Having in the preceding chapter considered with some attention the several species of injury by dispossession or ouster of the *freehold*, I next consider injuries by ouster of *chattels real*; that is by amoving the possession of the tenant from an estate by statute-merchant, statute staple, recognizance in the nature of it, or *elegit*; or from an estate for years.

Ouster From Estate by Statute, Etc.

I. Ouster, or amotion of possession, from estates held by statute, recognizance, or *elegit*, is only liable to happen by a species of disseisin, or turning out of the legal proprietor, before his estate is determined by raising the sum for which it is given him in pledge. And for such ouster, though the estate be merely a chattel interest, the owner shall have the same remedy as for an injury to a freehold, viz., by assize of *novel disseisin*.

Ouster From Estate for Years.

II. As for *ouster*, or amotion of possession, from an *estate for years*: this happens only by a like kind of disseisin, ejection, or turning out, of the tenant from the occupation of the land during the continuance of his term. For this injury the law has provided him with two remedies, according to the circumstances and situation of the wrong-doer: the writ of *ejectione firmae*; which lies against any one, the lessor, reversioner, remainder-man, or any stranger, who is himself the wrong-doer and has committed the injury complained of; and the writ of *quare ejecit infra terminum*, which lies not against the wrong-doer or ejector himself, but his feoffee or other person claiming under him. These are mixed actions, somewhat between real and personal; for therein are two things recovered, as well restitution of the term of years, as damages for the ouster or wrong.

Ejectment.

I. A writ then of *ejectione firmae*, or action of trespass in ejectment, lieth where lands or tenements are let for a term of years; and afterwards the lessor, reversioner, remainder-man, or any stranger, doth eject or oust the lessee of his term. In this case he shall have his writ of *ejection* to call the defendant to answer for entering on the lands so demised to the plaintiff for a term that

is not yet expired, and ejecting him. And by this writ the plaintiff shall recover back his term, or the remainder of it with damages.

Since the disuse of real actions, this mixed proceeding is become the common method of trying the title to lands or tenements.

The remedy by ejectment is in its original an action brought by one who hath a lease for years, to repair the injury done him by dispossession. In order therefore to convert it into a method of trying titles to the freehold, it is first necessary that the claimant do take possession of the lands, to empower him to constitute a lessee for years, that may be capable of receiving this injury of dispossession. For it would be an offense, called in our law *main-tenance*, to convey a title to another, when the grantor is not in possession of the land. When therefore a person, who hath right of entry into lands, determines to acquire that possession, which is wrongfully withheld by the present tenant, he makes (as by law he may) a formal entry on the premises; and being so in the possession of the soil, he there, upon the land, seals and delivers a lease for years to some third person or lessee: and having thus given him entry, leaves him in possession of the premises. This lessee is to stay upon the land till the prior tenant, or he who had the previous possession, enters thereon afresh and ousts him, or till some other person (either by accident or by agreement beforehand) comes upon the land, and turns him out or ejects him. For this injury the lessee is entitled to his action of ejectment against the tenant, or this *casual ejector*, whichever it was that ousted him, to recover back his term and damages. But where this action is brought against such a casual ejector as is before mentioned, and not against the very tenant in possession, the court will not suffer the tenant to lose his possession without any opportunity to defend it. Wherefore it is a standing rule, that no plaintiff shall proceed in ejectment to recover land against a casual ejector, without notice given to the tenant in possession (if any there be), and making him a defendant if he pleases. And, in order to maintain the action, the plaintiff must, in case of any defense, make out four points before the court; viz., *title, lease, entry, and ouster*. First, he must show a good *title* in his lessor, which brings the matter of right entirely before the court; then that the lessor, being seised or possessed by virtue of such title, did make him the *lease* for the present term; thirdly, that he, the lessee or plaintiff, did *enter*, or take possession in consequence of such lease; and then, lastly, that the defendant *ousted or ejected* him. Whereupon he shall have judgment to recover his term and damages; and shall, in consequence, have a *writ of possession*, which the sheriff is to execute by delivering him the undisturbed and peaceable possession of his term.

As much trouble and formality were found to attend the actual making of the *lease*, *entry*, and *ouster*, a new and more easy method of trying titles by writ of ejectment, where there is any actual tenant or occupier of the premises in dispute, was invented somewhat more than a century ago. This new method entirely depends upon a string of legal fictions: no actual lease is made, no actual entry by the plaintiff, no actual ouster by the defendant; but all are merely ideal, for the sole purpose of trying the title. To this end, in the proceedings a lease for a term of years is stated to have been made, by him who claims title, to the plaintiff who brings the action, as by John Rogers to Richard Smith, which plaintiff ought to be some real person, and not merely an ideal fictitious one who hath no existence, as is frequently though unwarrantably practiced; it is also stated that Smith the lessee entered; and that the defendant William Stiles, who is called the *casual ejector*, ousted him; for which ouster he brings this action. As soon as this action is brought, and the complaint fully stated in the declaration, Stiles, the casual ejector, or defendant, sends a written notice to the tenant in possession of the lands, as George Saunders, informing him of the action brought by Richard Smith, and transmitting him a copy of the declaration; withal assuring him that he, Stiles, the defendant, has no title at all to the premises, and shall make no defense; and therefore advising the tenant to appear in court and defend his own title: otherwise he, the casual ejector, will suffer judgment to be had against him; and thereby the actual tenant, Saunders, will inevitably be turned out of possession. On receipt of this friendly caution, if the tenant in possession does not within a limited time apply to the court to be admitted a defendant in the stead of Stiles, he is supposed to have no right at all; and upon judgment being had against Stiles, the casual ejector, Saunders, the real tenant, will be turned out of possession by the sheriff.

But, if the tenant in possession applies to be made a defendant, it is allowed him upon this condition: that he enter into a rule of court to confess, at the trial of the cause, three of the four requisites for the maintenance of the plaintiff's action: viz., the *lease* of Rogers, the lessor, the *entry* of Smith the plaintiff, and his *ouster* by Saunders himself, now made the defendant instead of Stiles: which requisites being wholly fictitious, should the defendant put the plaintiff to prove them, he must of course be nonsuited for want of evidence; but by such stipulated confession of *lease*, *entry*, and *ouster*, the trial will now stand upon the merits of the *title* only. This done, the declaration is altered by inserting the name of George Saunders instead of William Stiles, and the cause goes down to trial under the name of Smith (the plaintiff), upon

the demise of Rogers (the lessor) against Saunders, the new defendant. And therein the lessor of the plaintiff is bound to make out a clear title; otherwise his fictitious lessee cannot obtain judgment to have possession of the land for the term supposed to be granted. But if the lessor makes out his title in a satisfactory manner, then judgment and a writ of possession shall go for Richard Smith the nominal plaintiff, who by this trial has proved the right of John Rogers, his supposed lessor. But, if the new defendants, whether landlord or tenant, or both, after entering into the common rule, fail to appear at the trial, and to confess lease, entry, and ouster, the plaintiff, Smith, must indeed be there non-suited, for want of proving those requisites; but judgment will in the end be entered against the casual ejector, Stiles; for the condition on which Saunders, or his landlord, was admitted a defendant is broken, and therefore the plaintiff is put again in the same situation as if he never had appeared at all, the consequence of which (we have seen) would have been, that judgment would have been entered for the plaintiff, and the sheriff, by virtue of a writ for that purpose, would have turned out Saunders, and delivered possession to Smith. The same process therefore as would have been had, provided no conditional rule had been ever made, must now be pursued as soon as the condition is broken.

The damages recovered in these actions, though formerly their only intent, are now usually (since the title has been considered as the principal question) very small and inadequate, amounting commonly to one shilling, or some other trivial sum. In order therefore to complete the remedy when the possession has long been detained from him that hath the right to it, an action of trespass also lies, after a recovery in ejectment, to recover the mesne profits which the tenant in possession has wrongfully received. Which action may be brought in the name of either the nominal plaintiff in the ejectment, or his lessor, against the tenant in possession, whether he be made party to the ejectment or suffers judgment to go by default. In this case the judgment in ejectment is conclusive evidence against the defendant for all profits which have accrued since the date of the demise stated in the former declaration of the plaintiff: but if the plaintiff sues for any antecedent profits the defendant may make a new defense.

Such is the modern way of obliquely bringing in question the title to lands and tenements, in order to try it in this collateral manner; a method which is now universally adopted in almost every case.

But a writ of ejectment is not an adequate means to try the title of all estates; for on those things whereon an entry cannot in fact be made, no entry shall be supposed by any fiction of the par-

ties. Therefore an ejectment will not lie of an advowson, a rent, a common, or other incorporeal hereditament.

Writ of Quare Ejecit Infra Terminum.

2. The writ of *quare ejecit infra terminum* lieth, by the ancient law, where the wrong-doer or ejector is not himself in possession of the lands, but another who claims under him. But since the introduction of fictitious ousters, whereby the title may be tried against any tenant in possession (by what means soever he acquired it), and the subsequent recovery of damages by action of trespass for mesne profits, this action is fallen into disuse.

Chapter XII. OF TRESPASS. 208-216.

Trespass—Its Largest Meaning.

The second species of real injuries, or wrongs that affect a man's lands, tenements, or hereditaments, is that of *trespass*. Trespass in its largest and most extensive sense, signifies any transgression or offense against the law of nature, of society, or of the country in which we live, whether it relates to a man's person or his property.

Its Limited Sense.

But, in the limited and confined sense in which we are at present to consider it, it signifies no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property. The law of England, justly considering that much inconvenience may happen to the owner before he has an opportunity to forbid the entry, has treated every entry upon another's lands (unless by the owner's leave, or in some very particular cases) as an injury or wrong, for satisfaction of which an action of trespass will lie; but determines the *quantum* of that satisfaction, by considering how far the offense was willful or inadvertent, and by estimating the value of actual damage sustained.

For every unwarrantable entry on another's soil the law entitles a trespass *by breaking his close*: the words of the writ of trespass commanding the defendant to show cause *quare clausum querentis fregit*. For every man's land is, in the eye of the law, enclosed and set apart from his neighbor's. And every such entry or breach of a man's close carries necessarily along with it some damage or other; for, if no other special loss can be assigned, yet still the words of the writ itself specify one general damage, viz., the treading down and bruising his herbage.

One must have a property (either absolute or temporary) in

the soil, and actual possession by entry, to be able to maintain an action of trespass; or, at least, it is requisite that the party have a lease and possession of the vesture and herbage of the land. But before entry and actual possession one cannot maintain an action of trespass, though he hath the freehold in law. Neither, by the common law, in case of an intrusion or deforcement, could the party kept out of possession sue the wrong-doer by a mode of redress which was calculated merely for injuries committed against the land while *in the possession* of the owner.

A man is answerable for not only his own trespass, but that of his cattle also; for, if by his negligent keeping they stray upon the land of another (and much more if he permits or drives them on), and they there tread down his neighbor's herbage and spoil his corn or his trees, this is a trespass for which the owner must answer in damages, and the law gives the party injured a double remedy in this case, by permitting him to distrain the cattle thus *damage-feasant*, or doing damage, till the owner shall make him satisfaction, or else by leaving him to the common remedy *in foro contentioso*, by action. And the action that lies in either of these cases of trespass committed upon another's land, either by a man himself or his cattle, is the action of *trespass vi et armis*.

In trespasses of a permanent nature, where the injury is continually renewed (as by spoiling or consuming the herbage with the defendant's cattle), the declaration may allege the injury to have been committed by *continuation* from one given day to another (which is called laying the action with a *continuando*) and the plaintiff shall not be compelled to bring separate actions for every day's separate offense. But where the trespass is by one or several acts, each of which terminates in itself, and being once done cannot be done again it cannot be laid with a *continuando*; yet if there be repeated acts of trespass committed (as cutting down a certain number of trees), they may be laid to be done, not continually, but at divers days and times within a given period.

When Trespass is Justifiable.

In some cases trespass is justifiable, or, rather, entry on another's land or house shall not in those cases be accounted trespass; as if a man comes thither to demand or pay money there payable, or to execute in a legal manner the process of the law. Also, a man may justify entering into an inn or public house without the leave of the owner first especially asked, because when a man professes the keeping of such inn or public house he thereby gives a general license to any person to enter his doors. So a landlord may justify entering to distrain for rent; a commoner, to attend to his cattle commoning on another's land; and a reversioner, to see if any waste be committed on the estate; for the apparent necessity of the thing.

But in cases where a man misdemeanors himself or makes an ill use of the authority with which the law entrusts him, he shall be accounted a trespasser *ab initio*; as if one comes into a tavern and will not go out in a reasonable time, but tarries there all night contrary to the inclinations of the owner; this wrongful act shall affect and have relation back, even to his first entry, and make the whole a trespass. But a bare non-feasance, as not paying for the wine he calls for, will not make him a trespasser; for this is only a breach of contract for which the taverner shall have an action of debt or *assumpsit* against him. So, if a landlord distrained for rent and willfully killed the distress, this, by the common law, made him a trespasser *ab initio*: and so, indeed, would any other irregularity have done, till the statute 11 Geo. II. c. 19, which enacts that no subsequent irregularity of the landlord shall make his first entry a trespass; but the party injured shall have special action of trespass or on the case for the real specific injury sustained, unless tender of amends hath been made. But still if a reversioner, who enters on pretense of seeing waste, breaks the house, or stays there all night; or if the commoner who comes to tend his cattle cuts down a tree; in these and similar cases the law judges that he entered for this unlawful purpose, and therefore, as the act which demonstrates such his purpose is a trespass, he shall be esteemed a trespasser *ab initio*.

A man may also justify in an action for trespass, on account of the freehold and right of entry being in himself; and this defence brings the title of the estate in question. This is therefore one of the ways devised, since the disuse of real actions, to try the property of estates. Though it is not so usual as that by ejectment, because that, being now a mixed action, not only gives damages for the ejection, but also possession of the land; whereas in trespass, which is merely a personal suit, the right can be only ascertained, but no possession delivered; nothing being recovered, but damages for the wrong committed.

Chapter XIII. OF NUISANCE.

216-223.

Nuisance—the Meaning—Kinds.

A third species of real injuries to a man's lands and tenements, is by *nuisance*. Nuisance, or annoyance, signifies anything that worketh hurt, inconvenience, or damage. And nuisances are of two kinds: *public* or *common* nuisances, which affect the public, and are an annoyance to *all* the king's subjects: for which reason we must refer them to the class of public wrongs or crimes and

misdemeanors: and *private* nuisances, which are the objects of our present consideration, and may be defined, anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another.

Divisions.

I. In discussing the several kinds of nuisances, we will consider, first, such nuisances as may affect a man's corporeal hereditaments, and then those that may damage such as are incorporeal.

Nuisances Affecting Corporeal Inheritances—to Dwellings.

1. First, as to *corporal* inheritances. If a man builds a house so close to mine that his roof overhangs my roof and throws the water off his roof upon mine, this is a nuisance, for which an action will lie. Likewise to erect a house or other building so near to mine that it obstructs my ancient lights and windows, is a nuisance of a similar nature. But in this latter case it is necessary that the windows be *ancient*, that is, have subsisted there a long time without interruption; otherwise there is no injury done. For he hath as much right to build a new edifice upon his ground as I have upon mine; since every man may erect what he pleases upon the upright or perpendicular of his own soil, so as not to prejudice what has long been enjoyed by another; and it was my folly to build so near another's ground. Also if a person keeps his hogs, or other noisome animals, so near the house of another that the stench of them incommodes him and makes the air unwholesome, this is an injurious nuisance, as it tends to deprive him of the use and benefit of his house. A like injury is, if one's neighbor sets up and exercises an offensive trade; as a tanner's, a tallow-chandler's, or the like; for though these are lawful and necessary trades, yet they should be exercised in remote places; for the rule is, "*sic utere tuo, ut alienum non laedas*:" this therefore is an actionable nuisance. So that the nuisances which affect a man's *dwelling* may be reduced to these three: 1. Overhanging it: 2. Stopping ancient lights: and 3. Corrupting the air with noisome smells. But depriving one of a mere matter of pleasure, as of a fine prospect by building a wall, or the like: this, as it abridges nothing really convenient or necessary, is no injury to the sufferer, and is therefore not an actionable nuisance.

Nuisances to Lands, etc.

As to nuisance to one's *lands*: if one erects a smelting house for lead so near the land of another, that the vapor and smoke kill his corn and grass, and damage his cattle therein, this is held to be a nuisance. And by consequence it follows, that if one does any other act, in itself lawful, which yet being done in that place necessarily tends to the damage of another's property, it is a nuisance;

for it is incumbent on him to find some other place to do that act, where it will be less offensive. So also if my neighbor ought to scour a ditch and does not, whereby my land is overflowed, this is an actionable nuisance.

With regard to *other* corporeal hereditaments: it is a nuisance to stop or divert water that used to run to another's meadow or mill; to corrupt or poison a water-course, by erecting a dye-house or a lime pit for the use of trade, in the upper part of the stream: or, in short, to do any act therein that in its consequences must necessarily tend to the prejudice of one's neighbor.

Nuisances Affecting Incorporeal Hereditaments.

2. As to *incorporeal* hereditaments, the law carries itself with the same equity. If I have a way, annexed to my estate, across another's land, and he obstructs me in the use of it, either by totally stopping it, or putting logs across it, or ploughing over it, it is a nuisance: for in the first case I cannot enjoy my right at all, and in the latter I cannot enjoy it so commodiously as I ought.

Public Nuisances—The Remedy.

II. Let us next attend to the remedies which the law has given for this injury of nuisance. And here I must premise that the law gives no *private* remedy for anything but a *private* wrong. Therefore no *action* lies for a public or common nuisance, but an *indictment* only; because, the damage being common to all the king's subjects, no *one* can assign his particular proportion of it. For this reason, no person, natural or corporate, can have an action for a public nuisance, or punish it; but only the king in his public capacity of supreme governor. Yet this rule admits of one exception, where a private person suffers some extraordinary damage, beyond the rest of the king's subjects, by a public nuisance, in which case he shall have a private satisfaction by action. As if, by means of a ditch dug across the public way, which is a common nuisance, a man or his horse suffer any injury by falling therein; there, for this particular damage, which is not common to others the party shall have his action. Also, if a man hath abated or removed a nuisance which offended him, in this case he is entitled to no action. For he had choice of two remedies: either without suit, by abating it himself by his own mere act and authority; or by suit, in which he may both recover damages and remove it by the aid of the law; but, having made his election of one remedy, he is totally precluded from the other.

Remedies by Suit.

The remedies by suit are, 1. By action *on the case* for damages, in which the party injured shall only recover a satisfaction

for the injury sustained but cannot thereby remove the nuisance. Indeed, every continuance of a nuisance is held to be a fresh one; and therefore a fresh action will lie, and very exemplary damages will probably be given, if, after one verdict against him, the defendant has the hardiness to continue it.

Action on the Case for Damages.

The founders of the law of England have provided two other actions: the *assize of nuisance* and the writ of *quod permittat prosternere*; which not only give the plaintiff satisfaction for his injury past, but also strike at the root and remove the cause itself, the nuisance that occasioned the injury.

Chapter XIV. OF WASTE.

223-230.

Waste—Definition—Kinds.

The fourth species of injury, that may be offered to one's real property, is by *waste* or destruction in lands and tenements. Waste is a spoil and destruction of the estate, either in houses, woods, or lands; by demolishing not the temporary profits only, but the very substance of the thing; thereby rendering it wild and desolate; waste is either voluntary, or permissive; the one by an actual and designed demolition of the lands, woods, and houses; the other arising from mere negligence, and want of sufficient care in reparations, fences, and the like.

Who May be Injured by Waste.

I. The persons who may be injured by waste are such as have some *interest* in the estate wasted.

One species of interest which is injured by waste is that of a person who has a right of common in the place wasted; especially if it be common of *estovers*, or a right of cutting and carrying away wood for house-bote, plough-bote, etc.

But the most usual and important interest, that is hurt by this commission of waste, is that of him who hath the remainder or reversion of the *inheritance*, after a particular estate for life or years in being. Here, if the particular tenant (be it the tenant in dower or by curtesy, who was answerable for waste at the common law, or the lessee for life or years), commits or suffers any waste, it is a manifest injury to him that has the inheritance, as it tends to mangle and dismember it of its most desirable incidents and ornaments, among which timber and houses may justly be reckoned the principal. To him therefore in remainder or reversion, to whom the *inheritance* appertains in expectancy, the law

hath given an adequate remedy. For he, who hath the remainder *for life* only, is not entitled to sue for waste; since his interest may never perhaps come into possession, and then he hath suffered no injury.

Kinds of Remedy.

II. The redress for this injury of waste is of two kinds, preventive and corrective: the former of which is by writ of *estrepement*, the latter by that of *waste*.

Writ of Estrepement.

1. Estrepement is an old French word, signifying the same as waste or extirpation; and the writ of *estrepement* lay at the common law, *after* judgment obtained in action real, and before possession was delivered by the sheriff, to stop any waste which the vanquished party might be tempted to commit in lands which were determined to be no longer his. But as in some cases the demandant may be justly apprehensive that the tenant may make waste or *estrepement* pending the suit, well knowing the weakness of his title, therefore the statute of Gloucester gave another writ of *estrepement pendente placito*, commanding the sheriff firmly to inhibit the tenant "*ne faciat vastum vel estrepementum pendente placito dicto indiscusso.*"

Besides this preventive redress at common law, the courts of equity, upon bill exhibited therein, complaining of waste and destruction, will grant an injunction or order to stay waste, until the defendant shall have put in his answer, and the court shall thereupon make further order. Which is now become the most usual way of preventing waste.

Writ of Waste.

2. A writ of *waste* is also an action, partly founded upon the common law, and partly upon the statute of Gloucester; and may be brought by him who hath the immediate estate of inheritance in reversion or remainder, against the tenant for life, tenant in dower, tenant by curtesy, or tenant for years. This action is also maintainable in pursuance of statute Westm. 2, by one tenant in common of the inheritance against another, who makes waste in the estate holden in common. The equity of which statute extends to joint tenants, but not to coparceners.

This action of waste is a mixed action: partly real, so far as it recovers land; and partly personal so far as it recovers damages. For it is brought for both those purposes; and, if the waste be proved, the plaintiff shall recover the thing or place wasted, and also treble damages by the statute of Gloucester.

The defendant on the trial may give in evidence anything that proves there was no waste committed, as that the destruction hap-

pened by lightning, tempest, the king's enemies, or other inevitable accident. But it is no defense to say that a stranger did the waste, for against him the plaintiff hath no remedy, though the defendant is entitled to sue such stranger in an action of trespass *vi et armis*, and shall recover the damages he has suffered in consequence of such unlawful act. [The reversioner may maintain a case against such stranger.]

Chapter XV.
OF SUBTRACTION.
230-236.

Definition.

Subtraction, which is the fifth species of injuries affecting a man's real property, happens when any person who owes any suit, duty, custom, or service to another, withdraws or neglects to perform it. It differs from a disseisin, in that *this* is committed without any denial of the right, consisting merely of non-performance.

I. Fealty, suit of court, and rent, are duties and services usually issuing and arising *ratione tenuræ*, being the conditions upon which the ancient lords granted out their lands to their feudatories.

The Remedy.

The general remedy for all these is by *distress*; and it is the only remedy at the common law for the two first of them.

A distress is the taking of beasts, or other personal property, by way of pledge to enforce the performance of something due from the party distrained upon. And for the most part it is provided that distresses be reasonable and moderate; but in the case of distress for fealty or suit of court, no distress can be unreasonable, immoderate, or too large, for this is the only remedy to which the party aggrieved is entitled, and therefore it ought to be such as is sufficiently compulsory.

Among other remedies for subtraction of rents or services is action of *debt*, for the breach of this express contract. This is the most usual remedy when recourse is had to any action at all for the recovery of pecuniary rents, to which species of render almost all free services are now reduced since the abolition of the military tenures.

Chapter XVI.
OF DISTURBANCE.
236-254.

Definition and Divisions.

The sixth and last species of real injuries is that of *disturb-*

ance; which is usually a wrong done to some incorporeal hereditament, by hindering or disquieting the owners in their regular and lawful enjoyment of it. I shall consider five sorts of this injury, viz.: 1. Disturbance of *franchises*. 2. Disturbance of *common*. 3. Disturbance of *ways*. 4. Disturbance of *tenure*. 5. Disturbance of *patronage*.

Disturbance of Franchises.

I. Disturbance of *franchises* happens when a man has the franchise of holding a court-leet, of keeping a fair or market, of free-warren, of taking toll, of seizing waifs or estrays, or (in short) any other species of franchise whatsoever, and he is disturbed or incommoded in the lawful exercise thereof. To remedy which, as the law has given no other writ, he is therefore entitled to sue for damages by a special action *on the case*; or, in case of toll may take a distress if he pleases.

Disturbance of Common.

II. The disturbance of *common* comes next to be considered; where any act is done, by which the right of another to his common is incommoded or diminished. In general in case the beasts of a stranger, or the uncommonable cattle of a commoner, be found upon the land, the lord or any of the commoners may distrain them damage-feasant; or the commoner may bring an action on the case to recover damages, provided the injury done be anything considerable; so that he may lay his action with a *per quod*, or allege that *thereby* he was deprived of his common. But for a trivial trespass the commoner has no action; but the lord of the soil only, for the entry and trespass committed.

Another disturbance of common is by *surcharging* it; or putting more cattle therein than the pasture and herbage will sustain, or the party hath a right to do. In this case he that surcharges does an injury to the rest of the owners by depriving them of their respective portions, or at least contracting them into a smaller compass.

The usual remedies for surcharging the common, are either by distraining so many of the beasts as are above the number allowed, or else by an action of trespass, both of which may be had by the lord; or lastly, by a special action on the case for damages; in which any commoner may be plaintiff.

There is yet another disturbance of common, when the owner of the land, or other person, so encloses, or otherwise obstructs it that the commoner is precluded from enjoying the benefits to which he is by law entitled.

This kind of disturbance does indeed amount to a disseisin, and if the commoner chooses to consider it in that light, the law

has given him an assize of *novel disseisin*, against the lord, to recover the possession of his common. Or it has given a writ of *quod permittat*, against any stranger, as well as the owner of the land, in case of such a disturbance to the plaintiff as amounts to a total deprivation of his common: whereby the defendant shall be compelled to permit the plaintiff to enjoy his common as he ought. But if the commoner does not choose to bring a *real* action to recover seisin, or to try the right, he may (which is the easier and more usual way) bring an action on the case for his damages, instead of an assize or a *quod permittat*.

Disturbance of Ways.

III. The third species of disturbance, that of *ways*, is very similar in its nature to the last; it principally happening when a person who hath a right to a way over another's grounds, by grant or prescription, is obstructed by enclosures or other obstacles, or by ploughing across it; by which means he cannot enjoy his right of way, or at least not in so commodious a manner as he might have done. The remedy, therefore, for these disturbances is not by assize or any real action, but by the universal remedy of action on the case to recover damages.

Disturbance of Tenure.

IV. The fourth species of disturbance is that of disturbance of *tenure*, or breaking of that connection which subsists between the lord and his tenant, and to which the law pays so high a regard, that it will not suffer it to be wantonly dissolved by the act of a third person. The law gives the lord a reparation in damages against the offender by a special action on the case.

Disturbance of Patronage.

V. The fifth and last species of disturbance, but by far the most considerable, is that of disturbance of *patronage*; which is a hindrance or obstruction of a patron to present his clerk to a benefice.

Chapter XVII.

OF INJURIES PROCEEDING FROM, OR AFFECTING THE CROWN.

254-270.

Crown Injuries—The Leading Principle.

I proceed now to inquire into the mode of redressing injuries to which the crown itself is a party. In treating therefore of these, we will consider first the manner of redressing those wrongs or injuries which a subject may suffer from the crown, and then of redressing those which the crown may receive from a subject.

I. That the king can do no wrong, is a necessary and fundamental principle of the English constitution; meaning only, as has formerly been observed, that, in the first place, whatever may be amiss in the conduct of public affairs is not chargeable personally on the king; nor is he, but his ministers, accountable for it to the people; and, secondly, that the prerogative of the crown extends not to do any injury: for, being created for the benefit of the people, it cannot be exerted to their prejudice. And, as it presumes that to *know* of any injury and to *redress* it are inseparable in the royal breast, it then issues as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved.

Methods of Obtaining Redress from the Crown.

The common-law methods of obtaining possession or restitution from the crown, of either real or personal property, are: 1. By *petition de droit*, or petition of right. 2. By *monstrans de droit*, manifestation or plea of right: both of which may be preferred or prosecuted either in the chancery or exchequer.

Petition de Droit.

The former is of use, where the king is in full possession of any hereditaments or chattels, and the petitioner suggests such a right as controverts the title of the crown, grounded on facts disclosed in the petition itself; in which case he must be careful to state truly the whole title of the crown, otherwise the petition shall abate; and then, upon this answer being endorsed or underwritten by the king, *soit droit fait al partie* (let right be done to the party), a commission shall issue to inquire of the truth of this suggestion; after the return of which, the king's attorney is at liberty to plead in bar; and the merits shall be determined upon issue or demurrer, as in suits between subject and subject.

Monstrans de Droit.

But where the right of the party, as well as the right of the crown, appears upon record, there the party shall have *monstrans de droit*, which is putting in a claim of right grounded on facts already acknowledged and established, and praying the judgment of the court, whether upon those facts the king or the subject hath the right.

Methods of Obtaining Redress of Subject.

II. The methods of redressing such injuries as the crown may receive from the subject are:

1. By such usual common-law actions as are consistent with the royal prerogative and dignity.

Inquest of Office.

2. By *inquisition* or *inquest of office*; which is an inquiry

made by the king's officer, his sheriff, coroner, or escheator, *virtute officii*, or by writ to them sent for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels. This is done by a jury of no determinate number, being either twelve, or less or more.

These inquests of office were devised by law, as an authentic means to give the king his right by solemn matter of record, without which he, in general, can neither take nor part from anything.

Scire Facias in Chancery.

3. Where the crown hath unadvisedly granted anything by letters-patent which ought not to be granted, or where the patentee hath done an act that amounts to a forfeiture of the grant, the remedy to repeal the patent is by a writ of *scire facias* in chancery.

Information.

4. An *information* on behalf the crown, filed in the exchequer by the king's attorney-general, is a method of suit for recovering money or other chattels, or for obtaining satisfaction in damages for any personal wrong committed in the lands or other possessions of the crown. It is grounded on no writ under seal, but merely on the intimation of the king's officer, the attorney-general, who "gives the court to understand and be informed of" the matter in question: upon which the party is put to answer, and trial is had, as in suits between subject and subject. The most usual informations are those of *intrusion* and *debt*: *intrusion*, for any trespass committed on the lands of the crown, as by entering thereon without title, holding over after a lease is determined, taking the profits, cutting down timber, or the like; and *debt*, upon any contract for moneys due to the king, or for any forfeitures due to the crown upon the breach of a penal statute. There is also an information *in rem*, when any goods are supposed to become the property of the crown, and no man appears to claim them, or to dispute the title of the king. Upon such seizure an information was usually filed in the king's exchequer, and thereupon a proclamation was made for the owner (if any) to come in and claim the effects; and at the same time there issued a commission of appraisement to value the goods in the officer's hands; after the return of which, and a second proclamation had, if no claimant appeared, the goods were supposed derelict, and condemned to the use of the crown.

Quo Warranto.

5. A writ of *quo warranto* is in the nature of a writ of right for the king, against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his

claim, in order to determine the right. It lies also in case of non-user or long neglect of a franchise, or mis-user or abuse of it; being a writ commanding the defendant to show by what warrant he exercises such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse. And in case of judgment for the defendant, he shall have an allowance of his franchise; but in case of judgment for the king, for that the party is entitled to no such franchise, or hath disused or abused it, the franchise is either seized into the king's hands, to be granted out again to whomever he shall please; or, if it be not such a franchise as may subsist in the hands of the crown, there is merely judgment of *ouster*, to turn out the party who usurped it.

The judgment on a writ of *quo warranto* (being in the nature of a writ of right) is final and conclusive even against the crown. Which, together with the length of its process, probably occasioned that disuse into which it is now fallen, and introduced a more modern method of prosecution, by *information* filed in the court of king's bench by the attorney-general, in the nature of a writ of *quo warranto*; wherein the process is speedier, and the judgment not quite so decisive. This is properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him, or seize him for the crown; but hath long been applied to the mere purposes of trying the civil right, seizing the franchise, or ousting the wrongful possessor; the fine being nominal only.

This proceeding is, however, now applied to the decision of corporation disputes between party and party, without any intervention of the prerogative by virtue of the statute 9 Anne, c. 20, which permits an information in nature of *quo warranto* to be brought with leave of the court, at the relation of any person desiring to prosecute the same (who is then styled the *relator*), against any person usurping, intruding into, or unlawfully holding any franchise or office in any city, borough, or town corporate; provides, for its speedy determination; and directs that, if the defendant be convicted, judgment of *ouster* (as well as a fine) may be given against him, and that the relator shall pay or receive costs according to the event of the suit.

Mandamus.

6. The writ of *mandamus* is also made, by the same statute, 9 Anne, c. 20, a most full and effectual remedy, in the first place, for refusal of admission where a person is entitled to an office or place in any such corporation; and, secondly, for wrongful removal, when a person is legally possessed. These are injuries, for which though redress for the party interested may be had by assize, or other means, yet as the franchises concern the public,

and may affect the administration of justice, this prerogative writ also issues from the court of king's bench; commanding, upon good cause shown to the court, the party complaining to be admitted or restored to his office. And the statute requires, that a return be immediately made to the first writ of *mandamus*; which return may be pleaded to or traversed by the prosecutor, and his antagonist may reply, take issue or demur, and the same proceedings may be had, as if an action on the case had been brought, for making a false return; and, after judgment obtained for the prosecutor, he shall have a peremptory writ of *mandamus* to compel his admission or restitution; which latter (in case of an action) is effected by a writ of restitution. So that now the writ of *mandamus* in cases within this statute, is in the nature of an action; whereupon the party applying and succeeding may be entitled to costs, in case it be the franchise of a citizen, burgess, or freeman; and also, in general, a writ of error may be had thereupon.

This writ of *mandamus* may also be issued, in pursuance of the statute II Geo. I. c. 4, in case within the regular time no election shall be made of the mayor or other chief officer of any city, borough, or town corporate, or (being made) it shall afterwards become void; requiring the electors to proceed to election, and proper courts to be held for admitting and swearing in the magistrates so respectively chosen.

Chapter XVIII.

OF THE PURSUIT OF REMEDIES BY ACTION; AND FIRST, OF THE ORIGINAL WRIT.

270-279.

I am now to examine the *manner* in which these several remedies are *pursued* and applied by action in the courts of common law; to which I shall afterwards subjoin a brief account of the proceedings in courts of equity.

What, therefore, the student may expect in this and the succeeding chapters is, an account of the method of proceeding in and prosecuting a suit upon any of the personal writs we have before spoken of, in the court of *common pleas* at Westminster, that being the court originally constituted for the prosecution of all civil actions.

Parts of a Suit.

The general, therefore, and orderly parts of a suit are these: 1. The original writ; 2. The process; 3. The pleadings; 4. The issue or demurrer; 5. The trial; 6. The judgment, and its incidents; 7. The proceeding in nature of appeals; 8. The execution.

The Original Writ.

First, then, of the *original*, or original writ; which is the beginning or foundation of the suit. When a person hath received an injury, and thinks it worth his while to demand a satisfaction for it, he is to consider with himself, or take advice, what redress the law has given for that injury; and thereupon is to make application or suit to the crown, the fountain of all justice, for that particular specific remedy which he is determined or advised to pursue. As for money due on bond, an action of *debt*; for goods detained without force, an action of *detinue* or *trover*; or if taken with force, an action of *trespass vi et armis*; or to try the title of lands, a *writ of entry*, or action of trespass in *ejectment*; or for any consequential injury received, a special action *on the case*. To this end he is to sue out, or purchase by paying the stated fees, an *original*, or original writ, from the court of chancery, which is the *officina justitiae*, the shop or mint of justice, wherein all the king's writs are framed. It is a mandatory letter from the king, in parchment, sealed with his great seal, and directed to the sheriff of the county wherein the injury is committed, or supposed so to be, requiring him to command the wrong-doer or party accused either to do justice to the complainant, or else to appear in court and answer the accusation against him. Whatever the sheriff does in pursuance of this writ, he must return or certify to the court of common pleas, together with the writ itself, which is the foundation of the jurisdiction of the court, being the king's warrant for the judges to proceed to the determination of the cause.

Kinds of Originals.

Original writs are either *optional* or *peremptory*: or in the language of our law, they are either a *praecipe* or a *si te fecerit securum*. The *praecipe* is in the alternative commanding the defendant to do the thing required, or show the reason wherefore he hath not done it. The use of this writ is where something certain is demanded by the plaintiff, which it is incumbent on the defendant himself to perform; as to restore the possession of land, to pay a certain liquidated debt, to perform a specific covenant, to render an account, and the like: in all which cases the writ is drawn up in the form of a *praecipe* or command, to do thus or show cause to the contrary; giving the defendant his choice, to redress the injury or stand the suit. The other species of original writs is called a *si fecerit te securum*, from the words of the writ; which directs the sheriff to cause the defendant to appear in court, without any option given him, provided the plaintiff gives the sheriff security effectually to prosecute his claim. This writ is in use where nothing is specifically demanded, but only a satisfaction in general; to obtain which, and minister complete redress,

the intervention of some judicature is necessary. Such are writs of trespass, or on the case, wherein no debt or other specific thing is sued for in certain, but only damages to be assessed by a jury. For this end the defendant is immediately called upon to appear in court, provided the plaintiff gives good security of prosecuting his claim. Both species of writs are *tested*, or witnessed in the king's own name; "witness ourselves at Westminster," or wherever the chancery may be held.

The security here spoken of, to be given by the plaintiff for prosecuting his claim, is common to both writs, though it gives denomination only to the latter. The whole of it is at present become a mere matter of form; and John Doe and Richard Roe are always returned as the standing pledges for this purpose.

The Return.

The day on which the defendant is ordered to appear in court, and on which the sheriff is to bring in the writ and report how far he has obeyed, is called the *return* of the writ: it being then returned by him to the king's justices at Westminster. And it is always made returnable at the distance of at least fifteen days from the date of *teste*, that the defendant may have time to come up to Westminster, even from the most remote parts of the kingdom; and upon some day in one of the four *terms*, in which the court sits for the dispatch of business.

Appearance Days.

There are in each of these terms stated days called *days in bank, dies in banco*: that is, days of appearance in the court of common bench. They are generally at the distance of about a week from each other, and have reference to some festival of the church. On some one of these days in bank all original writs must be made returnable; and therefore they are generally called the *returns* of that term.

And thereon the court sits to take *essoigns*, or excuses, for such as do not appear according to the summons of the writ: wherefore this is usually called the *essoign day* of the term. But every return-day in the term, the person summoned has three days of grace, beyond the day named in the writ, in which to make his appearance; and if he appears on the fourth day inclusive, *quarto die post*, it is sufficient.

Chapter XIX. OF PROCESS.

279-293.

Two Kinds of Process.

The next step for carrying on the suit, after suing out the

original, is called the *process*; being the means of compelling the defendant to appear in court. This is sometimes called *original process*, being founded upon the original writ; and also to distinguish it from *mesne* or intermediate process, which issues, pending the suit, upon some collateral interlocutory matter; as to summon juries, witnesses and the like. *Mesne process* is also sometimes put into contradistinction to *final process*, or process of *execution*; and then it signifies all such process as intervenes between the beginning and the end of a suit.

Original Process—Summons.

But process, as we are now to consider it, is the method taken by the law to compel a compliance with the original writ, of which the primary step is by giving the party notice to obey it. This notice is given upon all real *praecipies*, and also upon all personal writs for injuries not against the peace, by *summons*, which is a warning to appear in court at the return of the original writ, given to the defendant by two of the sheriff's messengers, called *summoners*, either in person or left at his house or land.

Attachment.

If the defendant disobeys this verbal monition, the next process is by writ of *attachment* or *pone*, so called from the words of the writ. This is a writ not issuing out of chancery, but out of the court of common pleas, being grounded on the non-appearance of the defendant at the return of the original writ; and thereby the sheriff commanded to attach him, by taking *gage*, that is, certain of his goods, which he shall forfeit if he doth not appear; or by making him find *safe pledges* or sureties who shall be amerced in case of his non-appearance.

Distringas.

If, after *attachment*, the defendant neglects to appear, he not only forfeits this security, but is moreover to be further compelled by a writ of *distringas* or *distress infinite*; which is a subsequent process issuing from the court of common pleas, commanding the sheriff to distrain the defendant from time to time, and continually afterwards by taking his goods and the profits of his lands, which are called *issues*, and which by the common law he forfeits to the king if he doth not appear.

And here, by the common as well as the civil law, the process ended in case of injuries without force; the defendant, if he had any substance, being gradually stripped of it all by repeated distresses, till he rendered obedience to the king's writ; and, if he had no substance, the law held him incapable of making satisfaction, and therefore looked upon all further process as nugatory.

Capias ad Respondendum.

But, in case of injury accompanied with force, the law, to punish the breach of the peace, and prevent its disturbance for the future, provided also a process against the defendant's *person* in case he neglected to appear upon the former process of attachment, or had no substance whereby to be attached; subjecting his body to imprisonment by the writ of *capias ad respondendum*. But this immunity of the defendant's person, in case of peaceable though fraudulent injuries, producing great contempt of the law in indigent wrong-doers, a *capias* was also allowed to arrest the person, in actions of *account*, though no breach of the peace be suggested, by the statutes of Marlbridge. This practice (through custom rather than necessity, and for saving some trouble and expense, in suing out a special original adapted to the particular injury) still continues in almost all cases, except in actions of debt; though now, by virtue of the statutes above cited and others, a *capias* might be had upon almost every species of complaint.

If, therefore, the defendant; being summoned or attached makes default, and neglects to appear: or if the sheriff returns a *nihil*, or that the defendant hath nothing whereby he may be summoned, attached, or distrained; the *capias* now usually issues: being a writ commanding the sheriff to *take* the body of the defendant if he may be found in his bailiwick or county, and him safely to keep, so that he may have him in court on the day of the return, to answer to the plaintiff of a plea of debt or trespass, etc., as the case may be. This writ, and all others subsequent to the original writ, not issuing out of chancery, but from the court into which the original was returnable, and being grounded on what has passed in that court in consequence of the sheriff's return, are called *judicial*, not *original* writs; they issue under the private seal of that court, and not under the great seal of England; and are *tested*, not in the king's name, but in that of the chief (or, if there be no chief, of the senior) justice only. And these several writs, being grounded on the sheriff's return, must respectively bear date the same day on which the writ immediately preceding was returnable.

This is the regular and ordinary method of process. But it is now usual in practice to sue out the *capias* in the first instance, upon the supposed return of the sheriff. And, if the sheriff cannot find the defendant in his jurisdiction, he returns that he is not found, *non est inventus*, in his bailiwick; whereupon another writ issues, called a *testatum capias*, directed to the sheriff of the county where the defendant is supposed to reside, reciting the former writ, and that it is *testified, testatum est*, that the defendant lurks or wanders in *his* bailiwick, wherefore he is commanded to

take him, as in the former *capias*. But here also, when the action is brought in one county and the defendant lives in another, it is usual, for saving trouble, time and expense, to make out a *testatum capias* at the first; supposing not only an original, but also a former *capias* to have been granted, which in fact never was. And this fiction, being beneficial to all parties, is readily acquiesced in and is now become the settled practice.

Alias, Pluries, etc.

But where a defendant absconds, and the plaintiff would proceed to an outlawry against him, an original writ must then be sued out regularly, and after that a *capias*. And if the sheriff cannot find the defendant upon the first writ of *capias*, and return a *non est inventus*, there issues out an *alias* writ, and after that a *pluries*, to the same effect as the former. And, if a *non est inventus* is returned upon all of them then a writ of exigent, or *exigi facias* may be sued out, which requires the sheriff to cause the defendant to be proclaimed, required, or exacted, in five county courts successively, to render himself; and if he does, then to take him as in a *capias*; but if he does not appear, and is returned *quinto exactus*, he shall then be outlawed by the coroners of the county. Also by statute 6 Hen. VIII. c. 4, and 31 Eliz. c. 3, whether the defendant dwells within the same or another county than that wherein the *exigent* is sued out, a *writ of proclamation* shall issue out at the same time with the *exigent*, commanding the sheriff of the county, wherein the defendant dwells, to make three proclamations thereof in places the most notorious, and most likely to come to his knowledge, a month before the outlawry shall take place. Such *outlawry* is putting a man out of the protection of the law, so that he is incapable to bring an action for redress of injuries; and it is also attended with a forfeiture of all one's goods and chattels to the king. If after outlawry the defendant appears publicly, he may be arrested by a writ of *capias utlagatum*, and committed until the outlawry be reversed.

Such is the first process in the court of *common pleas*.

Process of the King's Bench.

In the *king's bench* they may also (and frequently do) proceed in certain causes, particularly in actions of ejectment and trespass, by *original writ*, with *attachment* and *capias* thereon; returnable not at Westminster, where the common pleas are now fixed in consequence of *magna charta*, but "*ubicunque fuerimus in Anglia*," wheresoever the king shall then be in England; the king's bench being removable into any part of England at the pleasure and discretion of the crown. But the more usual method of proceeding therein is without any original, but by a peculiar

species of process entitled a *bill of Middlesex*: and therefore so entitled, because the court now sits in that county; for if it sat in *Kent*, it would then be a *bill of Kent*. The bill of Middlesex (which was formerly always founded on a *plaint* of trespass *quare clausum fregit*, entered on the records of the court) is a kind of *capias*, directed to the sheriff of that county, and commanding him to take the defendant and have him before our lord the king at Westminster on a day prefixed, to answer to the plaintiff of a plea of trespass.

Process in the Exchequer.

In the exchequer the first process is by writ of *quo minus*, in order to give the court a jurisdiction over pleas between party and party. In which writ the plaintiff is alleged to be the king's farmer or debtor, and that the defendant hath done him the injury complained of *quo minus sufficiens existit*, by which he is the less able to pay the king his rent, or debt. And upon this the defendant may be arrested as upon a *capias* from the common pleas.

Common and Special Bail.

If the sheriff has found the defendant upon any of the former writs, the *capias*, *latitat*, etc., he was anciently obliged to take him into custody, in order to produce him in court upon the return, however small and minute the cause of action might be. But when the summons fell into disuse, and the *capias* became in fact the first process, it was thought hard to imprison a man for a contempt which was only supposed: and therefore in common cases, by the gradual indulgence of the courts, the sheriff or proper officer can now only personally serve the defendant with a copy of the writ or process, and with notice in writing to appear by his attorney in court to defend this action; which in effect reduces it to a mere summons. And if the defendant thinks proper to appear upon this notice, his appearance is recorded, and he puts in sureties for his future attendance and obedience; which sureties are called *common bail*, being the same two imaginary persons that were pledges for the plaintiff's prosecution, John Doe and Richard Roe. Or, if the defendant does not appear upon the return of the writ, or within four (or, in some cases, eight) days after, the plaintiff may enter an appearance for him, as if he had really appeared; and may file common bail in the defendant's name, and proceed thereupon as if the defendant had done it himself.

But if the plaintiff will make *affidavit*, or assert upon oath, that the cause of action amounts to ten pounds or upwards, then he may arrest the defendant and make him put in substantial sureties for his appearance, called *special bail*.

Arrest.

An *arrest* must be by corporal seizing or touching the defendant's body, after which the bailiff may justify breaking open the house in which he is to take him; otherwise he has no such power, but must watch his opportunity to arrest him; for every man's house is looked upon by the law to be his castle of defense and asylum, wherein he should suffer no violence. Peers of the realm, members of parliament, and corporations, are privileged from arrest; and of course from outlawries. And against them the process to enforce an appearance must be by summons and distress infinite, instead of a *capias*. Also clerks, attorneys, and all other persons attending the courts of justice (for attorneys, being officers of the court, are always supposed to be there attending), are not liable to be arrested by the ordinary process of the court, but must be sued by *bill* (called usually a *bill of privilege*), as being personally present in the court. Suitors, witnesses, and other persons, necessarily attending any courts of record on business, are not to be arrested during their actual attendance, which includes their necessary coming and returning. And no arrest can be made in the king's presence, nor within the verge of his royal palace, nor in any place where the king's justices are actually sitting.

Bail Bond.

When the defendant is regularly arrested he must either go to prison for safe custody, or put in *special bail* to the sheriff. The method of putting in bail to the sheriff is by entering into a bond or obligation, with one or more sureties, not fictitious persons, as in the former case of common bail, but real, substantial, responsible bondsmen, to insure the defendant's appearance at the return of the writ; which obligation is called the *bail bond*. The sheriff, if he pleases, *may* let the defendant go without any sureties; but that is at his own peril: for after once taking him, the sheriff is bound to keep him safely, so as to be forthcoming in court; otherwise an action lies against him for an escape. But, on the other hand, he is obliged, by statute 23 Hen. VI. c. 10, to take (if it be tendered) a sufficient bail bond; and by statute 12 Geo. I. c. 29, the sheriff shall take bail for no other sum than such as is sworn to by the plaintiff and endorsed on the back of the writ.

Appearance—Bail to the Action.

Upon the return of the writ, or within four days after, the defendant must *appear* according to the exigency of the writ. This *appearance* is effected by putting in and justifying bail *to the action*; which is commonly called putting in bail *above*. If this be not done, and the bail that were taken by the sheriff *below* are

responsible persons, the plaintiff may take an assignment from the sheriff of the bail bond and bring an action thereupon against the sheriff's bail. But if the bail so accepted by the sheriff be insolvent persons, the plaintiff may proceed against the sheriff himself by calling upon him, first to return the writ (if not already done), and afterwards to bring in the body of the defendant. And, if the sheriff does not then cause sufficient bail to be put in and perfected *above*, he will himself be responsible to the plaintiff.

When Special Bail is Required, as of Course.

Special bail is required (as of course) only upon actions of debt, or actions on the case in trover or for money due, where the plaintiff can swear that the cause of action amounts to ten pounds: but in actions where the damages are precarious, being to be assessed *ad libitum* by a jury, as in actions for words, ejectment, or trespass, it is very seldom possible for a plaintiff to swear to the amount of his cause of action; and therefore no special bail is taken thereon, unless by a judge's order or the particular directions of the court, in some peculiar species of injuries, as in cases of mayhem or atrocious battery; or upon such special circumstances as make it absolutely necessary that the defendant should be kept within the reach of justice. Also in actions against heirs, executors, and administrators, for debts of the deceased, special bail is not demandable; for the action is not so properly against them in person, as against the effects of the deceased in their possession. But special bail is required even of them in actions for a *devastavit*, or wasting the goods of the deceased; that wrong being of their own committing.

Chapter XX.

OF PLEADING.

293-314.

Definition.

Pleadings are the mutual altercations between the plaintiff and defendant; which at present are set down and delivered into the proper office in writing, though formerly they were usually put in by their counsel *ore tenus*, or *viva voce*, in court, and then minuted down by the chief clerks, or prothonotaries.

Declaration.

The first of these is the *declaration*, *narratio*, or *count*, anciently called the *tale*; in which the plaintiff sets forth his cause of complaint at length; being, indeed, only an amplification or exposition of the original writ upon which his action is founded, with the additional circumstances of time and place, when and where the injury was committed.

In *local* actions, where possession of land is to be recovered, or damages for an actual trespass, or for waste, etc., affecting land, the plaintiff must lay his declaration or declare his injury to have happened in the very county and place that it really did happen in; but in *transitory* actions, for injuries that might have happened anywhere, as debt, detinue, slander, and the like, the plaintiff may declare in what county he pleases, and then the trial must be had in that county in which the declaration is laid.

It is generally usual in actions upon the case to set forth several cases by different *counts* in the same declaration; so that if the plaintiff fails in the proof of one, he may succeed in another. He concludes with declaring that the defendant had refused to fulfill any of these agreements, whereby he is endamaged to such a value. And if he proves the case laid in any one of his counts, though he fails in the rest, he shall recover proportionable damages. This declaration always concludes with these words, "and thereupon he brings suit, etc.," "*inde producit sectum, etc.*"

Nonsuit. Retraxit. Discontinuance.

At the end of the declaration are added also the plaintiff's common pledges of prosecution, John Doe and Richard Roe, which as we before observed, are now mere names of form, though formerly they were of use to answer to the king for the amercement of the plaintiff in case he were nonsuited, barred of his action, or had a verdict of judgment against him. For if the plaintiff neglects to deliver a declaration for two terms after the defendant appears, or is guilty of other delays or defaults against the rules of law in any subsequent stage of the action, he is adjudged *not to follow* or pursue his remedy as he ought to do, and thereupon a *nonsuit* or *non prosequitur* is entered, and he is said to be *non pros'd.* And for thus deserting his complaint, after making a false claim or complaint (*pro falso clamore suo*), he shall not only pay costs to the defendant, but is liable to be amerced to the king. A *retraxit* differs from a nonsuit in that the one is negative and the other positive; the nonsuit is a mere default and neglect of the plaintiff, and therefore he is allowed to begin his suit again upon payment of costs; but a *retraxit* is an open and voluntary renunciation of his suit in court, and by this he forever loses his action. A *discontinuance* is somewhat similar to a nonsuit; for when a plaintiff leaves a chasm in the proceedings of his cause, as by not continuing the process regularly from day to day and time to time, as he ought to do, the suit is discontinued, and the defendant is no longer bound to attend; but the plaintiff must begin again by suing out a new original, usually paying costs to his antagonist.

When the plaintiff hath stated his case in the declaration, it is incumbent on the defendant within a reasonable time to make

his *defense* and to put in a *plea*; else the plaintiff will at once recover judgment by *default* or *nihil dicit* of the defendant.

Defence.

Defence, in its true legal sense, signifies not a justification, protection, or guard, which is now its popular signification, but merely an *opposing* or *denial* (from the French verb *defender*) of the truth or validity of the complaint. It is the *contestatio litis* of the civilians, a general assertion that the plaintiff hath no ground of action, which assertion is afterwards extended and maintained in his plea.

By defending the force and injury, the defendant waived all pleas of misnomer; by defending the damages, all exceptions to the person of the plaintiff; and by defending either one or the other *when and where* it should behoove him, he acknowledged the jurisdiction of the court.

Before defence made, if at all, *cognizance* of the suit must be *claimed* or demanded; when any person or body corporate hath the franchise, not only of *holding pleas* within a particular limited jurisdiction, but also of the *cognizance of pleas*: and that, either *without* any words exclusive of other courts, which entitles the lord of the franchise, whenever any suit that belongs to his jurisdiction is commenced in the courts of Westminster, to demand the cognizance thereof; or *with* such exclusive words, which also entitles the defendant to plead to the jurisdiction of the court. Upon this claim of cognizance, if allowed, all proceedings shall cease in the superior court, and the plaintiff is left at liberty to pursue his remedy in the special jurisdiction.

Plea. Impar lance. View. Oyer.

After defence made, the defendant must put in his *plea*. But before he defends, if the suit is commenced by *capias* or *latitat*, without any special *original*, he is entitled to demand one *impar lance*, and may before he pleads have more time granted by consent of the court, to see if he can end the matter amicably without further suit, by talking with the plaintiff. There are also many other previous steps which may be taken by a defendant before he puts in his plea. He may, in real actions, demand a *view* of the thing in question, in order to ascertain its identity and other circumstances. He may crave *oyer* of the writ, or of the bond, or other specialty upon which the action is brought, that is, to *hear* it read to him; the generality of defendants in the times of ancient simplicity, being supposed incapable to read it themselves, whereupon the whole is entered *verbatim* upon the record, and the defendant may take advantage of any condition or other part of it, not stated in the plaintiff's brief.

Plea.

When these proceedings are over, the defendant must then put in his excuse or plea. Pleas are of two sorts: *dilatory* pleas, and pleas *to the action*. Dilatory pleas are such as tend merely to delay or put off the suit, by questioning the propriety of the remedy, rather than by denying the injury: pleas to the action are such as dispute the very cause of suit. The former cannot be pleaded after a general imparlance, which is an acknowledgment of the propriety of the action. For imparlances are either *general*, of which we have before spoken, and which are granted of course; or *special*, with a saving of all exceptions to the writ or count, which may be granted by the prothonotary; or they may be still *more special*, with a saving of all exceptions whatsoever which are granted at the discretion of the court.

Dilatory Plea.

1. Dilatory pleas are: 1. To the *jurisdiction* of the court: alleging that it ought not to hold plea of this injury, it arising in Wales or beyond sea; or because the land in question is of ancient demesne, and ought only to be demanded in the lord's court, etc. 2. To the *disability* of the plaintiff, by reason whereof he is incapable to commence or continue the suit; as, that he is an alien enemy, outlawed, excommunicated, attainted of treason or felony, under a *praemunire* not in *rerum natura* (being only a fictitious person), an infant, a feme-covert, or a monk professed. 3. In *abatement*, which abatement is either of the writ or the count, for some defect in one of them; as by misnaming the defendant, which is called a *misnomer*; giving him a wrong addition, as *esquire*, instead of *knight*; or other want of form in any material respect. Or it may be that the plaintiff is dead; for the death of either party is at once an abatement of the suit. And in actions merely personal, arising *ex delicto*, for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the rule is that *actio personalis moritur cum persona*; and it never shall be revived either by or against the executors or other representatives. For neither the executors of the plaintiff have received, nor those of the defendant have committed, in their own personal capacity, any manner of wrong or injury. But in actions arising *ex contractu*, by breach of promise, and the like, where the right descends to the representatives of the plaintiff, and those of the defendant have assets to answer the demand, though the suits shall abate by the death of the parties, yet they may be revived against or by the executors: being indeed rather actions against the property than the person, in which the executors have now the same interest that their testator had before.

These pleas to the jurisdiction, to the disability, or in abatement, were formerly very often used as mere dilatory pleas, without any foundation of truth, and calculated only for delay; but now, by statute 4 and 5 Anne, c. 16, no dilatory plea is to be admitted without affidavit made of the truth thereof, or some probable matter shown to the court to induce them to believe it true. And with respect to the pleas themselves, it is a rule that no exception shall be admitted against a declaration or writ unless the defendant will in the same plea give the plaintiff a better; that is, show him how it might be amended, that there may not be two objections upon the same account. Neither by statute 8 and 9 W. III. c. 31, shall any plea in abatement be admitted in any suit for partition of lands; nor shall the same be abated by reason of the death of any tenant.

All pleas to the jurisdiction conclude to the cognizance of the court; praying "judgment, whether the court will have further cognizance of the suit:" pleas to the disability conclude to the person; by praying "judgment, if the said A, plaintiff, ought to be answered;" and pleas in abatement (when the suit is by original) conclude to the writ or declaration; by praying "judgment of the writ, or declaration, and that the same may be quashed," *cassetur*, made void, or abated; but, if the action be by bill, the plea must pray "judgment of the bill," and not of the declaration; the bill being here the original, and the declaration only a copy of the bill.

When these dilatory pleas are allowed, the cause is either dismissed from that jurisdiction; or the plaintiff is stayed till his disability be removed; or he is obliged to sue out a new writ, by leave obtained from the court, or to amend and new frame his declaration. But when on the other hand they are overruled as frivolous, the defendant has judgment of *respondeat ouster*, or to *answer over* in some better manner. It is then incumbent on him to plead.

Plea to the Action.

2. A plea *to the action*; that is to answer to the merits of the complaint. This is done by confessing or denying it.

A confession of the whole complaint is not very usual, for then the defendant would probably end the matter sooner, or not plead at all, but suffer judgment to go by default. Yet sometimes, after tender and refusal of a debt, if the creditor harasses his debtor with an action, it then becomes necessary for the defendant to acknowledge the debt, and plead the tender; adding that he has always been ready, *tout temps prist*, and still is ready, *uncore prist*, to discharge it: for a tender by the debtor and refusal by the creditor will in all cases discharge the costs, but not the debt itself, though in some particular cases the creditor will totally lose his

money. But frequently the defendant confesses one *part* of the complaint (by a *cognovit actionem* in respect thereof) and traverses or denies the rest; in order to avoid the expense of carrying that part to a formal trial which he has no ground to litigate. A species of this sort of confession is the *payment of money into court*; which is for the most part necessary upon pleading a tender, and is itself a kind of tender to the plaintiff, by paying into the hands of the proper officer of the court as much as the defendant acknowledges to be due, together with the costs hitherto incurred, in order to prevent the expense of any further proceedings. This may be done upon what is called a *motion*; which is an occasional application to the court by the parties or their counsel, in order to obtain some rule or order of court, which becomes necessary in the progress of a cause; and it is usually grounded upon an *affidavit* (the perfect tense of the verb *affido*), being a voluntary oath before some judge or officer of the court, to evince the truth of certain facts, upon which the motion is grounded: though no such *affidavit* is necessary for payment of money into court. If, after the money paid in, the plaintiff proceeds in his suit, it is at his own peril; for if he does not prove more due than is so paid into court, he shall be nonsuited and pay the defendant costs, but he shall still have the money so paid in; for that the defendant has acknowledged to be his due. To this head may also be referred the practice of what is called a *set-off*: whereby the defendant acknowledges the justice of the plaintiff's demand on the one hand, but on the other sets up a demand of his own, to counterbalance that of the plaintiff, either in the whole or in part: as, if the plaintiff sues for ten pounds due on a note of hand, the defendant may set off nine pounds due to himself for merchandise sold to the plaintiff, and in case he *pleads* such set-off, must pay the remaining balance into court.

Pleas that totally deny the cause of complaint are either the *general* issue, or a *special* plea, in bar.

General Issue.

1. The *general* issue, or general plea, is what traverses, thwarts, and denies at once the whole declaration; without offering any special matter whereby to evade it. As in trespass either *vi et armis*, or on the case, *non culpabilis*, not guilty; in debt upon contract, *nihil debet*, he owes nothing; in debt on bond, *non est factum*, it is not his deed; on an *assumpsit*, *non assumpsit*, he made no such promise. Or in real actions, *nul tort*, no wrong done; *nul disseisin*, no disseisin; and in a writ of right, the *mise* or issue is, that the tenant has more right to hold than the demandant has to demand. These pleas are called the general issue, because, by importing an absolute and general denial of what is alleged in the

declaration, they amount at once to an issue; by which we mean a fact affirmed on one side and denied on the other.

Special Pleas in Bar.

2. Special pleas, *in bar* of the plaintiff's demand, are very various, according to the circumstances of the defendant's case. As, in real actions, a general release or a fine, both of which may destroy and bar the plaintiff's title. Or, in personal actions, an accord, arbitration, conditions performed, nonage of the defendant, or some other fact which precludes the plaintiff from his action. A *justification* is likewise a special plea in bar; as in actions of assault and battery, *son assault demesne*, that it was the plaintiff's own original assault; in trespass, that the defendant did the thing complained of in right of some office which warranted him so to do; or in an action of slander, that the plaintiff is really as bad a man as the defendant said he was.

Also a man may plead the statutes of limitation in bar; or the time limited by certain acts of parliament, beyond which no plaintiff can lay his cause of action.

Estoppel.

An *estoppel* is likewise a special plea in bar; which happens where a man hath done some act or executed some deed which estops or precludes him from averring anything to the contrary.

Conditions and Qualities of a Plea.

The conditions and qualities of a plea (which, as well as the doctrine of estoppels, will also hold equally, *mutatis mutandis*, with regard to other parts of pleading) are: 1. That it be single and containing only one matter; for duplicity begets confusion. But by statute 4 and 5 Anne, c. 16, a man with leave of the court may plead two or more distinct matters or single pleas; as in an action of assault and battery, these three, not guilty, *son assault demesne*, and the statute of limitations. 2. That it be direct and positive, and not argumentative. 3. That it have convenient certainty of time, place, and persons. 4. That it answer the plaintiff's allegations in every material point. 5. That it be so pleaded as to be capable of trial.

Special pleas are usually in the affirmative, sometimes in the negative; but they always advance some new fact not mentioned in the declaration; and then they must be averred to be true in the common form,—“and this he is ready to verify.” This is not necessary in pleas of the general issue; those always containing a total denial of the facts before advanced by the other party, and therefore putting him upon the proof of them.

It is a rule in pleading that no man be allowed to plead specially such a plea as amounts only to the general issue, or a total denial of the charge; but in such case he shall be driven to plead

the general issue, in terms, whereby the whole question is referred to a jury. But if the defendant, in an assize or action of trespass, be desirous to refer the validity of his title to the court rather than the jury, he may state his title specially, and at the same time *give colour* to the plaintiff, or suppose him to have an appearance or colour of title, bad indeed in point of law, but of which the jury are not competent judges.

Reply, etc.

When the plea of the defendant is thus put in, if it does not amount to an issue or total contradiction of the declaration, but only evades it, the plaintiff may plead again, and *reply* to the defendant's plea: either traversing it, that is, totally denying it; as if in an action of debt upon bond the defendant pleads *solvit ad diem*, that he paid the money when due; here the plaintiff in his *replication* may totally traverse this plea by denying that the defendant paid it; or he may allege new matter in contradiction to the defendant's plea; or the replication may *confess and avoid* the plea, by some new matter or distinction consistent with the plaintiff's former declaration. To the replication the defendant may *rejoin*, or put in an answer, called a *rejoinder*. The plaintiff may answer the rejoinder by a *sur-rejoinder*; upon which the defendant may *rebut*, and the plaintiff answer him by a *sur-rebutter*.

Departure.

The whole of this process is denominated the *pleading*; in the several stages of which it must be carefully observed not to depart or vary from the title or defense which the party has once insisted on. For this (which is called a *departure* in pleading) might occasion endless altercation. Therefore the replication must support the declaration, and the rejoinder must support the plea, without departing out of it.

New Assignment.

Yet in many actions the plaintiff, who has alleged in his declaration a general wrong, may in his replication, after an evasive plea by the defendant, reduce that general wrong to a more particular certainty, by assigning the injury afresh, with all its specific circumstances, in such manner as clearly to ascertain and identify it, consistently with his general complaint; which is called a *new* or *novel assignment*.

Duplicity. Protestation.

It hath previously been observed that *duplicity* in pleading must be avoided. Every plea must be simple, entire, connected, and confined to one single point; it must never be entangled with a variety of distinct, independent answers to the same matter; which must require as many different replies, and introduce a multitude of issues upon one and the same dispute. For this would often

embarrass a jury, and sometimes the court itself, and at all events would greatly enhance the expense of the parties. Yet it frequently is expedient to plead in such a manner as to avoid any implied admission of a fact which cannot with propriety or safety be positively affirmed or denied. And this may be done by what is called a *protestation*; whereby the party interposes an oblique allegation or denial of some fact, protesting (by the gerund, *protestando*) that such a matter does or does not exist; and at the same time avoiding a direct affirmation or denial. Sir Edward Coke hath defined a protestation (in the pithy dialect of that age) to be "an exclusion of a conclusion." For the use of it is to save the party from being concluded with respect to some fact or circumstance, which cannot be directly affirmed or denied without falling into duplicity of pleading; and which yet, if he did not thus enter his protest, he might be deemed to have tacitly waived or admitted.

Tendering Issue.

In any stage of the pleadings, when either side advances or affirms any new-matter, he usually (as was said) avers it to be true; "and this he is ready to verify." On the other hand, when either side traverses or denies the facts pleaded by his antagonist, he usually tenders an issue, as it is called; the language of which is different according to the party by whom the issue is tendered; for if the traverse or denial comes from the defendant, the issue is tendered in this manner, "and of this he puts himself upon the country," thereby submitting himself to the judgment of his peers; but if the traverse lies upon the plaintiff he tenders the issue, or prays the judgment of the peers against the defendant in another form, thus: "and this he prays may be enquired of by the country."

But if either side (as for instance, the defendant) pleads a special negative plea; not traversing or denying anything that was before alleged, but disclosing some new negative matter; as, where the suit is on a bond, conditioned to perform an award, and the defendant pleads negatively, that no award was made, he tenders no issue upon this plea; because it does not appear whether the fact will be disputed, the plaintiff not having yet asserted the existence of any award; but when the plaintiff replies, and sets forth an actual specific award, if then the defendant traverses the replication, and denies the making of any such award, he then, and not before, tenders an issue to the plaintiff. For when in the course of pleading they come to a point which is affirmed on one side, and denied on the other, they are then said to be at issue; all their debates being at last contracted into a single point, which must now be determined either in favor of the plaintiff or of the defendant.

Chapter XXI. OF ISSUE AND DEMURRER.

314-325.

Definition of Issue and Kinds.

Issue *exitus*, being the end of all the pleadings, is the fourth part or stage of an action, and is either upon matter of *law*, or matter of *fact*.

Demurrer. Joinder in Demurrer.

An issue upon a matter of law is called a *demurrer*; and it confesses the facts to be true, as stated by the opposite party; but denies that, by the law arising upon those facts, any injury is done to the plaintiff, or that the defendant has made out a legitimate excuse; according to the party which first demurs, *demoratur*, rests or abides upon the point in question. As, if the matter of the plaintiff's complaint or declaration be insufficient in law, as by not assigning any sufficient trespass, then the defendant demurs to the declaration; if, on the other hand, the defendant's excuse or plea be invalid, as if he pleads that he committed the trespass by authority from a stranger, without making out the stranger's right; here the plaintiff may demur in law to the plea; and so on in every other part of the proceedings, where either side perceives any material objection in point of law, upon which he may rest his case.

The form of such demurrer is by averring the declaration or plea the replication or rejoinder, to be insufficient in law to maintain the action or the defence; and therefore praying judgment for want of sufficient matter alleged. Sometimes demurrers are merely for want of sufficient *form* in the writ or declaration. But in cases of exceptions to the form or manner of pleading, the party demurring must, by statute 27 Eliz. c. 5, and 4 and 5 Anne, c. 16, set forth the causes of his demurrer, or wherein he apprehends the deficiency to consist. And upon either a *general* or such a *special* demurrer, the opposite party must aver it to be sufficient, which is called a joinder in demurrer, and then the parties are at issue in point of law. Which issue in law, or demurrer, the judges of the court before which the action is brought must determine.

Issue of Fact. Joinder.

An issue of fact is where the fact only, and not the law, is disputed. And when he that denies or traverses the fact pleaded by his antagonist has tendered the issue, thus, "and this he prays may be enquired of by the country;" or "and of this he puts himself upon the country;" it may immediately be subjoined by the other party, "and the said A B doth the like." Which done, the issue is said to be joined, both parties having agreed to rest the

fate of the cause upon the truth of the fact in question. And this issue of fact must, generally speaking, be determined, not by the judges of the court, but by some other method; the principal of which methods is that by the country, *per pais* (in Latin *per patriam*), that is, by jury.

Nonsuit. Default. Continuance.

But here it will be proper to observe, that during the whole of these proceedings, from the time of the defendant's appearance in obedience to the king's writ, it is necessary that both the parties be kept or *continued* in court from day to day, till the final determination of the suit. For the court can determine nothing unless in the presence of both of the parties, in person or by their attorneys, or upon default of one of them, after his original appearance and a time prefixed for his appearance in court again. Therefore, in the course of pleading if either party neglects to put in his declaration, plea, replication, rejoinder, and the like, within the times allotted by the standing rules of the court, the plaintiff, if the omission be his, is said to be *nonsuit*, or not to follow and pursue his complaint, and shall lose the benefit of his writ: or, if the negligence be on the side of the defendant, judgment may be had against him for such his default. And, after issue or demurrer joined, as well as in some of the previous stages of proceeding, a day is continually given and entered upon the record, for the parties to appear on from time to time, as the exigence of the case may require. The giving of this day is called the *continuance*, because thereby the proceedings are continued without interruption from one adjournment to another. If these continuances are omitted, the cause is thereby discontinued, and the defendant is discharged *sine die*, without a day, for this term: for by his appearance in court he has obeyed the command of the king's writ; and unless he be adjourned over to a certain day, he is no longer bound to attend upon that summons; but he must be warned afresh, and the whole must begin *de novo*.

Pleas Puis Darrein Continuance.

Now, it may sometimes happen, that after the defendant has pleaded, nay, even after issue or demurrer joined, there may have arisen some new matter, which it is proper for the defendant to plead; as that the plaintiff, being a feme-sole, is since married, or that she has given the defendant a release, and the like; here, if the defendant takes advantage of this new matter as early as he possibly can, viz., at the day given for his next appearance, he is permitted to plead it in which is called a plea of *puis darrein continuance*, or since the last adjournment. For it would be unjust to exclude him from the benefit of this new defence, which it was not in his power to make when he pleaded the former. But it is dangerous to rely on such a plea, without due consideration; for it

confesses the matter which was before in dispute between the parties. And it is not allowed to be put in, if any continuance has intervened between the arising of this fresh matter and the pleading of it: for then the defendant is guilty of neglect, or *laches*, and is supposed to rely on the merits of his former plea. Also it is not allowed after a demurrer is determined, or verdict given; because then relief may be had in another way, namely, by writ of *audita querela*, of which hereafter. And these pleas *pro darrein continuance*, when brought to a demurrer in law or issue of fact, shall be determined in like manner as other pleas.

Record.

We have said that demurrers, or questions concerning the *sufficiency* of the matters alleged in the pleadings, are to be determined by the judges of the court, upon solemn argument by counsel on both sides, and to that end a demurrer-book is made up, containing all the proceedings at length, which are afterwards entered on *record*; and copies thereof, called *paper-books*, are delivered to the judges to peruse. The *record* is a history of the most material proceedings in the cause, entered on a parchment roll, and continued down to the present time; in which must be stated the original writ and summons, all the pleadings, the declaration, view, or *oyer* prayed, the imparlances, plea, replication, rejoinder, continuances, and whatever further proceedings have been had; all entered *verbatim* on the roll, and also the issue or demurrer, and joinder therein.

How Tried.

When the substance of the record is completed, and copies are delivered to the judges, the matter of law upon which the demurrer is grounded is upon solemn argument determined by the court, and not by any trial by jury; and judgment is thereupon accordingly given. As, in an action of trespass, if the defendant in his plea confesses the fact, but justifies it *causa venationis*, for that he was hunting, and to this the plaintiff demurs, that is, he admits the truth of the plea, but denies the justification to be legal: now on arguing this demurrer, if the court be of opinion that a man may not justify trespass in hunting, they will give judgment for the plaintiff; if they think that he may, then judgment is given for the defendant. Thus is an issue in law, or demurrer, disposed of.

An issue of fact takes up more form and preparation to settle it; for here the truth of the matters alleged must be solemnly examined and established by proper evidence in the channel prescribed by law. To which examination of facts, the name of trial is usually confined, which will be treated of at large in the two succeeding chapters.

Chapter XXII.

OF THE SEVERAL SPECIES OF TRIAL.

325-349.

Trial, Definition, and Species.

Trial is the examination of the matter of fact in issue; of which there are many different species, according to the difference of the subject, or thing to be tried; of all which we will take a cursory view in this and the subsequent chapter.

The species of trials in civil cases are seven. By *record*; by *inspection*, or *examination*; by *certificate*; by *witnesses*; by *wager of battle*; by *wager of law*; and by *jury*.

By Record.

I. First, then, of the trial by *record*. This is only used in one particular instance; and that is where a matter of record is pleaded in any action, as a fine, a judgment, or the like, and the opposite party pleads, "*nul tiel record*," that there is no such matter of record existing; upon this, issue is tendered and joined in the following form, "and this he prays may be enquired of by the *record*, and the other doth the like;" and hereupon the party pleading the record has a day given him to bring it in, and proclamation is made in court for him to "bring forth the record by him in pleading alleged, or else he shall be condemned;" and on his failure, his antagonist shall have judgment to recover. The trial therefore of this issue is merely by the record; for, as Sir Edward Coke observes, a record or enrollment is a monument of so high a nature, and importeth in itself such absolute verity, that if it be pleaded that there is no such record, it shall not receive any trial by witness, jury, or otherwise, but only by itself.

By Inspection. By Certificate.

II. Trial by *inspection*, or *examination*, is when, for the greater expedition of a cause, in some point or issue, being either the principal question, or arising collaterally out of it, but being evidently the object of senses, the judges of the court, upon the testimony of their own senses, shall decide the point in dispute.

III. The trial by *certificate* is allowed in such cases where the evidence of the person certifying is the only proper criterion of the point in dispute.

By Witnesses.

IV. A fourth species of trial is that by *witnesses*, *per testes*, without the intervention of a jury. It is very rarely used in our law, which prefers the trial by jury before it in almost every instance. And in every case Sir Edward Coke lays it down that the affirmative must be proved by two witnesses at the least.

By Wager of Battle.

V. The next species of trial is of great antiquity, but much disused; though still in force if the parties choose to abide by it; I mean the trial by *wager of battle*.

This trial was introduced into England among other Norman customs, by William the Conqueror; but was only used in three cases, one military, one criminal, and the third civil. The first in the court-martial or court of chivalry and honour; the second in appeals of felony, of which we shall speak in the next book; and the third upon issue joined in a writ of right, the last and most solemn decision of real property.

Wager of Law.

VI. A sixth species of trial is by *wager of law*, because as in the former case, the defendant gave a pledge, gage or *vadium*, to try the cause by battle; so here he was put in sureties or *vadios* that at such a day he will make his law, that is, take the benefit which the law has allowed him.

The manner of waging and making law is this: He that has waged, or given security, to make his law, brings with him into court eleven of his neighbors. The defendant then, standing at the end of the bar, is admonished by the judges of the nature and danger of a false oath. And if he still persists, he is to repeat this or the like oath: "Hear this, ye justices, that I do not owe unto Richard Jones the sum of ten pounds, nor any penny thereof, in manner and form as the said Richard hath declared against me. So help me God." And thereupon his eleven neighbors or compurgators shall avow upon their oaths that they believe in their consciences that he saith the truth; so that himself must be sworn *de fidelitate*, and the eleven *de credulitate*.

It must be however observed, that so long as the custom continued of producing the witnesses to give probability to the plaintiff's demand, the defendant was not put to wage his law unless the witnesses were first produced and their testimony was found consistent.

Chapter XXIII.
OF THE TRIAL BY JURY.

349-386.

Two Kinds.

Trials by jury in civil causes are of two kinds; *extraordinary*, and *ordinary*.

Proceedings.

When an issue is joined, by these words, "and this the said A prays may be enquired of by the country," or "and of this he puts

himself upon the country, and the said B does the like," the court awards a writ of *venire facias* upon the roll or record, commanding the sheriff "that he cause to come *here*, on such a day, twelve free and lawful men, of the body of his county, by whom the truth of the matter may be better known, and who are neither of kin to the aforesaid A nor the aforesaid B, to recognize the truth of the issue between the said parties." And such writ was accordingly issued to the sheriff.

If the sheriff be not an indifferent person: as if he be a party in the suit, or be related by either blood or affinity to either of the parties, he is not then trusted to return the jury, but the *venire* shall be directed to the coroners, who in this, as in many other instances, are the substitutes of the sheriff, to execute process when he is deemed an improper person. If any exception lies to the coroners, the *venire* shall be directed to two clerks of the court, or two persons of the county named by the court, and sworn. And these two, who are called *elisors*, or electors, shall indifferently name the jury, and their return is final; no challenge being allowed to their array.

Notice.

When the general day of trials is fixed, the plaintiff or his attorney must bring down the record to the assizes and enter it with the proper officer in order to its being called on in course. If it be not so entered, it cannot be tried; therefore it is in the plaintiff's breast to delay any trial by not carrying down the record; unless the defendant, being fearful of such neglect in the plaintiff, and willing to discharge himself from the action, will himself undertake to bring on the trial, giving proper notice to the plaintiff. In case the plaintiff intends to try the cause, he is bound to give the defendant (if he lives within forty miles of London) eight days' notice of trial, and if he lives at a greater distance, then fourteen days' notice, in order to prevent surprise; and if the plaintiff then changes his mind and does not countermand the notice six days before the trial, he shall be liable to pay costs to the defendant for not proceeding to trial, by the same last-mentioned statute. The defendant, however, or plaintiff, may, upon good cause shown to the court above, as upon absence or sickness of a material witness, obtain leave upon motion to defer the trial of the cause to the next assizes.

Special and Common Juries.

But we will now suppose all previous steps to be regularly settled, and the cause to be called on in court. The record is then handed to the judge, to peruse and observe the pleadings, and what issues the parties are to maintain and prove, while the jury is called and sworn. To this end the sheriff returns his compulsive

process, the writ of *habeas corpora*, or *distringas*, with the panel of jurors annexed, to the judges' officer in court. The jurors contained in the panel are either *special* or *common* jurors. *Special* juries were originally introduced in trials at bar when the causes were of too great nicety for the discussion of ordinary freeholders, or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him. He is in such cases, upon motion in court and a rule granted thereupon, to attend the prothonotary or other proper officer with his freeholders' book: and the officer is to take indifferently forty-eight of the principal freeholders in the presence of the attorneys on both sides; who are each of them to strike off twelve, and the remaining twenty-four are returned upon the panel.

A common jury is one returned by the sheriff according to the direction of the statute 3 Geo. II. c. 25, which appoints that the sheriff or officer shall not return a separate panel for every separate cause, as formerly; but one and the same panel for every cause to be tried at the same assizes, containing not less than forty-eight nor more than seventy-two jurors: and that their names, being written on tickets, shall be put into a box or glass; and when each cause is called, twelve of these persons, whose names shall be first drawn out of the box, shall be sworn upon the jury, unless absent, challenged, or excused; or unless a previous view of the messuages, lands, or place in question shall have been thought necessary by the court: in which case six or more of the jurors returned, to be agreed on by the parties, or named by a judge or other proper officer of the court, shall be appointed by special writ of *habeas corpora* or *distringas* to have the matters in question shown to them by two persons named in the writ; and then such of the jury as have had the view, or so many of them as appear, shall be sworn on the inquest previous to any other jurors. These acts are well calculated to restrain any suspicion of partiality in the sheriff, or any tampering with the jurors when returned.

Challenges.

As the jurors appear, when called, they shall be sworn, unless *challenged* by either party. Challenges are of two sorts: challenges to the *array*, and challenges to the *polls*.

To the Array.

Challenges to the array are at once an exception to the whole panel, in which the jury are arrayed or set in order by the sheriff in his return; and they may be made upon account of partiality or some default in the sheriff or his under officer who arrayed the panel. And, generally speaking, the same reasons that before the awarding the *venire* were sufficient to have directed it to the coro-

ners or elisors will be also sufficient to quash the array when made by a person or officer of whose partiality there is any tolerable ground of suspicion. Also, though there be no personal objection against the sheriff, yet if he arrays the panel at the nomination or under the direction of either party, this is good cause of challenge to the array.

To the Polls.

Challenges to the polls, *in capita*, are exceptions to particular jurors.

But challenges to the polls of the jury (who are judges of fact) are reduced to four heads by Sir Edward Coke: *propter honoris respectum*; *propter defectum*; *propter affectum*; and *propter delictum*.

1. *Propter honoris respectum*; as if a lord of parliament be impanelled on a jury, he may be challenged by either party, or he may challenge himself.

2. *Propter defectum*; as if a juror be an alien born, this is defect of birth; if he be a slave or bondman, this is defect of liberty, and he cannot be *liber et legalis homo*.

3. Jurors may be challenged *propter affectum*, for suspicion of bias or partiality. This may be either a *principal* challenge or *to the favour*. A *principal* challenge is such where the cause assigned carries with it *prima facie* evident marks of suspicion either of malice or favour: as, that a juror is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him: all these are principal causes of challenge, which, if true, cannot be overruled, for jurors must be *omni exceptione majores*. Challenges *to the favour* are where the party hath no principal challenge, but objects only to some probable circumstances of suspicion, as acquaintance and the like; the validity of which must be left to the determination of *triers*, whose office it is to decide whether the juror be favorable or unfavorable.

4. Challenges *propter delictum* are for some crime or misdemeanour that affects the juror's credit and renders him infamous. A juror may himself be examined on oath of *voir dire, veritatem dicere* with regard to such causes of challenge as are not to his dishonour or discredit; but not with regard to any crime, or anything which tends to his disgrace or disadvantage.

Besides these challenges, which are exceptions against the fitness of jurors, and whereby they may be *excluded* from serv-

ing, there are also other causes to be made use of by the jurors themselves, which are matter of exemption: whereby their service is *excused*, and not *excluded*. This exemption is also extended, by divers statutes, customs, and charters, to physicians and other medical persons, counsel, attorneys, officers of the courts, and the like; all of whom, if impanelled, must show their special exemption. Clergymen are also usually excused, out of favour and respect to their function.

Tales.

If by means of challenges, or other cause, a sufficient number of unexceptionable jurors doth not appear at the trial, either party may pray a *tales*. A *tales* is a supply of *such* men as are summoned upon the first panel, in order to make up the deficiency.

Oath.

When a sufficient number of persons impanelled, or *talesmen*, appear, they are then separately sworn, well and truly to try the issue between the parties, and a true verdict to give according to the evidence; and hence they are denominated the jury, *jurata* and jurors.

Hearing of the Merits.

The jury are now ready to hear the merits; and to fix their attention the closer to the facts which they are impanelled and sworn to try, the pleadings are opened to them by counsel on that side which holds the affirmative of the question in issue. For the issue is said to lie, and proof is always first required, upon that side which affirms the matter in question. The opening counsel briefly informs them what has been transacted in the court above; the parties, the nature of the action, the declaration, the plea, replication, and other proceedings, and, lastly, upon what point the issue is joined, which is there sent down to be determined. The nature of the case, and the evidence intended to be produced, are next laid before them by counsel also on the same side; and when their evidence is gone through, the advocate on the other side opens the adverse case, and supports it by evidence; and then the party which began is heard by way of reply.

Evidence.

Evidence signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other; and no evidence ought to be admitted to any other point. Therefore upon an action of debt, when the defendant denies his bond by the plea of *non est factum*, and the issue is, whether it be the defendant's deed or no; he cannot give a release of this bond in evidence; for that does not destroy the bond, and therefore does not prove the issue which he has chosen to rely upon, viz., that the bond has no existence.

Again, evidence in the trial by jury is of two kinds, either that which is given in proof, or that which the jury may receive by their own private knowledge. The former, or *proofs* (to which in common speech the name of evidence is usually confined), are either written, or *parol*, that is, by word of mouth.

Written Proofs.

Written proofs, or evidence, are: 1, Records, and 2, Ancient deeds of thirty years' standing, which prove themselves; but, 3, Modern deeds, and 4, Other writings, must be attested and verified by *parol* evidence of witnesses. And the one general rule that runs through all the doctrine of trials is this, that the best evidence the nature of the case will admit of shall always be required, if possible to be had; but if not possible then the best evidence that can be had shall be allowed. For if it be found that there is any better evidence existing than is produced, the very not producing it is a presumption that it would have detected some falsehood that at present is concealed. Thus, in order to prove a lease for years, nothing else shall be admitted but the very deed of lease itself, if in being; but if that be positively proved to be burned or destroyed (not relying on any loose negative, as that it cannot be found, or the like) then an attested copy may be produced; or *parol* evidence be given of its contents. So, no evidence of a discourse with another will be admitted, but the man himself must be produced; yet in some cases (as in proof of any general customs, or matters of common tradition or repute) the courts admit of *hearsay* evidence, or an account of what persons deceased have declared in their life-time; but such evidence will not be received of any particular facts. So, too, books of account or shop-books are not allowed of themselves to be given in evidence for the owner; but a servant who made the entry may have recourse to them to refresh his memory; and if such servant (who was accustomed to make those entries) be dead, and his hand be proved, the book may be read in evidence; for as tradesmen are often under a necessity of giving credit without any note or writing, this is therefore, when accompanied with such other collateral proofs of fairness and regularity, the best evidence that can then be produced.

Parol Evidence.

With regard to *parol* evidence, or *witnesses*; it must first be remembered, that there is a process to bring them in by writ of *subpoena ad testificandum*; which commands them, laying aside all pretences and excuses, to appear at the trial. But no witness, unless his reasonable expenses be tendered him, is bound to appear at all; nor, if he appears, is he bound to give evidence till such charges are actually paid him.

All witnesses, of whatever religion or country, that have the use of their reason, are to be received and examined, except such as are *infamous*, or such as are *interested* in the event of the cause. All others are *competent witnesses*; though the jury from other circumstances will judge of their *credibility*. Infamous persons are such as may be challenged as jurors *propter delictum*; and therefore never shall be admitted to give evidence to inform that jury, with whom they were too scandalous to associate. Interested witnesses may be examined upon *avoir dire*, if suspected to be secretly concerned in the event; or their interest may be proved in court. Which last is the only method of supporting an objection to the former class, for no man is to be examined to prove his own infamy. And no counsel, attorney, or other person, intrusted with the secrets of the cause by the party himself, shall be compelled, or perhaps allowed to give evidence of such conversation or matters of privacy, as came to his knowledge by virtue of such trust and confidence; but he may be examined as to mere matters of fact, as the execution of a deed or the like, which might have come to his knowledge without being intrusted in the cause.

One witness (if credible) is *sufficient* evidence to a jury of any single fact, though undoubtedly the concurrence of two or more corroborates the proof.

Circumstantial Evidence.

Positive proof is always required, where from the nature of the case it appears it might have possibly been had. But next to *positive proof*, circumstantial evidence or the doctrine of *presumptions* must take place: for when the fact itself cannot be demonstratively evinced, that which comes nearest to the proof of the fact is the proof of such circumstances which either *necessarily*, or *usually*, attend such facts; and these are called presumptions, which are only to be relied upon till the contrary be actually proved. *Violent* presumption is many times equal to full proof; for there those circumstances appear, which *necessarily* attend the fact. *Light*, or rash, presumptions have no weight or validity at all.

The Oath. Bill of Exceptions. Demurrer to Evidence.

The oath administered to the witness is not only that what he deposes shall be true, but that he shall also depose the *whole* truth; so that he is not to conceal any part of what he knows, whether interrogated particularly to that point or not. And all this evidence is to be given in open court, in the presence of the parties, their attorneys, the counsel, and all bystanders, and before the judge and jury; each party having liberty to except to its competency, which exceptions are publicly stated, and by the judges

are openly and publicly allowed or disallowed, in the face of the country, which must curb any secret bias or partiality that might arise in his own breast. And if, either in his directions or decisions, he mistakes the law by ignorance, inadvertence, or design, the counsel on either side may require him publicly to seal a *bill of exceptions* stating the point in which he is supposed to err; and this he is obliged to seal, by statute Westm. 2, 13 Edw. I. c. 31, or if he refuses so to do, the party may have a compulsory writ against him, commanding him to seal it, if the fact alleged be truly stated; and if he returns that the fact is untruly stated, when the case is otherwise, an action will lie against him for making a false return. This bill of exceptions is in the nature of an appeal, examinable, not in the court out of which the record issues for the trial at *nisi prius*, but in the next immediate superior court, upon a writ of error, after judgment given in the court below. But a *demurrer* to evidence shall be determined by the court out of which the record is sent. This happens where a record or other matter is produced in evidence, concerning the legal consequences of which there arises a doubt in law; in which case the adverse party may if he pleases demur to the whole evidence; which admits the truth of every fact that has been alleged, but denies the sufficiency of them all in point of law to maintain or overthrow the issue: which draws the question of law from the cognizance of the jury to be decided (as it ought) by the court. But neither these demurrers to evidence, nor the bills of exceptions, are at present so much in use as formerly; since the more frequent extension of the discretionary powers of the court in granting a new trial, which is now very commonly had for the misdirection of the judge at *nisi prius*.

Jury's Own Knowledge.

As to such evidence as the jury may have in their own consciences by their private knowledge of facts, it was an ancient doctrine that this had as much right to sway their judgment as the written or parol evidence which is delivered in court. And therefore, it hath been often held that though no proofs be produced on either side, yet the jury might bring in a verdict. For the oath of the jurors to find according to their evidence was construed to be, to do it according to the best of their own knowledge. But this doctrine was gradually exploded, when *attaints* began to be disused and *new trials* introduced in their stead. For it is quite incompatible with the grounds upon which such new trials are every day awarded, viz., that the verdict was given *without or contrary to*, evidence. And therefore, together with new trials, the practice seems to have been first introduced which now uni-

versally obtains, that if a juror knows anything of the matter in issue he may be sworn as a witness and give his evidence publicly in court.

The Summing Up.

When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel, and all others, sums up the whole to the jury; omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence.

The jury, after the proofs are summed up, unless the case be very clear, withdraw from the bar to consider of their verdict; and, in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed. If our juries eat or drink at all, or have any eatables about them, without consent of the court, and before verdict, it is finable; and if they do so at his charge for whom they afterwards find, it will set aside the verdict. Also if they speak with either of the parties or their agents, after they are gone from the bar; or if they receive any fresh evidence in private: or if to prevent disputes they cast lots for whom they shall find; any of these circumstances will entirely vitiate the verdict. And it has been held, that if the jurors do not agree in their verdict before the judges are about to leave the town, though they are not to be threatened or imprisoned, the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart.

When they are all unanimously agreed, the jury return back to the bar; and, before they deliver their verdict, the plaintiff is bound to appear in court, by himself, attorney, or counsel, in order to answer the amercement to which by the old law he is liable, as has been formerly mentioned in case he fails in his suit, as a punishment for his false claim. To be *amerced*, or a *mercie*, is to be at the king's mercy with regard to the fine to be imposed. The amercement is disused, but the form still continues; and if the plaintiff does not appear, no verdict can be given, but the plaintiff is said to be *nonsuit*, *non sequitur clamorem suum*. Therefore it is usual for a plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain his issue, to be voluntarily nonsuited, or withdraw himself: whereupon the crier is ordered to *call* the plaintiff; and if neither he, nor anybody for him, appears, he is nonsuited, the jurors are discharged, the action is at an end, and the defendant shall recover his costs. The reason of this

practice is, that a nonsuit is more eligible for the plaintiff than a verdict against him; for after a nonsuit, which is only a default, he may commence the same suit again for the same cause of action; but after a verdict had, and judgment consequent thereupon, he is forever barred from attacking the defendant upon the same ground of complaint. But, in case the plaintiff appears, the jury by their foreman deliver in their verdict.

Species of Verdict.

A verdict, *vere dictum*, is either *privy*, or *public*. A *privy* verdict is when the judge hath left or adjourned the court: and the jury being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the judge out of court; which *privy* verdict is of no force unless afterwards affirmed by a public verdict given openly in court; wherein the jury may, if they please, vary from their *privy* verdict. So that the *privy* verdict is indeed a mere nullity. But the only effectual and legal verdict is the *public* verdict: in which they openly declare to have found the issue for the plaintiff, or for the defendant; and if for the plaintiff, they assess the damages also sustained by the plaintiff in consequence of the injury upon which the action is brought.

Special Verdict.

Sometimes, if there arises in the case any difficult matter of law, the jury, for the sake of better information, and to avoid the danger of having their verdict attained, will find a *special* verdict. And herein they state the naked facts, as they find them to be proved, and pray the advice of the court thereon; concluding conditionally, that if upon the whole matter the court should be of opinion that the plaintiff had cause of action, they then find for the plaintiff; if otherwise, then for the defendant. This is entered at length on the record, and afterwards argued and determined in the court at Westminster, from whence the issue came to be tried.

Another method of finding a species of special verdict is when the jury find a verdict generally for the plaintiff, but subject nevertheless to the opinion of the judge or the court above, on a *special case* stated by the counsel on both sides with regard to a matter of law: which has this advantage over a special verdict, that it is attended with much less expense, and obtains a much speedier decision; the *postea* (of which in the next chapter) being stayed in the hands of the officer of *nisi prius*, till the question is determined, and the verdict is then entered for the plaintiff or defendant as the case may happen. But, as nothing appears upon the record but the general verdict, the parties are precluded hereby from the benefit of a writ of error, if dissatisfied with the

judgment of the court, or judge, upon the point of law. Which makes it a thing to be wished, that a method could be devised of either lessening the expense of special verdicts, or else of entering the cause at length upon the *postea*. But in both these instances the jury may, if they thing proper, take upon themselves to determine, at their own hazard, the complicated question of fact and law, and without either special verdict or special case, may find a verdict absolutely either for the plaintiff or defendant.

When the jury have delivered in their verdict, and it is recorded in court, they are then discharged, and so ends the trial by jury.

The author concludes the chapter with what he terms a "just panegyric" on the trial by jury and a statement of four principal defects, as follows:

1. The want of a complete discovery by the oath of the parties.
2. The want of a compulsive power for the production of books and papers belonging to the parties.
3. The want of power to examine witnesses abroad.
4. The danger arising from local prejudices, etc.

Chapter XXIV.

OF JUDGMENT AND ITS INCIDENTS.

386-402.

Postea.

In the present chapter we are to consider the transactions in a cause, next immediately subsequent to arguing the demurrer, or trial of the issue.

If the issue be an issue of fact, and upon trial by any of the methods mentioned in the two preceding chapters, it be found for either the plaintiff or defendant, or specially; or if the plaintiff makes default or is nonsuit; or whatever, in short, is done subsequent to the joining of issue and awarding the trial, it is entered on record, and is called a *postea*. The substance of which is, that *postea, afterwards*, the said plaintiff and defendant appeared, by their attorneys at the place of trial; and a jury, being sworn, found such a verdict; or, that the plaintiff, after the jury sworn, made default, and did not prosecute his suit; or, as the case may happen. This is added to the roll, which is now returned to the court from which it was sent; and the history of the cause, from the time it was carried out, is thus continued by the *postea*.

The Judgment.

Next follows, *sixthly*, the judgment of the court upon what has previously passed; both the matter of law and matter of fact being now fully weighed and adjusted. Judgment may, however, for certain causes be *suspended*, or finally *arrested*; for it cannot

be entered till the next term after trial had, and that upon notice to the other party. So that if any defect of justice happened at the trial, by surprise, inadvertence, or misconduct, the party may have relief in the court above, by obtaining a new trial: or if, notwithstanding the issue of fact be regularly decided, it appears that the complaint was either not actionable in itself, or not made with sufficient precision and accuracy, the party may supersede it by arresting or staying the judgment.

Causes of Suspending Judgment.

I. Causes of *suspending* the judgment, by granting a *new* trial, are at present wholly *extrinsic*, arising from matter foreign to or *dehors* the record. Of this sort are want of notice of trial; or any flagrant misbehavior of the party prevailing towards the jury, which may have influenced their verdict; or any gross misbehavior of the jury among themselves; also if it appears by the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith; or if they have given exorbitant damages; or if the judge himself has misdirected the jury, so that they found an unjustifiable verdict: for these, and other reasons of the like kind, it is the practice of the court to award a *new* or *second trial*. But if two juries agree in the same or a similar verdict, a third trial is seldom awarded; for the law will not readily suppose that the verdict of any one subsequent jury can counter-vail the oaths of the two preceding ones.

New Trial.

A new trial is a rehearing of the cause before another jury, but with as little prejudice to either party as if it had never been heard before. No advantage is taken of the former verdict on the one side, or the rules of court for awarding such second trial on the other.

A sufficient ground must, however, be laid before the court, to satisfy them that it is necessary to justice that the cause should be further considered. If the matter be such as did not or could not appear to the judge who presided at *nisi prius*, it is disclosed to the court by *affidavit*: if it arises from what passed at the trial, it is taken from the judge's information, who usually makes a special and minute report of the evidence. Counsel are heard on both sides to impeach or establish the verdict, and the court give their reasons at large why a new examination ought or ought not to be allowed. The true import of the evidence is duly weighed, false colours are taken off, and all points of law which arose at

Nor do the courts lend too easy an ear to every application the trial are upon full deliberation clearly explained and settled.

for a review of the former verdict. They must be satisfied that there are strong probable grounds to suppose that the merits have not been fairly and fully discussed, and that the decision is not agreeable to the justice and truth of the case. A new trial is not granted where the value is too inconsiderable to merit a second examination. It is not granted upon nice and formal objections, which do not go to the real merits. It is not granted in cases of strict right or *summum jus*, where the rigorous exaction of extreme legal justice is hardly reconcilable to conscience. Nor is it granted where the scales of evidence hang nearly equal; that which leans against the former verdict ought always very strongly to preponderate.

In granting such further trial (which is matter of sound discretion) the court has also an opportunity, which it seldom fails to improve, of supplying those defects in this mode of trial which were stated in the preceding chapter; by laying the party applying under all such equitable terms as his antagonist shall desire and mutually offer to comply with: such as the discovery of some facts upon oath; the admission of others not intended to be litigated; the production of deeds, books, and papers; the examination of witnesses, infirm or going beyond sea; and the like. And the delay and expense of this proceeding are so small and trifling, that it seldom can be moved for to gain time or gratify humour. The motion must be made within the first four days of the next succeeding term, within which term it is usually heard and decided.

Arrest of Judgment.

2. Arrests of judgment arise from *intrinsic* causes, appearing upon the face of the record. Of this kind are, first, where the declaration varies totally from the original writ; as where the writ is in debt or detinue, and the plaintiff declares in an action on the case for an assumpsit; for, the original writ out of chancery being the foundation and warrant of the whole proceedings in the common pleas, if the declaration does not pursue the nature of the writ, the court's authority totally fails. Also, secondly, where the verdict materially differs from the pleadings and issue thereon; as if, in an action for words, it is laid in the declaration that the defendant said, "the plaintiff is a bankrupt;" and the verdict finds specially that he said "the plaintiff *will* be a bankrupt." Or, thirdly, if the case laid in the declaration is not sufficient in point of law to found an action upon. And this is an invariable rule with regard to arrests of judgment upon matter of law, "that whatever is alleged in arrest of judgment must be such matter as would upon demurrer have been sufficient to over-

turn the action or plea." But the rule will not hold *e converso*, "that everything that may be alleged as cause of demurrer will be good in arrest of judgment;" for if a declaration or plea omits to state some particular circumstance without proving of which at the trial it is impossible to support the action or defense, this omission shall be aided by a verdict. For the verdict ascertains those facts, which before from the inaccuracy of the pleadings might be dubious; since the law will not suppose, that a jury, under the inspection of a judge, would find a verdict for the plaintiff or defendant, unless he had proved those circumstances, without which his general allegation is defective. Exceptions therefore that are moved in arrest of judgment must be much more material and glaring than such as will maintain a demurrer: or, in other words, many inaccuracies and omissions, which would be fatal if early observed, are cured by a subsequent verdict; and not suffered, in the last stage of a cause, to unravel the whole proceedings. But if the thing omitted be essential to the action or defense, as if the plaintiff does not merely state his title in a defective manner, but sets forth a title that is totally defective in itself, or if to an action of debt the defendant pleads *not guilty* instead of *nil debet*, these cannot be cured by a verdict for the plaintiff in the first case, or for the defendant in the second.

If, by the misconduct or inadvertence of the pleaders, the issue be joined on a fact totally immaterial, or insufficient to determine the right so that the court upon the finding cannot know for whom judgment ought to be given; as if in an action on the case in *assumpsit* against an executor, he pleads that he himself (instead of the testator) made no such promise; or if, in an action of debt on bond condition to pay money *on* or *before* a certain day, the defendant pleads payment *on* the day (which issue if found for the plaintiff, would be inconclusive, as the money might have been paid *before*); in these cases the court will after verdict award a *repleader quod partes replacitent*; unless it appears from the whole record that nothing material can possibly be pleaded in any shape whatsoever, and then a repleader would be fruitless. And, whenever a repleader is granted, the pleadings must begin *de novo*, at that stage of them, whether it be the plea, replication, or rejoinder, etc., wherein there appears to have been the first defect or deviation from the regular course.

If judgment is not by some of these means arrested within the first four days of the next term after the trial, it is then to be entered on the roll or record.

Judgment.

Judgments are the sentence of the law, pronounced by the

court upon the matter contained in the record; and are of four sorts. First, where the facts are confessed by the parties, and the law determined by the court; as in case of judgment upon *demurrer*: secondly, where the law is admitted by the parties, and the facts disputed; as in case of judgment on a *verdict*: thirdly, where both the fact and the law arising thereon are admitted by the defendant; which is the case of judgments by *confession* or *default*; or, lastly, where the plaintiff is convinced that either fact, or law, or both, are insufficient to support his action, and therefore abandons or withdraws his prosecution; which is the case in judgments upon a *non-suit* or *retraxit*.

The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of *the law*. Therefore the style of the judgment is, not that it is decreed or resolved by the court, for then the judgment might appear to be their own: but, "it is considered," *consideratum est per curiam*, that the plaintiff do recover his damages, his debt, his possession, and the like; which implies that the judgment is none of their own; but the act of law, pronounced and declared by the court, after due deliberation and inquiry.

Interlocutory and Final Judgment.

All these species of judgments are either *interlocutory* or *final*. *Interlocutory* judgments are such as are given in the middle of a cause, upon some plea, proceeding or default, which is only intermediate, and does not finally determine or complete the suit. Of this nature are all judgments for the plaintiff upon pleas in abatement of the suit or action: in which it is considered by the court, that the defendant do answer over, *respondeat ouster*; that is, put in a more substantial plea.

But the interlocutory judgments, most usually spoken of, are those incomplete judgments, whereby the *right* of the plaintiff is indeed established, but the *quantum* of damages sustained by him is not ascertained: which is a matter that cannot be done without the intervention of a jury. This can only happen where the plaintiff recovers; for, when judgment is given for the defendant, it is always complete as well as final. And this happens in the first place, where the defendant suffers judgment to go against him by default, or *nihil dicit*; as if he puts in no plea at all to the plaintiff's declaration: by confession or *cognovit actionem*, where he acknowledges the plaintiff's demand to be just; or by *non sum informantus*, when the defendant's attorney declares he has no instructions to say anything in answer to the plaintiff, or in defence of his client; which is a species of judgment by default. If these, or any of them, happen in actions where the specific thing

sued for is recovered, as in actions of debt for a sum certain, the judgment is absolutely complete. And therefore it is very usual, in order to strengthen a creditor's security, for the debtor to execute a warrant of attorney to some attorney named by the creditor, empowering him to confess a judgment by either of the ways just now mentioned (by *nihil dicit, cognovit actionem, or non sum informatus*) in an action of debt to be brought by the creditor against the debtor for a specific sum due: which judgment when confessed, is absolutely complete and binding; provided the same (as is also required in all other judgments) be regularly *doctretted*, that is, abstracted and entered in a book, according to the directions of statute 4 and 5 W. and M. c. 20. But where damages are to be recovered, a jury must be called in to assess them; unless the defendant, to save charges, will confess the whole damages laid in the declaration; otherwise the entry of the judgment is, "that the plaintiff ought to recover his damages (indefinitely), but, because the court know not what damages the said plaintiff has sustained, therefore the sheriff is commanded, that by the oaths of twelve honest and lawful men he inquire into the said damages, and return such inquisition into court." This process is called a *writ of inquiry*: in the execution of which the sheriff sits as judge, and tries by a jury, subject to nearly the same laws and conditions as the trial by jury at *nisi prius*, what damages the plaintiff has really sustained; and when their verdict is given, which must assess *some* damages, the sheriff returns the inquisition, which is entered upon the roll in manner of a *postea*; and thereupon it is considered, that the plaintiff do recover the exact sum of the damages so assessed. In like manner when a demurrer is determined for the plaintiff and upon action wherein damages are recovered, the judgment is also incomplete, without the aid of a writ of inquiry.

Final judgments are such as at once put an end to the action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for.

Costs.

Thus much for judgments: to which costs are a necessary appendage: it being now as well the maxim of ours as of the civil law that "*victus victori in expensis condemnandus est*:" though the common law did not professedly allow any, the amercement of the vanquished party being his only punishment. These costs, on both sides, are taxed and moderated by the prothonotary, or other proper officer of the court.

Execution.

After judgment is entered, *execution* will immediately follow,

unless the party condemned thinks himself unjustly aggrieved by any of these proceedings; and then he has his remedy to reverse them by several writs in the nature of appeals, which we shall consider in the succeeding chapter.

Chapter XXV.

OF PROCEEDINGS IN THE NATURE OF APPEALS.

402-412.

Writs of Attaint and Deceit.

Proceedings in the nature of *appeals* from the proceedings of the king's courts of law, are of various kinds: according to the subject-matter in which they are concerned. They are principally four.

I. A writ of *attaint*: which lieth to inquire whether a jury of *twelve* men gave a false verdict; that so the judgment following thereupon may be reversed.

II. The writ of *deceit*, or action on the case in nature of it, may be brought in the court of common pleas, to reverse a judgment there had by fraud or collusion in a real action, whereby lands and tenements have been recovered to the prejudice of him that hath right. But of this enough hath been observed in a former chapter.

Audita Querela.

III. An *audita querela* is where a defendant, against whom judgment is recovered, and who is therefore in danger of execution, or perhaps actually in execution, may be relieved upon good matter of discharge which has happened since the judgment: as if the plaintiff hath given him a general release; or if the defendant hath paid the debt to the plaintiff without procuring satisfaction to be entered on the record. In these and the like cases, wherein the defendant hath good matter to plead, but hath had no opportunity of pleading it (either at the beginning of the suit, or *puis darrein continuance*, which, as was shown in a former chapter, must always be before judgment), an *audita querela* lies, in the nature of a bill in equity, to be relieved against the oppression of the plaintiff. It is a writ directed to the court stating that the complaint of the defendant hath been heard, *audita querela defendantis*, and then setting out the matter of the complaint, it at length enjoins the court to call the parties before them, and, having heard their allegations and proofs, to cause justice to be done between them. It also lies for bail, when judgment is obtained against them by *scire facias* to answer the debt of their principal, and it happens afterwards that the original judgment against their principal is reversed: for here the bail, after judgment had against

them, have no opportunity to *plead* this special matter, and therefore they shall have redress by *audita querela*; which is a writ of a most remedial nature, and seems to have been invented lest in any case there should be an oppressive defect of justice, where a party who hath a good defence is too late to make it in the ordinary forms of law. But the indulgence now shown by the courts in granting a summary relief upon motion, in cases of such evident oppression, has almost rendered useless the writ of *audita querela*, and driven it quite out of practice.

Writ of Error.

IV. But, fourthly, the principal method of redress for erroneous judgments in the king's courts of record is by *writ of error* to some superior court of appeal.

A writ of error lies for some supposed mistake in the proceedings of a court of record; for to amend errors in a base court, not of record, a writ of *false judgment* lies. A writ of error only lies upon matter of law arising upon the face of the proceedings; so that no evidence is required to substantiate or support it; there being no method of reversing an error in the determination of *facts*, but by an attain or a new trial to correct the mistakes of the former verdict.

When once the record was made up, it was formerly held that by the common law no amendment could be permitted, unless within the very terms in which the judicial act so recorded was done: for during the term the record is in the breast of the court, but afterward it admitted of no alteration. But now the courts are become more liberal, and, where justice requires it, will allow of amendments at any time while the suit is pending, notwithstanding the record be made up and the term be past. For they at present consider the proceedings as in *feri*, till judgment is given; and therefore, that till then they have power to permit amendments by the common law; but when judgment is once given and enrolled, no amendment is permitted in any subsequent term. Mistakes are also effectually helped by the statutes of amendment and *jeofails*: so called because when a pleader perceives any slip in the form of his proceedings and acknowledges such error (*jeo faile*) he is at liberty by those statutes to amend it; which amendment is seldom actually made, but the benefit of the acts is attained by the court's overlooking the exception.

If a writ of error be brought to reverse any judgment of an inferior court of record, where the damages are less than ten pounds; or if it is brought to reverse the judgment of any superior court after verdict, he that brings the writ, or that is plaintiff in error, must (except in some peculiar cases) find substantial pledges of prosecution, or bail; to prevent delays by frivolous pre-

tences to appeal: and for securing payment of costs and damages, which are now payable by the vanquished party in all except a few particular instances, by virtue of the several statutes recited in the margin.

Each court of appeal, in their respective stages, may, upon hearing the matter of law in which the error is assigned, reverse or affirm the judgment of the inferior courts; but none of them are final, save only the house of peers, to whose judicial decisions all other tribunals must therefore submit and conform their own. And thus much for the reversal or affirmance of judgments at law by writs in the nature of appeals.

Chapter XXVI. OF EXECUTION. 412-426.

If the regular judgment of the court, after the decision of the suit, be not suspended, superseded, or reversed by one or other of the methods mentioned in the two preceding chapters, the next and last step is the *execution* of that judgment; or putting the sentence of the law in force. This is performed in different manners, according to the nature of the action upon which it is founded, and of the judgment which is had or recovered.

Executions in Real or Mixed Actions.

If the plaintiff recovers in an action real or mixed, whereby the seisin or possession of land is awarded to him, the writ of execution shall be an *habere facias seisinam*, or writ of seisin, of a freehold; or an *habere facias possessionem*, or writ of possession, of a chattel interest. These are writs directed to the sheriff of the county, commanding him to give actual possession to the plaintiff of the land so recovered: in the execution of which the sheriff may take with him the *posse comitatus*, or power of the county; and may justify breaking open doors, if the possession be not quietly delivered. But if it be peaceably yielded up, the delivery of a twig, a turf, or the ring of the door, in the name of seisin, is sufficient execution of the writ.

In Other Actions.

In other actions, where the judgment is that something in special be done or rendered by the defendant, then, in order to compel him so to do, and to see the judgment executed, a special writ of execution issues to the sheriff according to the nature of the case. As, upon an assize of nuisance, or *quod permittat prosternere*, where one part of the judgment is *quod nocumentum amoveatur*, a writ goes to the sheriff to abate it at the charge of

the party, which likewise issues even in case of an indictment. Upon a replevin, the writ of execution is the writ *de retorno habendo*; and, if the distress be eligned, the defendant shall have a *capias in withernam*; but on the plaintiff's tendering the damages and submitting to a fine, the process *in withernam* shall be stayed. In detinue, after judgment, the plaintiff shall have a *distringas*, to compel the defendant to deliver the goods, by repeated distresses of his chattels; or else a *scire facias* against any third person in whose hands they may happen to be, to show cause why they should not be delivered: and if the defendant still continues obstinate, then (if the judgment hath been by default or on demurrer) the sheriff shall summon an inquest to ascertain the value of the goods, and the plaintiff's damages; which being so assessed, or by verdict in case of an issue shall be levied on the person or goods of the defendant.

Executions on Money Judgment.

Executions in actions where money only is recovered, as a debt or damages (and not any specific chattel), are of five sorts: either against the body of the defendant: or against his goods and chattels: or against his goods and the *profits* of his lands; or against his goods and the *possession* of his lands; or against all three, his body, lands, and goods.

Capias ad Satisfaciendum.

1. The first of these species of execution is by writ of *capias ad satisfaciendum*; which addition distinguishes it from the former *capias ad respondendum*, which lies to compel an appearance at the beginning of a suit. And, properly speaking, this cannot be sued out against any but such as were liable to be taken upon the former *capias*. The intent of it is, to imprison the body of the debtor till satisfaction be made for the debt, costs, and damages. If an action be brought against a husband and wife for the debt of the wife, when sole, and the plaintiff recovers judgment, the *capias* shall issue to take both husband and wife in execution: but if the action was originally brought against herself, when sole, and pending the suit she marries, the *capias* shall be awarded against her only, and not against her husband. Yet, if judgment be recovered against a husband and wife for the contract, nay, even for the personal misbehaviour of the wife during her coverture, the *capias* shall issue against the husband only: which is one of the many great privileges of English wives.

The writ of *capias ad satisfaciendum* is an execution of the highest nature inasmuch as it deprives a man of his liberty, till he makes the satisfaction awarded; and therefore when a man is once taken in execution upon this writ, no other process can be sued

out against his lands or goods. Only by statute 21 Jac. I. c. 24, if the defendant dies while charged in execution upon this writ, the plaintiff may, after his death, sue out a new execution against his lands, goods or chattels. The writ is directed to the sheriff, commanding him to take the body of the defendant and have him at Westminster on a day therein named, to make the plaintiff satisfaction for his demand. And if he does not then make satisfaction, he must remain in custody till he does. This writ may be sued out, as may all other executory process, for costs against a plaintiff, as well as a defendant, when judgment is had against him.

When a defendant is once in custody upon this process, he is to be kept in *arcta et salva custodia*: and if he be afterwards seen at large, it is an *escape*; and the plaintiff may have an action thereupon against the sheriff for his whole debt.

If a *capias ad satisfaciendum* is sued out, and a *non est inventus* is returned thereon, the plaintiff may sue out a process against the bail, if any were given: who, we may remember, stipulated in this triple alternative, that the defendant should, if condemned in the suit, satisfy the plaintiff his debt and costs; or that he should surrender himself a prisoner; or, that they would pay it for him: as therefore the two former branches of the alternative are neither of them complied with, the latter must immediately take place. In order to which, a writ of *scire facias* may be sued out against the bail, commanding them to show cause why the plaintiff should not have execution against them for his debt and damages: and on such writ, if they show no sufficient cause, or the defendant does not surrender himself on the day of the return, or of showing cause (for afterwards is not sufficient), the plaintiff may have judgment against the bail, and take out a writ of *capias ad satisfaciendum*, or other process of execution against them.

Writ of Fieri Facias.

2. The next species of execution is against the goods and chattels of the defendant, and is called a writ of *feri facias*, from the words in it where the sheriff is commanded, *quod, fieri faciat de bonis*, that he cause to be made of the goods and chattels of the defendant the sum or debt recovered. The sheriff may not break open any outer doors, to execute either this or the former writ, but must enter peaceably; and may then break open any inner door, belonging to the defendant, in order to take the goods. And he may sell the goods and chattels (even an estate for years, which is a chattel real) of the defendant, till he has raised enough to satisfy the judgment and costs: first paying the landlord of the premises, upon which the goods are found, the arrears of rent

then due, not exceeding one year's rent in the whole. If part only of the debt be levied on a *feri facias*, the plaintiff may have a *capias ad satisfaciendum* for the residue.

Writ of *Levari Facias*.

3. A third species of execution is by writ of *levari facias*; which affects a man's goods and the *profits* of his lands, by commanding the sheriff to levy the plaintiff's debt on the lands and goods of the defendant; whereby the sheriff may seize all his goods, and receive the rents and profits of his lands till satisfaction be made to the plaintiff.

Writ of *Elegit*.

4. The fourth species of execution is by the writ of *elegit*; which is a judicial writ given by the statute Westm. 2, 13 Edw. I. c. 18, either upon a judgment for a debt, or damages, or upon the forfeiture of a recognizance taken in the king's court. By the common law a man could only have satisfaction of goods, chattels, and the present profits of lands, by the two last mentioned writs of *feri facias*, or *levari facias*; but not the possession of the lands themselves; which was a natural consequence of the feudal principles, which prohibited the alienation, and of course the encumbering of the fief with the debts of the owner. And, when the restriction of alienation began to wear away, the consequence still continued; and no creditor could take the possession of lands, but only levy the growing profits; so that, if the defendant aliened his lands, the plaintiff was ousted of his remedy. The statute therefore granted this writ (called an *elegit*, because it is in the choice or election of the plaintiff whether he will sue out this writ or one of the former), by which the defendant's goods and chattels are not sold, but only appraised; and all of them (except oxen and beasts of the plough) are delivered to the plaintiff, at such reasonable appraisement and price, in part of satisfaction of his debt. If the goods are not sufficient, then the moiety or one-half of his freehold lands, which he had at the time of the judgment given, whether held in his own name, or by any other in trust for him, are also to be delivered to the plaintiff; to hold till out of the rents and profits thereof the debt be levied, or till the defendant's interest be expired; as till the death of the defendant, if he be tenant for life or in tail. During this period the plaintiff is called tenant by *elegit*, of whom we spoke in a former part of these commentaries. This execution, or seizing of lands by *elegit*, is of so high a nature, that after it the body of the defendant cannot be taken; but if execution can only be had of the goods, because there are no lands, and such goods are not sufficient to pay the debt, a *capias ad satisfaciendum* may then be had after the *elegit*; for such *elegit*

is in this case no more in effect than a *feri facias*. So that body and goods may be taken in execution, or land and goods; but not body and land too, upon any judgment between subject and subject in the course of the common law. But,

Extendi Facias.

5. Upon some prosecutions given by statute: as in the case of recognizances or debts acknowledged on statutes merchant, or statutes staple (pursuant to the statutes 13 Edw. I. *de mercatoribus*, and 27 Edw. III. c. 9); upon forfeiture of these, the body, lands and goods may all be taken at once in execution to compel the payment of the debt. The process hereon is usually called an *extent*, or *extendi facias*, because the sheriff is to cause the lands, etc., to be appraised to their full extended value before he delivers them to the plaintiff, that it may be certainly known how soon the debt will be satisfied.

These are the methods which the law of England has pointed out for the execution of judgments: and when the plaintiff's demand is satisfied, either by the voluntary payment of the defendant or by this compulsory process or otherwise, satisfaction ought to be entered on the record, that the defendant may not be liable to be hereafter harassed a second time on the same account. But all these writs of execution must be sued out within a year and a day after the judgment is entered; otherwise the court concludes *prima facie* that the judgment is satisfied and extinct; yet, however, it will grant a writ of *scire facias*, in pursuance of statute Westm. 2, 13 Edw. I. c. 45, for the defendant to show cause why the judgment should not be revived, and execution had against him; to which the defendant may plead such matter as he has to allege in order to show why process of execution should not be issued; or the plaintiff may still bring an action of debt, founded on this dormant judgment, which was the only method of revival allowed by the common law.

Chapter XXVII.

OF PROCEEDINGS IN THE COURTS OF EQUITY.

426-456.

Before we enter on the proposed subject of the ensuing chapter, viz., the nature and method of proceedings in the courts of equity, it will be proper to recollect the observations which were made in the beginning of this book on the principal tribunals of that kind, acknowledged by the constitution of England; and to premise a few remarks upon those particular causes, wherein any of them claims and exercises, a sole jurisdiction, distinct from and exclusive of the other.

I have already attempted to trace (though very concisely) the history, rise and progress of the extraordinary court, or court of equity, in chancery. The same jurisdiction is exercised, and the same system of redress pursued in the equity court of exchequer; with a distinction, however, as to some few matters, peculiar to each tribunal, and in which the other cannot interfere. And, first, of those peculiar to the chancery.

As to Infants.

1. Upon the abolition of the court of wards, the care, which the crown was bound to take as guardian of its infant tenants, was totally extinguished in every feudal view; but resulted to the king in his courts of chancery, together with the general protection of all other *infants* in the kingdom. When therefore a fatherless child has no other guardian, the court of chancery has a right to appoint one; and from all proceedings relative thereto, an appeal lies to the house of lords. The court of exchequer can only appoint a guardian *ad litem*, to manage the defence of the infant if a suit be commenced against him; a power which is incident to the jurisdiction of every court of justice: but when the interest of a minor comes before the court judicially, in the progress of a cause, or upon a bill for that purpose filed, either tribunal indiscriminately will take care of the property of the infant.

As to Idiots and Lunatics.

2. As to *idiots* and *lunatics*: the king himself used formerly to commit the custody of them to proper committees, in every particular case; but now, to avoid solicitations and the very shadow of undue partiality, a warrant is issued by the king under his royal sign-manual to the chancellor or keeper of his seal to perform this office for him; and, if he acts improperly in granting such custodies, the complaint must be made to the king himself in council. But the previous proceedings on the commission, to inquire whether or no the party be an idiot or a lunatic, are on the law side of the court of chancery, and can only be redressed (if erroneous) by writ of error in the regular course of law.

As to Charities.

3. The king, as *parens patriae*, has the general superintendance of all *charities*; which he exercises by the keeper of his conscience, the chancellor. And therefore whenever it is necessary, the attorney-general, at the relation of some informant (who is usually called the *relator*), files *ex officio* an information in the court of chancery to have the charity properly established. By statute also 43 Eliz. c. 4, authority is given to the lord chancellor or lord keeper, and to the chancellor of the duchy of Lancaster, respectively, to grant commissions under their several seals, to

inquire into any abuses of charitable donations, and rectify the same by decree; which may be reviewed in the respective courts of the several chancellors, upon exceptions taken thereto. But, though this is done in the petty-bag office in the court of chancery, because the commission is there returned, it is not a proceeding at common law, but treated as an original cause in the court of equity. The evidence below is not taken down in writing, and the respondent in his answer to the exceptions may allege what new matter he pleases, upon which they go to proof, and examine witnesses in writing upon all the matters in issue: and the court may decree the respondent to pay all the costs, though no such authority is given by the statute. And as it is thus considered as an original cause throughout, an appeal lies of course from the chancellor's decree to the house of peers notwithstanding any loose opinions to the contrary.

As to Bankrupts.

4. By the several statutes relating to *bankrupts*, a summary jurisdiction is given to the chancellor in many matters consequential or previous to the commissions thereby directed to be issued; from which the statutes give no appeal.

Equity—Nature.

Let us next take a brief, but comprehensive, view of the general nature of *equity*, as now understood and practiced in our several courts of judicature. I have formerly touched upon it, but imperfectly: it deserves a more complete explication. Yet as nothing is hereto extant, that can give a stranger a tolerable idea of the courts of equity subsisting in England, as distinguished from the courts of law, the compiler of these observations cannot but attempt it with diffidence: those who know them best are too much employed to find time to write: and those who have attended but little in those courts must be often at a loss for materials.

Equity, then, in its true and genuine meaning, is the soul and spirit of all law: *positive* law is construed, and *rational* law is made by it. In this, equity is synonymous to justice; in that, to the true sense and sound interpretation of the rule. But the very terms of a court of *equity*, and a court of *law*, as contrasted to each other, are apt to confound and mislead us: as if the one judged without equity, and the other was not bound by any law. Whereas every definition or illustration to be met with, which now draws a line between the two jurisdictions, by setting law and equity in opposition to each other, will be found either totally erroneous, or erroneous to a certain degree.

1. Thus in the first place it is said, that it is the business of a court of equity in England to abate the rigour of the common

law. But no such power is contended for. Hard was the case of bond-creditors whose debtor devised away his real estate; rigorous and unjust the rule which put the devisee in a better condition than the heir; yet a court of equity had no power to interpose. In all such cases of positive law, the courts of equity, as well as the courts of law, must say, with Ulpian, "*hoc quidem perquam durum est, sed ita lex scripta est.*"

2. It is said, that a court of equity determines according to the spirit of the rule, and not according to the strictness of the letter. But so also does a court of law. Both, for instance, are equally bound, and equally profess, to interpret statutes according to the true intent of the legislature. In general laws all cases cannot be foreseen; or, if foreseen, cannot be expressed: some will arise that will fall within the meaning, though not within the words of the legislator; and others, which may fall within the letter, may be contrary to his meaning, though not expressly excepted. These cases, thus out of the letter, are often said to be within the equity of an act of parliament; and so cases within the letter are frequently out of the equity. Here by *equity* we mean nothing but the sound interpretation of the law; though the words of the law itself may be too general, too special, or otherwise inaccurate or defective. But there is not a single rule of interpreting laws, whether equitably or strictly, that is not equally used by the judges in courts both of law and equity: the construction must in both be the same; or, if they differ, it is only as one court of law may also happen to differ from another. Each endeavors to fix and adopt the true sense of the law in question; neither can enlarge, diminish, nor alter that sense in a single tittle.

3. Again, it hath been said that *fraud*, *accident* and *trust* are the proper and peculiar objects of a court of equity. But every kind of *fraud* is equally cognizable, and equally adverted to, in a court of law; and some frauds are cognizable only there: as fraud in obtaining a devise of lands, which is always sent out of the equity courts to be there determined. Many *accidents* are also supplied in a court of law; as, loss of deeds, mistakes in receipts or accounts, wrong payments, deaths which make it impossible to perform a condition literally, and a multitude of other contingencies; and many cannot be relieved even in a court of equity; as, if by accident a recovery is ill-suffered, a devise ill-executed, a contingent remainder destroyed, or a power of leasing omitted in a family settlement. A technical *trust*, indeed, created by the limitation of a second use, was forced into the courts of equity in the manner formerly mentioned; and this species of trust extended by inference and construction, have ever since remained as a kind of *peculium* in those courts. But there are other trusts which are

cognizable in a court of law; as deposits, and all manner of bailments; and especially that implied contract, so highly beneficial and useful, of having undertaken to account for money received to another's use, which is the ground of an action on the case almost as universally remedial as a bill in equity.

4. Once more: it has been said that a court of equity is not bound by rules or precedents, but acts from the opinion of the judge, founded on the circumstances of every particular case. Whereas the system of our courts of equity is a laboured connected system, governed by established rules, and bound down by precedents from which they do not depart, although the reason of some of them may perhaps be liable to objection. Thus, the refusing a wife her dower in a trust estate, yet allowing the husband his curtesy; the holding the penalty of a bond to be merely a security for the debt and interest, yet considering it sometimes as the debt itself so that the interest shall not exceed that penalty; the distinguishing between a mortgage at *five per cent.* with a clause of a reduction to *four* if the interest be regularly paid, and a mortgage at *four per cent.* with a clause of enlargement to *five* if the payment of the interest be deferred; so that the former shall be deemed a conscientious, the latter an unrighteous, bargain; all these, and other cases that might be instanced, are plainly rules of positive law, supported only by the reverence that is shown, and generally very properly shown, to a series of former determinations, that the rule of property may be uniform and steady. Nay, sometimes a precedent is so strictly followed that a particular judgment founded upon special circumstances gives rise to a general rule.

The suggestion of every bill to give jurisdiction to the courts of equity (copied from those early times) is, that the complainant hath no remedy at the common law. But he who should from thence conclude that no case is judged of in equity where there might have been relief at law, and at the same time casts his eye on the extent and variety of the cases in our equity reports, must think the law a dead letter indeed. The rules of property, rules of evidence, and rules of interpretation in both courts are, or should be, exactly the same; both ought to adopt the best, or must cease to be courts of justice. Formerly some causes, which now no longer exist, might occasion a different rule to be followed in one court from what was afterward adopted in the other, as found in the nature and reason of the thing.

Again, neither a court of equity nor of law can vary men's wills or agreements, or (in other words) make wills or agreements for them. Both are to understand them truly, and therefore both of them uniformly. One court ought not to extend, nor the other

abridge, a lawful provision deliberately settled by the parties, contrary to its just intent. A court of equity, no more than a court of law, can relieve against a penalty in the nature of stated damages; as a rent of 5*l*, an acre for ploughing up ancient meadow; nor against a lapse of time, where the time is material to the contract; as in covenants for renewal of leases. Both courts will equitably construe, but neither pretends to control or change, a lawful stipulation or engagement.

The rules of decision are in both courts equally opposite to the subjects of which they take cognizance. Where the subject-matter is such as requires to be determined *secundum aequum et bonum*, as generally upon actions on the case, the judgments of the courts of law are guided by the most liberal equity. In matters of positive right, both courts must submit to and follow those ancient and invariable maxims "*quae relictæ sunt et traditæ*." Both follow the law of nations, and collect it from history and the most approved authors of all countries, where the question is the object of that law: as in case of the privileges of ambassadors, hostages, or ransom-bills. In mercantile transactions they follow the marine law, and argue from the usages and authorities received in all maritime countries. Where they exercise a concurrent jurisdiction, they both follow the law of the proper *forum*; in matters originally of ecclesiastical cognizance, they both equally adopt the canon or imperial law, according to the nature of the subject; and, if a question came before either, which was properly the object of a foreign municipal law, they would both receive information what is the rule of the country, and would both decide accordingly.

Difference Between Law and Equity Courts.

Such then being the parity of the law and reason which governs both species of courts, wherein (it may be asked) does their essential difference consist? It principally consists in the different modes of administering justice in each; in the mode of proof, the mode of trial, and the mode of relief. Upon these, and upon two other accidental grounds of jurisdiction, which were formerly driven into those courts by narrow decisions of the courts of law, viz., the true construction of securities for money lent, and the form and effect of a trust or second use; upon these main pillars hath been gradually erected that structure of jurisprudence which prevails in our courts of equity, and is inwardly bottomed upon the same substantial foundations as the legal system which hath hitherto been delineated in these commentaries, however different they may appear in their outward form, from the different taste of their architects.

As to Proof.

1. And, first, as to the mode of *proof*. When facts, or their

leading circumstances, rest only in the knowledge of the party, a court of equity applies itself to his conscience, and purges him upon oath with regard to the truth of the transaction; and, that being once discovered, the judgment is the same in equity as it would have been at law. But, for want of this discovery at law, the courts of equity have acquired a concurrent jurisdiction with every other court in all matters of account. As incident to accounts, they take a concurrent cognizance of the administration of personal assets, consequently of debts, legacies, the distribution of the residue, and the conduct of executors and administrators. As incident to accounts, they also take the concurrent jurisdiction of tithes, and all questions relating thereto; of all dealings in partnership and many other mercantile transactions; and so of bailiffs, receivers, factors and agents. It would be endless to point out all the several avenues in human affairs, and in this commercial age, which lead to or end in accounts.

From the same fruitful source, the compulsive discovery upon oath, the courts of equity have acquired a jurisdiction over almost all matters of fraud; all matters in the private knowledge of the party, which, though concealed, are binding in conscience; and all judgments at law, obtained through such fraud or concealment. And this, not by impeaching or reversing the judgment itself, but by prohibiting the plaintiff from taking any advantage of a judgment obtained by suppressing the truth; and which, had the same facts appeared on the trial as now are discovered, he would never have obtained at all.

As to Trial.

2. As to the mode of *trial*. This is by interrogatories administered to the witnesses, upon which their depositions are taken in writing, wherever they happen to reside. If, therefore, the cause arises in a foreign country, and the witnesses reside upon the spot: if in causes arising in England, the witnesses are abroad, or shortly to leave the kingdom; or if witnesses residing at home are aged or infirm; any of these causes lays a ground for a court of equity to grant a commission to examine them, and (in consequence) to exercise the same jurisdiction, which might have been exercised at law, if the witnesses could probably attend.

As to Mode of Relief.

3. With respect to the mode of *relief*. The want of a more specific remedy, than can be obtained in the courts of law, gives a concurrent jurisdiction to a court of equity in a great variety of cases. To instance in executory agreements. A court of equity will compel them to be carried into strict execution, unless where it is improper or impossible; instead of giving damages for their non-performance. And hence a fiction is established, that what

ought to be done shall be considered as being actually done, and shall relate back to the time when it ought to have been done originally; and this fiction is so closely pursued through all its consequences, that it necessarily branches out into many rules of jurisprudence, which form a certain regular system. So of waste, and other similar injuries, a court of equity takes a concurrent cognizance, in order to prevent them by injunction. Over questions that may be tried at law, in a great multiplicity of actions, a court of equity assumes a jurisdiction, to prevent the expense and vexation of endless litigations and suits. In various kinds of frauds it assumes a concurrent jurisdiction, not only for the sake of a discovery, but of a more extensive and specific relief: as by setting aside fraudulent deeds, decreeing reconveyances, or directing an absolute conveyance merely to stand as a security. And thus, lastly, for the sake of a more beneficial and complete relief by decreeing a sale of lands, a court of equity holds plea of all debts, encumbrances, and charges that may affect it or issue there-out.

As to True Construction of Securities.

4. The true construction of *securities* for money lent is another fountain of jurisdiction in courts of equity. When they held the penalty of a bond to be the form, and that in substance it was only as a pledge to secure the repayment of the sum *bona fide* advanced, with a proper compensation for the use, they laid the foundation of a regular series of determinations, which have settled the doctrine of personal pledges or securities, and are equally applicable to mortgages of real property. The mortgagor continues owner of the land, the mortgagee of the money lent upon it; but this ownership is mutually transferred, and the mortgagor is barred from redemption if, when called upon by the mortgagee, he does not redeem within a time limited by the court; or he may when out of possession be barred by length of time, by analogy to the statute of limitations.

As to Form of a Trust.

5. The form of a *trust*, or second use, gives the courts of equity an exclusive jurisdiction as to the subject-matter of all settlements and devises in that form, and of all the long terms created in the present complicated mode of conveyancing. This is a very ample source of jurisdiction; but the trust is governed by very nearly the same rules, as would govern the estate in a court of law, if no trustee was interposed: and by a regular positive system established in the courts of equity, the doctrine of trusts is now reduced to as great a certainty as that of legal estates in the courts of common law.

These are the principal (for I omit the minuter) grounds of the jurisdiction at present exercised in our courts of equity.

Proceedings in a Court of Chancery.

The first commencement of a suit in chancery is by preferring a bill to the lord chancellor, in the style of a petition; "humbly complaining showeth to your lordship your orator A B, that," etc. This is in the nature of a declaration at common law, or a libel and allegation in the spiritual courts: setting forth the circumstances of the case at length, as, some fraud, trust, or hardship; "in tender consideration whereof" (which is the usual language of a bill), "and for that your orator is wholly without remedy at the common law," relief is therefore prayed at the chancellor's hands, and also process of *subpoena* against the defendant, to compel him to answer upon oath to all the matter charged in the bill. And, if it be to quiet the possession of lands, to stay waste, or to stop proceedings at law, an injunction is also prayed, in the nature of an *interdictum* by the civil law, commanding the defendant to cease.

This bill must call all necessary parties, however remotely concerned in interest, before the court; otherwise no decree can be made to bind them; and must be signed by counsel, as a certificate of its decency and propriety. For it must not contain matter either scandalous or impertinent; if it does, the defendant may refuse to answer it till such scandal or impertinence is expunged, which is done upon an order to refer it to one of the officers of the court, called a master in chancery; of whom there are in number twelve, including the master of the rolls, all of whom, so late as the reign of queen Elizabeth, were commonly doctors of the civil laws. The master is to examine the propriety of the bill; and if he reports it scandalous or impertinent, such matter must be struck out, and the defendant shall have his costs; which ought of right to be paid by the counsel who signed the bill.

When the bill is filed in the office of the six clerks (who originally were all in orders; and therefore, when the constitution of the court began to alter, a law was made to permit them to marry), when, I say, the bill is thus filed, if an injunction be prayed therein, it may be had at various stages of the cause, according to the circumstances of the case. If the bill be to stay execution upon an oppressive judgment, and the defendant does not put in his answer within the stated time allowed by the rules of the court, an injunction will issue of course; and, when the answer comes in, the injunction can only be continued upon a sufficient ground appearing from the answer itself. But if an injunction be wanted to stay waste, or other injuries of an equally urgent nature, then upon the filing of the bill, and a proper case supported by *affidavits*, the court will grant an injunction immediately, to continue till the defendant has put in his answer, and till the court shall make some further order concerning it: and, when the answer comes in,

whether it shall then be dissolved or continued till the hearing of the cause, is determined by the court upon argument, drawn from considering the answer and affidavit together.

But, upon common bills, as soon as they are filed, process of *subpoena* is taken out: which is a writ commanding the defendant to appear and answer to the bill, on pain of 100*l.* But this is not all; for if the defendant, on service of the *subpoena*, does not appear within the time limited by the rules of the court, and plead, demur, or answer to the bill, he is then said to be in *contempt*; and the respective processes of contempt are in successive order awarded against him. The first of which is an *attachment*, which is a writ in the nature of a *capias*, directed to the sheriff, and commanding him to attach, or take up, the defendant, and bring him into court. If the sheriff returns that the defendant is *non est inventus*, then an *attachment with proclamations* issues; which, besides the ordinary form of attachment, directs the sheriff, that he cause public proclamation to be made, throughout the county, to summon the defendant, upon his allegiance, personally to appear and answer. If this also be returned with a *non est inventus*, and he still stands out in contempt, a *commission of rebellion* is awarded against him, for not obeying the king's proclamations according to his allegiance; and four commissioners therein named, or any of them, are ordered to attach him wheresoever he may be found in Great Britain, as a rebel and contemner of the king's laws and government, by refusing to attend his sovereign when thereunto required: since, as before observed, matters of equity were originally determined by the king in person, assisted by his council; though that business is now devolved upon his chancellor. If upon this commission of rebellion, a *non est inventus* is returned, the court then sends a *sergeant-at-arms* in quest of him; and if he eludes the search of the sergent also, then a *sequestration* issues to seize all his personal estate, and the profits of his real, and to detain them, subject to the order of the court. Sequestration was first introduced by Sir Nicholas Bacon, lord keeper in the reign of queen Elizabeth; before which the court found some difficulty in enforcing its process and decrees. After an order for a sequestration issued, the plaintiff's bill is to be taken *pro confesso*, and a decree to be made accordingly. So that the sequestration does not seem to be in the nature of process to bring in the defendant, but only intended to enforce the performance of the decree. Thus much if the defendant absconds.

If the defendant is taken upon any of this process, he is to be committed to the Fleet or other prison till he puts in his appearance or answer, or performs whatever else this process is issued to enforce, and also clears his contempts by paying the costs which

the plaintiff has incurred thereby. For the same kind of process (which was also the process of the court of star-chamber till its dissolution) is issued out in all sorts of contempts during the progress of the cause, if the parties in any point refuse or neglect to obey the order of the court.

The process against a body corporate is by *distringas*, to distrain them from their goods and chattels, rents and profits, till they shall obey the summons or directions of the court.

The ordinary process before mentioned cannot be sued out till after the service of the *subpoena*, for then the contempt begins; otherwise he is not presumed to have notice of the bill; and therefore by absconding to avoid the *subpoena* a defendant might have eluded justice, till the statute 5 Geo. II. c. 25, which enacts that where the defendant cannot be found to be served with process of *subpoena*, and absconds (as is believed) to avoid being served therewith, a day shall be appointed him to appear to the bill of the plaintiff which is to be inserted in the London Gazette, read in the parish church where the defendant last lived, and fixed up at the royal exchange; and, if the defendant doth not appear upon that day, the bill shall be taken *pro confesso*.

But if the defendant appears regularly, and takes a copy of the bill, he is next to *demur*, *plead*, or *answer*.

A demurrer in equity is nearly of the same nature as demurrer in law, being an appeal to the judgment of the court, whether the defendant shall be bound to answer the plaintiff's bill: as for want of sufficient matter of equity therein contained; or where the plaintiff, upon his own showing, appears to have no right; or where the bill seeks a discovery of a thing which may cause a forfeiture of any kind, or may convict a man of any criminal misbehavior. For any of these causes a defendant may demur to the bill. And if, on demurrer, the defendant prevails, the plaintiff's bill shall be dismissed: if the demurrer be overruled, the defendant is ordered to answer.

A plea may be either to the *jurisdiction*, showing that the court has no cognizance of the cause, or to the *person*, showing some disability in the plaintiff, as by outlawry, excommunication, and the like; or it is in *bar*; showing some matter wherefore the plaintiff can demand no relief, as an act of parliament, a fine, a release, or a former decree. And the truth of this plea the defendant is bound to prove, if put upon it by the plaintiff. But as bills are often of a complicated nature, and contain various matter, a man may plead as to part, demur as to part, and answer to the residue. But no exceptions to formal *minutiae* in the pleadings will be here allowed; for the parties are at liberty, on the discovery of any errors in form, to amend them.

An *answer* is the most usual defence that is made to a plaintiff's bill. It is given in upon oath, or the honor of a peer or peeress: but where there are amicable defendants, their answer is usually taken without oath, by consent of the plaintiff. Yet, if in the bill any question be put that tends to the discovery of any crime, the defendant may thereupon demur, as was before observed, and may refuse to answer.

An answer must be signed by counsel, and must either deny or confess all the material parts of the bill; or it may confess and avoid, that is, justify or palliate the facts. If one of these is not done, the answer may be excepted to for insufficiency, and the defendant be compelled to put in a more sufficient answer. A defendant cannot pray anything in this, his answer, but to be dismissed the court; if he has any relief to pray against the plaintiff, he must do it by an original bill of his own, which is called a *cross-bill*.

After answer put in, the plaintiff upon payment of costs may amend his bill, either by adding new parties, or new matter, or both, upon the new lights given him by the defendant; and the defendant is obliged to answer afresh to such amended bill. But this must be before the plaintiff has replied to the defendant's answer whereby the cause is at issue; for afterwards, if new matter arises, which did not exist before, he must set it forth by a *supplemental bill*. There may be also a bill of *revivor* when the suit is abated by the death of any of the parties; in order to set the proceedings again in motion, without which they remain at a stand. And there is likewise a bill of *interpleader*; where a person who owes a debt or rent to one of the parties in suit, but, till the determination of it he knows not to which, desires that they may interplead, that he may be safe in the payment. In this last case it is usual to order the money to be paid into court for the benefit of such of the parties to whom upon hearing, the court shall decree it to be due. But this depends upon circumstances; and the plaintiff must also annex an *affidavit* to his bill, swearing that he does not collude with either of the parties.

If the plaintiff finds sufficient matter confessed in the defendant's answer to ground a decree upon, he may proceed to the hearing of the cause upon bill and answer only. But in that case he must take the defendant's answer to be true, in every point. Otherwise the course is for the plaintiff to reply generally to the answer, averring his bill to be true, certain, and sufficient, and the defendant's answer to be directly the reverse: which he is ready to prove as the court shall award; upon which the defendant rejoins, averring the like on his side: which is joining issue upon the facts in dispute. To prove which facts is the next concern.

This is done by examination of witnesses, and taking their *depositions* in writing, according to the manner of the civil law. And for that purpose *interrogatories* are framed, or questions in writing; which, and which only, are to be proposed to and asked of, the witnesses in the cause. These interrogatories must be short and pertinent: not leading ones (as, "did not you see this"? or "did not you hear that?"), for if they be such, the depositions taken thereon will be suppressed and not suffered to be read. For the purpose of examining witnesses in or near London, there is an examiner's office appointed; but for such as live in the country, a commission to examine witnesses is usually granted to four commissioners, two named of each side, or any three or two of them, to take the depositions there. And if the witnesses reside beyond sea, a commission may be had to examine them there upon their own oaths, and (if foreigners) upon the oaths of skillful interpreters. And it hath been established that the deposition of a heathen who believes in the Supreme Being, taken by commission in the most solemn manner according to the custom of his own country, may be read in evidence.

The commissioners are sworn to take the examinations truly and without partiality, and not to divulge them till published in the court of chancery; and their clerks are also sworn to secrecy. The witnesses are compellable by process of *subpoena*, as in the courts of common law, to appear and submit to examination. And when their depositions are taken, they are transmitted to the court with the same care that the answer of a defendant is sent.

If witnesses to a disputable fact are old and infirm, it is very usual to file a bill to perpetuate the testimony of those witnesses, although no suit is depending; for, it may be, a man's antagonist only waits for the death of some of them to begin his suit. This is most frequent when lands are devised by will away from the heir at law, and the devisee in order to perpetuate the testimony of the witnesses to such will, exhibits a bill in chancery against the heir, and sets forth the will *verbatim* therein, suggesting that the heir is inclined to dispute its validity: and then, the defendant having answered, they proceed to issue as in other cases, and examine the witnesses to the will; after which the cause is at an end, without proceeding to any decree, no relief being prayed by the bill: but the heir is entitled to his costs, even though he contests the will. This is what is usually meant by proving a will in chancery.

When all the witnesses are examined, then, and not before, the depositions may be published, by a rule to pass publication; after which they are open for the inspection of all the parties, and copies may be taken of them. The cause is then ripe to be set

down for hearing, which may be done at the procurement of the plaintiff, or defendant, before either the lord chancellor or the master of the rolls, according to the discretion of the clerk in court, regulated by the nature and importance of the suit; and the arrear of causes depending before each of them respectively. Concerning the authority of the master of the rolls, to hear and determine causes, and his general power in the court of chancery, there were (not many years since) divers questions and disputes very warmly agitated; to quiet which it was declared, by statute 3 Geo. II. c. 30, that all orders and decrees by him made, except such as by the course of the court were appropriated to the great seal alone, should be deemed to be valid; subject nevertheless to be discharged or altered by the lord chancellor, and so as they shall not be enrolled, till the same are signed by his lordship. Either party may be *subpoenaed* to hear judgment on the day so fixed for the hearing; and then, if the plaintiff does not attend, his bill is dismissed with costs; or, if the defendant makes default, a decree will be made against him, which will be final unless he pays the plaintiff's cost of attendance, and shows good cause to the contrary on a day appointed by the court. A plaintiff's bill may also at any time be dismissed for want of prosecution, which is in the nature of a nonsuit at law, if he suffers three terms to elapse without moving forward in the cause.

When there are cross-causes, on a cross-bill filed by the defendant against the plaintiff in the original cause, they are generally contrived to be brought on together, that the same hearing and the same decree may serve for both of them.

Method of Hearing.

The method of hearing causes in court is usually this. The parties on both sides appearing by their counsel, the plaintiff's bill is first opened, or briefly abridged, and the defendant's answer also, by the junior counsel on each side: after which the plaintiff's leading counsel states the case and the matters in issue, and the points of equity arising therefrom: and then such depositions as are called for by the plaintiff are read by one of the six clerks, and the plaintiff may also read such part of the defendant's answer as he thinks material or convenient: and after this the rest of the counsel for the plaintiff make their observations and arguments. Then the defendant's counsel go through the same process for him, except that they may not read any part of his answer; and the counsel for plaintiff are heard in reply. When all are heard, the court pronounces the *decree*, adjusting every point in debate according to equity and good conscience; which decree being usually very long, the minutes of it are taken down, and read openly in court by the registrar. The matter of costs to be

given to either party is not here held to be a point of right, but merely discretionary (by the statute 17 Ric. II. c. 6) according to the circumstances of the case, as they appear more or less favorable to the party vanquished. And yet the statute 15 Hen. VI. c. 4 seems expressly to direct, that as well damages as costs shall be given to the defendant, if wrongfully vexed in this court.

The Decree.

The chancellor's decree is either *interlocutory* or *final*. It very seldom happens that the first decree can be final, or conclude the cause for, if any matter of fact is strongly controverted, this court is so sensible of the deficiency of trial by written depositions, that it will not bind the parties thereby, but usually directs the matter to be tried by jury; especially such important facts as the validity of a will, or whether A is the heir at law to B, or the existence of a *modus decimandi*, or real and immemorial composition for tithes. But, as no jury can be summoned to attend this court, the fact is usually directed to be tried at the bar of the court of king's bench, or at the assizes, upon a *feigned issue*. For (in order to bring it there, and have the point in dispute, and that only, put in issue) an action is brought, wherein the plaintiff by a fiction declares that he laid a wager of 5*l.* with the defendant that A was heir at law to B; and then avers that he is so; and therefore demands the 5*l.* The defendant admits the feigned wager, but avers that A is not the heir to B; and thereupon that issue is joined, which is directed out of chancery to be tried; and thus the verdict of the jurors at law determines the fact in the court of equity.

So, likewise, if a question of mere law arise, in the course of a cause, as whether by the words of a will an estate for life or in tail is created, or whether a future interest devised by a testator shall operate as a remainder or an executory devise, it is the practice of this court to refer it to the opinion of the judges of the court of king's bench or common pleas, upon a case stated for that purpose, wherein all the material facts are admitted, and the point of law is submitted to their decision; who thereupon hear it solemnly argued by counsel on both sides, and certify their opinion to the chancellor. And upon such certificate the decree is usually founded.

Another thing also retards the completion of decrees. Frequently long accounts are to be settled, encumbrances and debts to be enquired into, and a hundred little facts to be cleared up, before a decree can do full and sufficient justice. These matters are always, by the decree on the first hearing, referred to a master in chancery to examine, which examinations frequently last for years; and then he is to report the fact, as it appears to him, to

the court. This report may be excepted to, disproved, and overruled; or otherwise is confirmed, and made absolute, by order of the court.

When all issues are tried and settled, and all references to the master ended, the cause is again brought to hearing upon the matters of equity reserved, and a final decree is made; the performance of which is enforced (if necessary) by commitment of the person, or sequestration of the party's estate. And if by this decree either party thinks himself aggrieved he may petition the chancellor for a *rehearing*; whether it was heard before his lordship, or any of the judges sitting for him, or before the master of the rolls. For, whoever may have heard the cause, it is the chancellor's decree, and must be signed by him before it is enrolled; which is done of course unless a rehearing be desired. Every petition for a rehearing must be signed by two counsel of character, usually such as have been concerned in the cause, certifying that they apprehend the cause is proper to be reheard. And upon the rehearing, all the evidence taken in the cause, whether read before or not, is now admitted to be read: because it is the decree of the chancellor himself, who only now sits to hear reasons why it should not be enrolled and perfected; at which time all omissions of either evidence or argument may be supplied. But, after the decree is once signed and enrolled, it cannot be reheard or rectified but by bill of review, or by appeal to the house of lords.

A bill of *review* may be had upon apparent error in judgment appearing on the face of the decree; or by special leave of the court, upon oath made of the discovery of new matter or evidence, which could not possibly be had or used at the time when the decree passed. But no new evidence or matter then in the knowledge of the parties, and which might have been used before, shall be a sufficient ground for a bill of review.

An *appeal* to parliament, that is, to the house of lords, is the dernier resort of the subject who thinks himself aggrieved by an interlocutory order or final determination in this court; and it is effected by *petition* to the house of peers, and not by *writ of error*, as upon judgments at common law. But no new evidence is admitted in the house of lords upon any account; this being a distinct jurisdiction: which differs it very considerably from those instances, wherein the same jurisdiction revises and corrects its own acts, as in rehearings and bills of review. For it is a practice unknown to our law (though constantly followed in the spiritual courts) when a superior court is reviewing the sentence of an inferior, to examine the justice of the former decree by evidence that was never produced below. And thus much for the general method of proceeding in the courts of equity.

THE END OF THE THIRD BOOK.

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BOOK THE FOURTH. OF PUBLIC WRONGS.

Chapter I.

OF THE NATURE OF CRIMES, AND THEIR PUNISHMENT.

1-20.

Definition of Crime.

I. A crime or misdemeanour is an act committed or omitted, in violation of a public law either forbidding or commanding it. This general definition comprehends both crimes and misdemeanours, which, properly speaking, are mere synonymous terms; though, in common usage, the word "crime" is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler names of "misdemeanours" only.

Distinction Between Public and Private Wrongs.

The distinction of public wrongs from private, of crimes and misdemeanours from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanours, are a breach and violation of the public rights and duties due the whole community, considered as a community, in its social aggregate capacity.

In all cases the crime includes an injury: every public offence is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community. In gross and atrocious injuries the private wrong is swallowed up in the public: we seldom hear any mention made of satisfaction to the individual, the satisfaction to the community being so very great. And, indeed, as the public crime is not otherwise avenged than by forfeiture of life and property, it is impossible afterwards to make any reparation for the private wrongs, which can only be had from the body or goods of the aggressor. But there are crimes of an inferior nature, in which the public punishment is not so severe but it affords room for a private compensation also; and herein the distinction of crimes from civil injuries is very apparent. For in-

stance : in the case of battery, or beating another, the aggressor may be indicted for this at the suit of the king, for disturbing the public peace, and be punished criminally by fine and imprisonment; and the party beaten may also have his private remedy by action of trespass for the injury which he in particular sustained, and recover a civil satisfaction in damages.

Upon the whole, we may observe that, in taking cognizance of all wrongs or unlawful acts, the law has a double view, viz. : not only to redress the party injured by either restoring to him his right, if possible, or by giving him an equivalent, the manner of doing which was the object of our inquiries in the preceding book of these commentaries but also to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws which the sovereign power has thought proper to establish for the government and tranquillity of the whole. What those breaches are, and how prevented or punished, are to be considered in the present book.

Here follows a discussion as to the power, end and measure of human punishment, the principal points being as follows: The right of punishing crimes against the law of nature is, in a state of mere nature, vested in every individual. In a state of society, this right is transferred by the individual to the sovereign power. As to offences merely against the laws of society, which are only *mala prohibita*, the magistrate may also inflict coercive penalties, and this by consent of individuals, who in forming society, tacitly consented thereto.

The end of punishment is not by way of atonement or expiation, but as a precaution against future offences, either by the amendment of the offender himself, or by deterring others by dread of the example or by depriving the person of the power to do further mischief. The method should be proportioned to the purpose, and not exceed it. As to the measure of punishment, regard must be had to the object of it, to the fact that violence of passion, or temptation may alleviate a crime; that crimes the most destructive of public safety should be most severely punished; and as to crimes of equal malignity, those which a man has most frequent and easy opportunities of committing and the strongest inducements to commit should be punished the most severely.

Punishments of unreasonable severity have less effect in preventing crime than such as are more merciful or properly intermixed with due distinctions of severity.

Chapter II.

OF THE PERSONS CAPABLE OF COMMITTING CRIMES.

20-34.

Persons Incapable—The Will and the Act.

The general rule is, that no person shall be excused from punishment for disobedience to the laws of his country, excepting such as are expressly defined and exempted by the laws themselves.

All the several pleas and excuses which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto may be reduced to this single consideration, the want or defect of *will*. To constitute a crime against human laws there must be first, a vicious will; and secondly an unlawful act consequent upon such vicious will.

Three Cases of Will and Act Not Joining.

Now, there are three cases in which the will does not join with the act: 1. Where there is a defect of understanding. 2. Where there is understanding and will sufficient residing in the party, but not called forth or exerted at the time of the action done; which is the case of all offences committed by chance or ignorance. 3. Where the action is constrained by some outward force and violence.

Infancy.

I. First we will consider the case of *infancy*, or nonage, which is a defect of the understanding. Infants under the age of discretion ought not to be punished by any criminal prosecution whatever. What the age of discretion is, in various nations, is matter of some variety.

The law of England does in some cases privilege an infant under the age of twenty-one, as to common misdemeanours, so as to escape fine, imprisonment, and the like; and particularly in cases of omission, as not repairing a bridge, or a highway, and other similar offences; for not having the command of his fortune till twenty-one, he wants the capacity to do those things which the law requires. But where there is any notorious breach of the peace, a riot, battery, or the like (which infants, when full grown, are at least as liable as others to commit), for these an infant above the age of fourteen is equally liable to suffer as a person of the full age of twenty-one.

With regard to capital crimes, the law is still more minute and circumspect; distinguishing with greater nicety the several degrees of age and discretion. By the law, as it now stands, and has stood at least ever since the time of Edward the Third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen; and in these cases our maxim is, that "*malitia supplet aetatem*." Under seven years of age, indeed, an infant cannot be guilty of felony, for then a felonious discretion is almost an impossibility in nature; but at eight years old he may be guilty of felony. Also, under fourteen, though an infant shall be *prima facie* adjudged to be *doli incapax*, yet if it appear to the

court and jury that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death. Thus a girl of thirteen has been burned for killing her mistress; and one boy of ten, and another of nine years old, who had killed their companions, have been sentenced to death, and he of ten years actually hanged; because it appeared, upon their trials, that the one hid himself, and the other hid the body he had killed, which hiding manifested a consciousness of guilt, and a discretion to discern between good and evil. And there was an instance in the last century where a boy of eight years old was tried at Abington for firing two barns; and it appearing that he had malice, revenge, and cunning, he was found guilty, condemned, and hanged accordingly. Thus, also, in very modern times a boy of ten years old was convicted on his own confession of murdering his bedfellow, there appearing in his whole behaviour plain tokens of a mischievous discretion; and, as the sparing this boy merely on account of his tender years might be of dangerous consequence to the public by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment. But in all such cases, the evidence of that malice which is to supply age ought to be strong and clear beyond all doubt and contradiction.

Idiocy and Lunacy.

II. The second case of a deficiency in will, which excuses from the guilt of crimes, arises also from a defective or vitiated understanding, viz., in an *idiot* or a *lunatic*. For the rule of law as to the latter, which may easily be adapted also to the former, is that "*furiosus furore solum punitur.*" In criminal cases, therefore, idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. Also, if a man in his sound memory commits a capital offence, and before arraignment for it he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if after judgment he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution. But if there be any doubt whether the party be *compos* or not, this shall be tried by a jury. And if he be so found, a total idiocy, or absolute insanity, excuses from the guilt, and of course from the punishment, of any criminal action committed under such deprivation

of the senses: but, if a lunatic hath lucid intervals of understanding, he shall answer for what he does in those intervals, as if he had no deficiency. Yet in the case of absolute madmen, as they are not answerable for their actions, they should not be permitted the liberty of acting, unless under proper control.

Drunkenness.

III. Thirdly: as to artificial, voluntarily contracted madness by *drunkenness* or intoxication, which, depriving men of their reason, puts them in a temporary frenzy: our law looks upon this as an aggravation of the offence, rather than an excuse for any criminal misbehaviour. A drunkard, says Sir Edward Coke, who is *voluntarius daemon* hath no privilege thereby; but what hurt or ill soever he doth, his drunkenness doth aggravate it. The law of England, considering how easy it is to counterfeit this excuse, and how weak an excuse it is (though real), will not suffer any man thus to privilege one crime by another.

Misfortune or Chance.

IV. A fourth deficiency of will is where a man commits an unlawful act by *misfortune* or *chance*, and not by design. Here the will observes a total neutrality, and does not co-operate with the deed; which therefore wants one main ingredient of a crime. Of this when it affects the life of another, we shall find more occasion to speak hereafter, at present only observing that, if any accidental mischief happens to follow from the performance of a *lawful act*, the party stands excused from all guilt; but if a man be doing anything *unlawful*, and a consequence ensues which he did not foresee or intend, as the death of a man, or the like, his want of foresight shall be no excuse; for, being guilty of one offence in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehaviour.

Ignorance or Mistake.

V. Fifthly: *ignorance* or *mistake* is another defect of will; when a man, intending to do a lawful act, does that which is unlawful. For here, the deed and the will acting separately, there is not that conjunction between them which is necessary to form a criminal act. But this must be an ignorance or mistake of fact, and not an error, in point of law. As if a man intending to kill a thief or housebreaker in his own house, by mistake kills one of his own family, this is no criminal action; but if a man thinks he has a right to kill a person excommunicated or outlawed wherever he meets him, and does so, this is a wilful murder. For a mistake in point of law, which every person of discretion not only may but is bound and presumed to know, is in criminal cases no sort of defence. *Ignorantia juris, quod quisque tenetur scire, neminem excusat* is as well the maxim of our own law as it was of the Roman.

Compulsion and Necessity.

VI. A sixth species of defect of will is that arising from *compulsion* and inevitable *necessity*. These are a constraint upon the will whereby a man is urged to do that which his judgment disapproves; and which, it is to be presumed, his will (if left to itself) would reject.

Civil Subjection.

I. Of this nature, in the first place, is the obligation of *civil subjection*, whereby the inferior is constrained by the superior to act contrary to what his own reason and inclination would suggest; as when a legislator establishes iniquity by a law and commands the subject to do an act contrary to religion or sound morality. Obedience to the laws in being is undoubtedly a sufficient extenuation of civil guilt before the municipal tribunal.

As to Persons in Private Relations.

The principal case, where constraint of a superior is allowed as an excuse for criminal misconduct, is with regard to the matrimonial subjection of the wife to her husband: for neither a son nor a servant are excused for the commission of any crime, whether capital or otherwise, by the command or coercion of the parent or master; though in some cases the command or authority of the husband, either expressed or implied, will privilege the wife from punishment even for capital offences. And therefore if a woman commit theft, burglary, or other civil offences against the laws of society by the coercion of her husband; or even in his company, which the law construes a coercion; she is not guilty of any crime; being considered as acting by compulsion and not of her own will. Even with regard to wives, this rule admits of an exception in crimes that are *mala in se*, and prohibited by the law of nature, as murder and the like: not only because these are of a deeper dye, but also, since in a state of nature no one is in subjection to another, it would be unreasonable to screen an offender from the punishment due to natural crimes by the refinements and subordinations of civil society. In treason, also (the highest crime which a member of society can as such be guilty of), no plea of coverture shall excuse the wife; no presumption of the husband's coercion shall extenuate her guilt: as well because of the odiousness and dangerous consequences of the crime itself, as because the husband, having broken through the most sacred tie of social community by rebellion against the state, has no right to that obedience from a wife, which he himself as a subject has forgotten to pay. In inferior misdemeanours also we may remark another exception: that a wife may be indicted, and set in the pillory *with* her husband, for keeping a brothel; for this is an offence touching

the domestic economy or government of the house, in which the wife has a principal share; and is also such an offence as the law presumes to be generally conducted by the intrigues of the female sex. And in all cases where the wife offends alone, without the company or coercion of her husband, she is responsible for her offence as much as any feme sole.

Duress per Minas.

2. Another species of compulsion or necessity is what our law calls *duress per minas*; or threats and menaces which induce a fear of death or other bodily harm, and which take away for that reason the guilt of many crimes and misdemeanours; at least, before the human tribunal. But then that fear which compels a man to do an unwarrantable action ought to be just and well grounded. Therefore, in time of war or rebellion a man may be justified in doing many treasonable acts by compulsion of the enemy or rebels, which would admit of no excuse in time of peace. This, however, seems only, or at least principally, to hold as to positive crimes, so created by the laws of society, and which, therefore, society may excuse; but not as to natural offences so declared by the law of God, wherein human magistrates are only the executioners of divine punishment. And therefore though a man be violently assaulted and hath no other possible means of escaping death but by killing an innocent person, this fear and force shall not acquit him of murder; for he ought rather to die himself than escape by the murder of an innocent. But, in such a case, he is permitted to kill the assailant; for there the law of nature, and self-defence, its primary canon, have made him his own protector.

The Choice of Two Evils Necessary.

3. There is a third species of necessity, which may be distinguished from the actual compulsion of external force or fear; being the result of reason and reflection which act upon and constrain a man's will, and oblige him to do an action which, without such obligation, would be criminal. And that is, when a man has his choice of two evils set before him, and being under a necessity of choosing one, he chooses the least pernicious of the two. Here the will cannot be said freely to exert itself, being rather passive than active; or, if active, it is rather in rejecting the greater evil than in choosing the less. Of this sort is that necessity where a man by the commandment of the law is bound to arrest another for any capital offence, or to disperse a riot, and resistance is made to his authority; it is here justifiable, and even necessary, to beat, to wound, or perhaps to kill the offenders, rather than to permit the murderer to escape, or the riot to continue. For the preservation of the peace of the kingdom, and the apprehending of notorious

malefactors, are of the utmost consequence to the public; and therefore excuse the felony which the killing would otherwise amount to.

Want Not Justifying Stealing.

4. There is yet another case of necessity, which has occasioned great speculation among the writers upon general law; viz., whether a man in extreme want of food or clothing may justify stealing either, to relieve his present necessities? The law of England admits no such excuse at present. And this is founded upon the highest reason: for men's properties would be under a strange insecurity if liable to be invaded according to the want of others, of which wants no man can possibly be an adequate judge but the party himself who pleads them. But the founders of our constitution thought it better to vest in the crown the power of pardoning particular objects of compassion than to countenance and establish theft by one general undistinguishing law.

The Case of the King.

VII. To these several cases, in which the incapacity of committing crimes arises from a deficiency of the will, we may add one more, in which the law supposes an incapacity of doing wrong, from the excellence and perfection of the person; which extend as well to the will as to the other qualities of his mind. I mean the case of the king; who, by virtue of his royal prerogative, is not under the coercive power of the law; which will not suppose him capable of committing a folly, much less a crime.

Chapter III.

OF PRINCIPALS AND ACCESSORIES.

34-41.

We are next to make a few remarks on the different degrees of guilt among persons that are capable of offending, viz., as *principal*, and as *accessory*

Principal and the Two Degrees.

1. A man may be *principal* in an offence in two degrees. A principal in the first degree is he that is the actor or absolute perpetrator of the crime; and in the second degree he is who is present, aiding and abetting the fact to be done. Which *presence* need not always be an actual immediate standing by, within sight or hearing of the fact; but there may be also a constructive presence, as when one commits a robbery or murder and another keeps watch or guard at some convenient distance. And this rule hath also other exceptions; for, in case of murder by poisoning, a man may be a principal felon by preparing and laying the poison, or

persuading another to drink it who is ignorant of its poisonous quality, or giving it to him for that purpose, and yet not administer it himself, nor be present when the very deed of poisoning is committed. And the same reasoning will hold with regard to other murders committed in the absence of the murderer by means which he had prepared beforehand, and which probably could not fail of their mischievous effect. As by laying a trap or pitfall for another, whereby he is killed, letting out a wild beast, with an intent to do mischief, or inciting a madman to commit murder, so that death thereupon ensues; in every of these cases the party offending is guilty of murder as a principal, in the first degree. For he cannot be called an accessory, that necessarily presupposing a principal; and the poison, the pitfall, the beast, or the madman cannot be held principals, being only the instruments of death. As therefore he must be certainly guilty either as principal or accessory, and cannot be so as accessory, it follows that he must be guilty as principal, and, if principal, then in the first degree; for there is no other criminal, much less a superior in the guilt, whom he could aid, abet or assist.

Accessory.

II. An *accessory* is he who is not the chief actor in the offence, nor present at its performance, but is some way concerned therein, either *before* or *after* the fact committed.

Offences Admitting of Accessories.

1. And first, as to what offences admit of accessories, and what not. In high treason there are no accessories, but all are principals. In petit treason, murder, and felonies with or without benefit of clergy, there may be accessories; except only in those offences which by judgment of law are sudden and unpremeditated, as manslaughter and the like, which therefore cannot have any accessories *before* the fact. So too in petit larceny, and in all crimes under the degree of felony, there are no accessories either *before* or *after* the fact, but all persons concerned therein, if guilty at all, are principals: the same rule holding with regard to the highest and lowest offences, though upon different reasons. In treason all are principals *propter odium delicti*; in trespass all are principals because the law, *quae de minimis non curat*, does not descend to distinguish the different shades of guilt in petty misdemeanours. It is a maxim that *accessorius sequitur naturam sui principalis*: and therefore an accessory cannot be guilty of a higher crime than his principal: being only punished as a partaker of his guilt. So that if a servant instigates a stranger to kill his master, this being murder in the stranger as principal, of course the servant is accessory only to the crime of murder; though, had he

been present and assisting, he would have been guilty as principal of petit treason, and the stranger of murder.

Who May be Accessory Before the Fact.

2. As to the second point, who may be an accessory *before* the fact: Sir Matthew Hale defines him to be one who, being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime. Herein absence is necessary to make him an accessory; for if such procurer, or the like, be present, he is guilty of the crime as principal. And it is also settled that whoever procureth a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact. It is likewise a rule, that he who in any wise commands or counsels another to commit an unlawful act is accessory to all that ensue upon that unlawful act; but is not accessory to any act distinct from the other. But if the felony committed be the same in substance with that which is commanded, and only varying in some circumstantial matters; as if, upon a command to poison Titus, he is stabbed or shot, and dies; the commander is still accessory to the murder, for the substance of the thing commanded was the death of Titus, and the manner of its execution is a mere collateral circumstance.

Who May be Accessory After the Fact.

3. An accessory *after* the fact may be, where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon. Therefore to make an accessory *ex post facto*, it is in the first place requisite that he knows of the felony committed. In the next place, he must receive, relieve, comfort, or assist him. And, generally, any assistance whatever given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes the assistor an accessory. As furnishing him with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force and violence to rescue or protect him. So likewise to convey instruments to a felon to enable him to break gaol, or to bribe the gaoler to let him escape, makes a man an accessory to the felony. To buy or receive stolen goods, knowing them to be stolen, falls under none of these descriptions; it was therefore at common law a mere misdemeanour, and made not the receiver accessory to the theft; because he received the *goods* only and not the *felon*.

The felony must be complete at the time of the assistance given; else it makes not the assistant an accessory. But so strict is the law where a felony is actually complete, in order to do effectual justice, that the nearest relations are not suffered to aid or receive one another. If the parent assists his child, or the child

the parent, if the brother receives the brother, the master his servant, or the servant his master or even if the husband receives his wife, who have any of them committed a felony, the receivers become accessories *ex post facto*. But a feme covert cannot become an accessory by the receipt and concealment of her husband; for she is presumed to act under his coercion, and therefore she is not bound, neither ought she, to discover her lord.

Accessories and Principals—Difference in Treatment.

4. The last point of inquiry is how accessories are to be treated, considered distinct from principals. And the general rule of the ancient law is this, that accessories shall suffer the same punishment as their principals: if one be liable to death, the other is also liable. Why then, it may be asked, are such elaborate distinctions made between accessories and principals, if both are to suffer the same punishment? For these reasons: 1. To distinguish the nature and denomination of crimes, that the accused may know how to defend himself when indicted. 2. Because, though by the ancient common law the rule is as before laid down, that both shall be punished alike, yet now by the statutes relating to the benefit of clergy a distinction is made between them: accessories *after* the fact being still allowed the benefit of clergy in all but a few cases, which is denied to the principals and accessories *before* the fact in many cases. 3. Because formerly no man could be tried as accessory till after the principal was convicted or at least he must have been tried at the same time with him; though that law is now much altered, as will be shown more fully in its proper place. 4. Because though a man be indicted as accessory and acquitted, he may afterwards be indicted as principal; for an acquittal of receiving or counseling a felon is no acquittal of the felony itself; but it is matter of some doubt whether, if a man be acquitted as principal, he can be afterwards indicted as accessory before the fact; since those offences are frequently very nearly allied, and therefore an acquittal of the guilt of one may be an acquittal of the other also. But it is clearly held that one acquitted as principal may be indicted as an accessory *after* the fact: since that is always an offence of a different species of guilt, principally tending to evade the public justice, and is subsequent in its commencement to the other. Upon these reasons the distinction of principal and accessory will appear to be highly necessary; though the punishment is still much the same with regard to principals, and such accessories as offend *before* the fact is committed.

Chapter IV.

OF OFFENCES AGAINST GOD AND RELIGION

41-66.

The first species of offences against God and religion treated are apostasy, heresy, reviling the ordinances of the church, non-conformity, witchcraft, conjuration, enchantment or sorcery, and religious impostors.

Blasphemy.

The fourth species of offences, more immediately against God and religion, is that of *blasphemy* against the Almighty by denying his being or providence; or by contumelious reproaches of our Saviour Christ. Whither also may be referred all profane scoffing at the holy scripture, or exposing it to contempt and ridicule. These are offences punishable at common law by fine and imprisonment, or other infamous corporal punishment; for Christianity is part of the laws of England.

Swearing and Cursing.

V. Somewhat allied to this, though in an inferior degree, is the offence of profane and common *swearing* and *cursing*. By the last statute against which, 19 Geo. II. c. 21, which repeals all former ones, every labourer, sailor, or soldier profanely cursing or swearing shall forfeit 1s.; every other person under the degree of a gentleman, 2s.; and every gentleman, or person of superior rank, 5s.; to the poor of the parish: and, on the second conviction, double; and for every subsequent offence, treble the sum first forfeited; with all charges of conviction: and in default of payment shall be sent to the house of correction for ten days.

Simony.

VIII. Simony, or the corrupt presentation of any one to an ecclesiastical benefice for gift or reward, is also to be considered as an offence against religion.

Profanation of the Lord's Day.

IX. Profanation of the Lord's day, vulgarly (but improperly) called *sabbath-breaking*, is a ninth offence against God and religion, punished by the municipal law of England.

Drunkenness.

X. Drunkenness is also punished, by statute 4 Jac. I. c. 5, with the forfeiture of 5s., or the sitting six hours in the stocks: by which time the statute presumes the offender will have regained his senses, and not be liable to do mischief to his neighbors. And there are many wholesome statutes by way of prevention, chiefly passed in the same reign of King James I., which regulate the licensing of alehouses, and punish persons found tippling therein; or the masters of such houses permitting them.

Lewdness.

XI. The last offence which I shall mention, more immediately against religion and morality, and cognizable by the temporal courts, is that of open and notorious *lewdness*; either by frequenting houses of ill fame, which is an indictable offence; or by some grossly scandalous and public indecency, for which the punishment is by fine and imprisonment. The temporal courts take no cognizance of the crime of adultery otherwise than as a private injury.

Chapter V.
OF OFFENCES AGAINST THE LAW OF NATIONS.

66-74.

The Law of Nations.

The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each. This general law is founded upon this principle.—that different nations ought in time of peace to do one another all the good they can, and in time of war as little harm as possible, without prejudice to their own real interests. Such rules must necessarily result from those principles of natural justice in which all the learned of every nation agree; or they depend upon mutual compacts or treaties between the respective communities, in the construction of which there is also no judge to resort to but the law of nature and reason, being the only one in which all the contracting parties are equally conversant and to which they are equally subject.

The Principal Offences.

The principal offences against the law of nations, animadverted on as such by the municipal laws of England, are of three kinds: 1. Violation of safe conducts; 2. Infringements of the rights of ambassadors; and 3. Piracy.

Violation of Safe Conducts.

I. As to the first, *violation of safe-conducts or passports*, expressly granted by the king or his ambassadors to the subjects of a foreign power in time of mutual war, or committing acts of hostility against such as are in amity, league, or truce with us, who are here under a general implied safe-conduct: these are breaches of the public faith, without the preservation of which there can be no intercourse or commerce between one nation and another: and

such offences may, according to the writers upon the law of nations, be a just ground of a national war; since it is not in the power of the foreign prince to cause justice to be done to his subjects by the very individual delinquent, but he must require it of the whole community. And as during the continuance of any safe-conduct, either express or implied, the foreigner is under the protection of the king and the law, and, more especially, as it is one of the articles of *magna charta* that foreign merchants should be entitled to safe-conduct and security throughout the kingdom, there is no question that any violation of either the person or property of such foreigner may be punished by indictment in the name of the king, whose honour is more particularly engaged in supporting his own safe-conduct.

Rights of Embassadors.

II. As to the rights of *embassadors*, which are also established by the law of nations, and are therefore matter of universal concern, they have formerly been treated of at large. It may here be sufficient to remark that the common law of England recognizes them in their full extent by immediately stopping all legal process, sued out through the ignorance or rashness of individuals, which may intrench upon the immunities of a foreign minister or any of his train. And, the more effectually to enforce the law of nations in this respect, when violated through wantonness or insolence, it is declared, by the statute 7 Anne, c. 12, that all process whereby the person of any ambassador, or of his domestic or domestic servant, may be arrested, or his goods distrained or seized, shall be utterly null and void; and that all persons prosecuting, soliciting, or executing such process, being convicted, by confession or the oath of one witness, before the lord chancellor and the chief justices, or any two of them, shall be deemed violators of the laws of nations and disturbers of the public repose, and shall suffer such penalties and corporal punishment as the said judges, or any two of them, shall think fit. Thus, in case of extraordinary outrage, for which the law hath provided no special penalty, the legislature hath intrusted to these three principal judges of the kingdom an unlimited power of proportioning the punishment to the crime.

Piracy.

III. Lastly, the crime of *piracy*, or robbery and depredation upon the high seas, is an offence against the universal law of society; a pirate being, according to Sir Edward Coke, *hostis humani generis*.

By the ancient common law, piracy, if committed by a subject, was held to be a species of high treason, being contrary to

his natural allegiance, and by an alien to be felony only; but now since the statute of treason, 25 Edw. III., c. 2, it is held to be only felony in a subject.

The offence of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there.

Chapter VI.

OF HIGH TREASON.

74-94.

Allegiance and the Breach of the Duty.

In a former part of these commentaries we had occasion to mention the nature of allegiance as the tie or *ligamen* which binds every subject to be true and faithful to his sovereign *liege* lord the king, in return for that protection which is afforded him, and truth and faith to bear of life and limb, and earthly honour, and not to know or hear of any ill intended him, without defending him therefrom. Every offence, therefore, more immediately affecting the royal person, his crown, or dignity, is in some degree a breach of this duty of allegiance, whether natural and innate, or local and acquired by residence; and these may be distinguished into four kinds: 1. Treason; 2. Felonies injurious to the king's prerogative; 3. *Praemunire*; 4. Other misprisions and contempts. Of which crimes the first and principal is that of treason.

Treason.

Treason, *proditio*, in its very name imports a betraying, treachery, by breach of faith. It therefore happens only between allies, saith the Mirror: for treason is indeed a general appellation, made use of by the law, to denote not only offences against the king and government, but also that accumulation of guilt which arises whenever a superior reposes a confidence in a subject or inferior between whom and himself there subsists a natural, a civil or even a spiritual relation, and the inferior so abuses that confidence, so forgets the obligations of duty, subjection, and allegiance, as to destroy the life of any such superior or lord. This is looked upon as proceeding from the same principle of treachery in private life as would have urged him who harbours it to have conspired in public against his liege lord and sovereign: and, therefore, for a wife to kill her lord or husband, a servant his lord or master, and an ecclesiastic his lord or ordinary; these being breaches of the lower allegiance of private and domestic faith, are denominated *petit* treasons. But when disloyalty so rears its crest as to attack even majesty itself, it is called by way of eminent distinction, *high* treason.

As this is the highest civil crime which (considered as a member of the community) any man can possibly commit, it ought therefore to be the most precisely ascertained. For if the crime of high treason be indeterminate, this alone (says the president Montesquieu) is sufficient to make any government degenerate into arbitrary power. And yet, by the ancient common law, there was a great latitude left in the breast of the judges to determine what was treason, or not so: whereby the creatures of tyrannical princes had opportunity to create abundance of constructive treasons; that is, to raise, by forced and arbitrary constructions, offences into the crime and punishment of treason which never were suspected to be such. But, however, to prevent the inconveniences which began to arise in England from this multitude of constructive treasons, the statute 25 Edw. III. c. 2, was made; which defines what offences only for the future should be held to be treason. This statute must therefore be our text and guide, in order to examine into the several species of high treason. And we shall find that it comprehends all kinds of high treason under seven distinct branches.

Branches of High Treason.

1. "When a man doth compass or imagine the death of our lord the king, of our lady his queen, or of their eldest son and heir."

2. The second species of treason is, "if a man do violate the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir."

3. The third species of treason is, "if a man do levy war against our lord the king, in his realm." And this may be done by taking arms, not only to dethrone the king but under pretence to reform religion or the laws, or to remove evil counsellors, or other grievances whether real or pretended. To resist the king's forces by defending a castle against them, is a levying of war; and so is an insurrection with an avowed design to pull down *all* enclosures, *all* brothels, and the like: the universality of the design making it a rebellion against the state, an usurpation of the powers of government, and an insolent invasion of the king's authority. But a tumult, with a view to pull down a particular house, or lay open a particular enclosure, amounts at most to a riot, this being no general defiance of public government. So, if two subjects quarrel, and levy war against each other (in that spirit of private war which prevailed all over Europe in the early feudal times), it is only a great riot and contempt, and no treason. A bare conspiracy to levy war does not amount to this species of treason; but (if particularly pointed at the person of the king, or his government) it falls within the first, of compassing or imagining the king's death.

4. "If a man be adherent to the king's enemies in his realm; giving to them aid and comfort in the realm or elsewhere," he is also declared guilty of high treason. This must likewise be proved by some overt act, as by giving them intelligence, by sending them provisions, by selling them arms, by treacherously surrendering a fortress, or the like. By enemies are here understood the subjects of foreign powers with whom we are at open war. As to foreign pirates or robbers, who may happen to invade our coasts without any open hostilities between their nation and our own, and without any commission from any prince or state at enmity with the crown of Great Britain, the giving them any assistance is also clearly treason, either in the light of adhering to the public enemies of the king and kingdom, or else in that of levying war against his majesty. And, most indisputably, the same acts of adherence or aid which (when applied to foreign enemies) will constitute treason under this branch of the statute will (when afforded to our own fellow-subjects in actual rebellion at home) amount to high treason under the description of levying war against the king. But to relieve a rebel fled out of the kingdom is no treason: for the statute is taken strictly, and a *rebel* is not an *enemy*; an enemy being always the subject of some foreign prince, and one who owes no allegiance to the crown of England. And if a person be under circumstances of actual force and constraint, through a well-grounded apprehension of injury to his life or person, this fear of compulsion will excuse his even joining with either rebels or enemies in the kingdom, provided he leaves them whenever he hath a safe opportunity.

5. "If a man counterfeit the king's great or privy seal," this is also high treason.

6. The sixth species of treason under this statute is "if a man counterfeit the king's money, and if a man bring false money into the realm counterfeit to the money of England, knowing the money to be false, to merchandise and make payment withal."

7. The last species of treason ascertained by the statute is, "if a man slay the chancellor, treasurer, or the king's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places doing their offices."

The punishment of high treason in general is very solemn and terrible. 1. That the offender be drawn to the gallows, and not be carried or walk; though usually (by connivance, at length ripened by humanity into law) a sledge or hurdle is allowed, to preserve the offender from the extreme torment of being dragged on the ground or pavement. 2. That he be hanged by the neck, and then cut down alive. 3. That his entrails be taken out and burned

while he is yet alive. 4. That his head be cut off. 5. That his body be divided into four parts. 6. That his head and quarters be at the king's disposal.

The king may and often doth, discharge all the punishment, except beheading, especially where any of the noble blood are attainted. For beheading being a part of the judgment, that may be executed, though all the rest be omitted by the king's command. But where beheading is no part of the judgment, as in murder or other felonies, it hath been said that the king cannot change the judgment, although at the request of the party, from one species of death to another. But of this we shall say more hereafter.

In the case of coining, which is a treason of a different complexion from the rest, the punishment is milder for male offenders, being only to be drawn, and hanged by the neck until dead. But in treason of every kind the punishment of women is the same, and different from that of men. For as the decency due to the sex forbids the exposing and publicly mangling their bodies, their sentence (which is to the full as terrible to sensation as the other) is to be drawn to the gallows, and there to be burned alive.

Chapter VII.

OF FELONIES INJURIOUS TO THE KING'S PREROGATIVE.

94-104.

Felony, in the general acceptation of our English law, comprises every species of crime which occasioned at common law the forfeiture of lands and goods. This most frequently happens in those crimes for which a capital punishment either is or was liable to be inflicted; for those felonies which are called clergyable, or to which the benefit of clergy extends, were anciently punished with death in all lay or unlearned offenders, though now, by the statute-law, that punishment is for the first offence universally remitted. All treasons, strictly speaking, are felonies, though all felonies are not treason. And to this also we may add that not only all offences now capital are in some degree or other felony, but this is likewise the case with some other offences, which are not punished with death, as suicide, where the party is already dead; homicide by chance-medley, or in self-defence; and petit larceny, or pilfering; all which are (strictly speaking) felonies, as they subject the committers of them to forfeitures. So that, upon the whole, the only adequate definition of felony seems to be that which is before laid down, viz., an offence which occasions a total forfeiture of either lands or goods, or both, at the common law,

and to which capital or other punishment may be superadded, according to the degree of guilt.

Hence it follows that capital punishment does by no means enter into the true idea and definition of felony. Felony may be without inflicting capital punishment, as in the cases instanced of self-murder, excusable homicide, and petit larceny; and it is possible that capital punishments may be inflicted and yet the offence be no felony; as in case of heresy by the common law, which, though capital, never worked any forfeiture of lands or goods, an inseparable incident to felony. And of the same nature was the punishment of standing mute without pleading to an indictment, which at the common law was capital, but without any forfeiture, and therefore such standing mute was no felony. In short, the true criterion of felony is forfeiture.

The idea of felony is, indeed, so generally connected with that of capital punishment that we find it hard to separate them; and to this usage the interpretations of the law do now conform. And therefore, if a statute makes any new offence felony, the law implies that it shall be punished with death, viz., by hanging, as well as with forfeiture: unless the offender prays the benefit of clergy; which all felons are entitled once to have, provided the same is not expressly taken away by statute. And, in compliance herewith, I shall for the future consider it also in the same light as a generical term, including all capital crimes below treason.

Kinds of Felonies as Are Against the King's Prerogative.

I proceed now to consider such felonies as are immediately injurious to the king's prerogative. These are, 1. Offences relating to the coin, not amounting to treason. 2. Offences against the king's council. 3. The offence of serving a foreign prince. 4. The offence of embezzling or destroying the king's armour or stores of war. To which may be added a fifth: 5. Desertion from the king's armies in time of war.

Chapter VIII.

OF PRAEMUNIRE.

104-119.

The chapter is mainly historical and the subject of no practical importance to the student in this country.

The original meaning of the offence which we call *praemunire*, is introducing a foreign power into this land, and creating *imperium in imperio* by paying that obedience to papal process which constitutionally belonged to the king alone.

Chapter IX.

OF MISPRISIONS AND CONTEMPTS AFFECTING
THE KING AND GOVERNMENT.

119-127.

Misprisions—Definition and Divisions.

Misprisions are, in the acceptation of our law, generally understood to be all such high offences as are under the degree of capital, but nearly bordering thereon: and it is said that a misprision is contained in every treason and felony. Misprisions are generally divided into two sorts; negative, which consist in the concealment of something which ought to be revealed; and positive, which consist in the commission of something which ought not to be done.

Misprision of Treasons.

I. Of the first, or negative kind, is what is called *Misprision of treason*; consisting in the bare knowledge and concealment of treason, without any degree of assent thereto: for any assent makes the party a principal traitor; as indeed the concealment, which was construed aiding and abetting, did at the common law. But it is now enacted, by the statute 1 and 2 Ph. and M. c. 10, that a bare concealment of treason shall only be held a misprision. This concealment becomes criminal if the party apprised of the treason does not, as soon as conveniently may be, reveal it to some judge of assize or justice of the peace.

Misprision of Felony.

Misprision of felony is also the concealment of a felony which a man knows but never assented to; for, if he assented, this makes him either principal or accessory.

There is also another species of negative misprisions: namely, the *concealing of treasure-trove*, which belongs to the king or his grantees by prerogative royal: the concealment of which was formerly punishable by death; but now only by fine and imprisonment.

II. Misprisions which are merely positive are generally denominated *contempts* or *high misdemeanours*; of which

Mal-Administration.

I. The first and principal is the *mal-administration* of such high officers as are in public trust and employment. This is usually punished by the method of parliamentary impeachment; wherein such penalties, short of death, are inflicted, as to the wisdom of the peers shall seem proper; consisting usually of banishment, imprisonment, fines, or perpetual disability. Hitherto also may be referred the offence of *embezzling the public money*.

With us it is not a capital crime, but subjects the committer of it to a discretionary fine and imprisonment. Other misprisions are, in general, such contempts of the executive magistrate as demonstrate themselves by some arrogant and undutiful behaviour towards the king and government. These are

Contempts Against the King's Prerogative.

2. Contempts against the king's *prerogative*. As, by refusing to assist him for the good of the public, either in his councils, by advice, if called upon, or in his wars, by personal service for defence of the realm, against a rebellion or invasion. Under which class may be ranked the neglecting to join the *posse comitatus* or power of the county, being thereunto required by the sheriff or justices. Contempts against the prerogative may also be by preferring the interests of a foreign potentate to those of their own, or doing or receiving anything that may create an undue influence in favour of such extrinsic power; as by taking a pension from any foreign prince without the consent of the king. Or by disobeying the king's lawful commands: whether by writs issuing out of his courts of justice, or by a summons to attend his privy council, or by letters from the king to a subject commanding him to return from beyond seas (for disobedience to which his lands shall be seized until he does return, and himself afterwards punished), or by his writ of *ne exeat regnum*, or proclamation commanding the subject to stay at home. Disobedience to any of these commands is a high misprision and contempt; and so, lastly, is disobedience to any act of parliament where no particular penalty is assigned; for then it is punishable, like the rest of these contempts, by fine and imprisonment, at the discretion of the king's courts of Justice.

Contempts Against the King's Person, Title, and Courts of Justice.

3. Contempts and misprisions against the king's *person* and *government* may be by speaking or writing against them, cursing or wishing him ill, giving out scandalous stories concerning him, or doing anything that may tend to lessen him in the esteem of his subjects, may weaken his government, or may raise jealousies between him and his people.

4. Contempts against the king's *title*, not amounting to treason or *praemunire*, are the denial of his right to the crown in common and unadvised discourse.

5. Contempts against the king's *palaces* or *courts of justice* have been always looked upon as high misprisions; and by the ancient law, before the conquest, fighting in the king's palace, or before the king's judges, was punished with death. And at pres-

ent, with us, by the statute 33 Hen. VIII. c. 12, malicious striking in the king's palace, wherein his royal person resides, whereby blood is drawn, is punishable by perpetual imprisonment, and fine at the king's pleasure, and also loss of the offender's right hand: the solemn execution of which sentence is prescribed in the statute at length.

But *striking* in the king's superior courts of justice, in Westminster hall, or at the assizes, is made still more penal than even in the king's palace. The reason seems to be that these courts being anciently held in the king's palace and before the king himself, striking there included the former contempt against the king's palace, and something more, viz., the disturbance of public justice. For this reason, by the ancient common law before the conquest, striking in the king's court of justice, or drawing a sword therein, was a capital felony; and our modern law retains so much of the ancient severity as only to exchange the loss of life for the loss of the offending limb. Therefore a stroke or blow in such a court of justice, whether blood be drawn or not, or even assaulting a judge sitting in the court by drawing a weapon, without any blow struck, is punishable with the loss of the right hand, imprisonment for life, and forfeiture of goods and chattels, and of the profits of his lands during life. A *rescue* also of a prisoner from any of the said courts, without striking a blow, is punished with perpetual imprisonment and forfeiture of goods, and of the profits of lands during life, being looked upon as an offence of the same nature with the last; but only, as no blow is actually given, the amputation of the hand is excused. For the like reason an affray or riot near the said courts, but out of their actual view, is punished only with fine and imprisonment.

Not only such as are guilty of an actual violence, but of threatening or reproachful words to any judge sitting in the courts, are guilty of a high misprision, and have been punished with large fines, imprisonment, and corporal punishment. And, even in the inferior courts of the king, an affray or contemptuous behaviour is punishable with a fine by the judges there sitting, as by the steward in a court-leet or the like.

Likewise all such as are guilty of any injurious treatment to those who are immediately under the protection of a court of justice are punishable by fine and imprisonment; as, if a man assaults or threatens his adversary for suing him, a counsel or attorney for being employed against him, a juror for his verdict, or a gaoler or other ministerial officer by keeping him in custody, and properly executing his duty.

Lastly, to endeavor to dissuade a witness from giving evidence, to disclose an examination before the privy council, or to

advise a prisoner to stand mute (all of which are impediments of justice), are high misprisions, and contempts of the king's courts, and punishable by fine and imprisonment. And anciently it was held that if one of the grand jury disclose to any person indicted the evidence that appeared against him, he was thereby made accessory to the offence, if felony, and in treason a principal. And at this day it is agreed that he is guilty of a high misprision, and liable to be fined and imprisoned.

Chapter X.

OF OFFENCES AGAINST PUBLIC JUSTICE.

127-142.

Five Species.

The crimes and misdemeanours that more especially affect the commonwealth may be divided into five species, viz., offences against public *justice*, against the public *peace*, against the public *trade*, against the public *health* and against the public *police* or *economy*; of each of which we will take a cursory view in their order.

Against Public Justice.

First, then, of offences against public *justice*, some of which are felonious, whose punishment may extend to death; others only misdemeanours. I shall begin with those that are most penal, and descend gradually to such as are of less malignity.

Embezzling or Vacating Records, Obstructing Process, etc.

1. Embezzling or vacating *records*, or falsifying certain other proceedings in a court of judicature, is a felonious offence against public justice.

2. To prevent abuses by the extensive power which the law is obliged to repose in gaolers, it is enacted, by statute 14 Edw. III. c. 10, that if any *gaoler* by too great duress of imprisonment makes any prisoner that he hath in ward become an *approver* or an *appellor* against his will: that is, as we shall see hereafter, to accuse and turn evidence against some other person; it is felony in the gaoler.

3. A third offence against public justice is *obstructing* the execution of lawful *process*. This is at all times an offence of a very high and presumptuous nature; but more particularly so when it is an obstruction of an arrest upon criminal process. And it hath been holden that the party opposing such arrest becomes thereby *particeps criminis*; that is, an accessory in felony, and a principal in high treason.

4. An *escape* of a person arrested upon criminal process by eluding the vigilance of his keepers before he is put in hold, is

also an offence against public justice, and the party himself is punishable by fine or imprisonment. But the officer permitting such escape, either by negligence or connivance, is much more culpable than the prisoner; the natural desire of liberty pleading strongly in his behalf, though he ought in strictness of law to submit himself quietly to custody till cleared by the due course of justice. Officers therefore who, after arrest, *negligently* permit a felon to escape, are also punishable by fine: but *voluntary* escapes, by consent and connivance of the officer, are a much more serious offence; for it is generally agreed that such escapes amount to the same kind of offence, and are punishable in the same degree, as the offence of which the prisoner is guilty and for which he is in custody, whether treason, felony or trespass. And this, whether he were actually committed to gaol or only under a bare arrest. But the officer cannot be thus punished until the original delinquent hath actually received judgment, or been attainted, upon verdict, confession, or outlawry, of the crime for which he was so committed or arrested: otherwise it might happen that the officer might be punished for treason or felony, and the person arrested and escaping might turn out to be an innocent man. But before the conviction of the principal party, the officer thus neglecting his duty may be fined and imprisoned for a misdemeanour.

Breach of Prison.

5. Breach of prison by the offender himself, when committed for any cause, was felony at the common law; or even conspiring to break it. But this severity is mitigated by the statute *de frangentibus prisonam*, 1 Edw. II., which enacts that no person shall have judgment of life or member for breaking prison, unless committed for some capital offence. So that to break prison and escape, when lawfully committed for any treason or felony, remains still felony, as at the common law; and to break prison (whether it be the county gaol, the stocks or other usual place of security), when lawfully confined upon any other inferior charge, is still punishable as a high misdemeanour, by fine and imprisonment. For the statute which ordains that such offence shall be no longer capital never meant to exempt it entirely from every degree of punishment.

Rescue.

6. Rescue is the forcibly and knowingly freeing another from an arrest or imprisonment; and it is generally the same offence in the stranger so rescuing as it would have been in the gaoler to have *voluntarily* permitted an escape. A rescue, therefore, of one apprehended for felony is felony; for treason, treason; and for a misdemeanour, a misdemeanour also. But here likewise,

as upon voluntary escapes, the principal must first be attainted or receive judgment before the rescuer can be punished, and for the same reason; because, perhaps, in fact it may turn out that there has been no offence committed.

Returning from Transportation.

7. Another capital offence against public justice is the *returning from transportation*, or being seen at large in Great Britain before the expiration of the term for which the offender was ordered to be transported, or had agreed to transport himself.

Taking a Reward Under Pretence, etc.

8. An eighth is that of *taking a reward* under pretence of *helping* the owner to his *stolen goods*. To prevent which audacious practice, to the ruin and in defiance of public justice, it was enacted, by statute 4 Geo. I. c. 11, that whoever shall take a reward under the pretence of helping any one to stolen goods shall suffer as the felon who stole them, unless he causes such principal felon to be apprehended and brought to trial and also gives evidence against him.

Receiving of Stolen Goods.

9. Receiving of stolen goods, *knowing them to be stolen*, is also a high misdemeanour and affront to public justice. We have seen in a former chapter that this offence, which is only a misdemeanour at common law, by the statute 3 and 4 W. and M. c. 9, and 5 Anne c. 31, makes the offender accessory to the theft and felony. But because the accessory cannot in general be tried, unless with the principal or after the principal is convicted, the receivers by that means frequently eluded justice. To remedy which it is enacted, by statute 1 Anne, c. 9, and 5 Anne, c. 31, that such receivers may still be prosecuted for a misdemeanour, and punished by fine and imprisonment, though the principal felon be not before taken, so as to be prosecuted and convicted. And in case of receiving stolen lead, iron, and certain other metals, such offence is, by statute 29 Geo. II. c. 30, punishable by transportation for fourteen years. So that now the prosecutor has two methods in his choice: either to punish the receivers for the misdemeanour immediately, before the thief is taken, or to wait till the felon is convicted, and then punish them as accessories to the felony. But it is provided by the same statutes, that he shall only make use of one, and not both, of these methods of punishment. By the same statute, also, 29 Geo. II. c. 30, persons having lead, iron, and other metals in their custody, and not giving a satisfactory account how they came by the same, are guilty of a misdemeanour, and punishable by fine or imprison-

ment. And, by statute 10 Geo. III. c. 48, all knowing receivers of stolen plate or jewels, taken by robbery on the highway, or when a burglary accompanies the stealing, may be tried as well before as after the conviction of the principal, and whether he be in or out of custody, and, if convicted, shall be adjudged guilty of felony, and transported for fourteen years.

Theft Bote.

10. Of a nature somewhat similar to the two last is the offence of *theft bote*, which is where the party robbed not only knows the felon, but also takes his goods again, or other amends upon agreement not to prosecute. This is frequently called *compounding a felony*, and formerly was held to make a man an *accessory*; but it is now punished only with fine and imprisonment.

Common Barretry.

11. Common *barretry* is the offence of frequently exciting and stirring up suits and quarrels between his majesty's subjects, either at law or otherwise. The punishment for this offence in a common person is by fine and imprisonment; but if the offender (as is too frequently the case) belongs to the profession of the law, a *barretor* who is thus able as well as willing to do mischief ought also to be disabled from practicing for the future. And indeed it is enacted, by statute 12 Geo. I. c. 29, that if any one who hath been convicted of forgery, perjury, subornation of perjury, or common *barretry*, shall practice as an attorney, solicitor, or agent, in any suit, the court upon complaint shall examine it in a summary way, and, if proved, shall direct the offender to be transported for seven years. Hereunto may also be referred another offence of equal malignity and audaciousness, that of suing another in the name of a fictitious plaintiff; either one not in being at all, or one who is ignorant of the suit. This offence, if committed in any of the king's superior courts is left, as a high contempt, to be punished at their discretion. But in courts of a lower degree, where the crime is equally pernicious, but the authority of the judges not equally extensive, it is directed by statute 8 Eliz. c. 2, to be punished by six months' imprisonment, and treble damages to the party injured.

Maintenance.

12. *Maintenance* is an offence that bears a near relation to the former, being an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party, with money or otherwise to prosecute or defend it; a practice that was greatly encouraged by the first introduction of uses. This is an offence against public justice, as it keeps alive strife and conten-

tion, and perverts the remedial process of the law into an engine of oppression. And therefore by the Roman law, it was a species of the *crimen falsi* to enter into any confederacy, or do any act, to support another's law-suit, by money, witnesses or patronage. A man may, however, maintain the suit of his near kinsman, servant, or poor neighbor, out of charity and compassion, with impunity. Otherwise, the punishment by common law is fine and imprisonment, and by the statute 32 Hen. VIII. c. 9, a forfeiture of ten pounds.

Champerty.

13. Champerty is a species of maintenance and punished in the same manner; being a bargain with a plaintiff or defendant, *campum partire*, to divide the land or other matter sued for between them, if they prevail at law: whereupon the champertor is to carry on the party's suit at his own expense. Thus, *champart*, in the French law, signifies a similar division of profits, being a part of the crop annually due to the landlord by bargain or custom. In our sense of the word it signifies the purchasing of a suit or right of suing: a practice so much abhorred by our law, that it is one main reason why a *chose* in action, or thing of which one hath the right but not the possession, is not assignable at common law; because no man should purchase any pretence to sue in another's right. Hitherto also must be referred the provision of the statute 32 Hen. VIII. c. 9, that no one shall sell or purchase any pretended right or title to land, unless the vendor hath received the profits thereof for one whole year before such grant, or hath been in actual possession of the land, or of the reversion or remainder, on pain that both purchaser and vendor shall each forfeit the value of such land to the king and the prosecutor. These offences relate chiefly to the commencement of *civil* suits.

Compounding for Informations.

14. but the *compounding of informations* upon penal statutes is an offence of an equivalent nature in *criminal* causes, and is, besides, an additional misdemeanour against public justice, by contributing to make the laws odious to the people. At once, therefore, to discourage malicious informers, and to provide that offences, when once discovered, shall be duly prosecuted, it is enacted, by statute 18 Eliz. c. 5, that if any person, informing under pretence of any penal law, makes any composition without leave of the court, or takes any money or promise from the defendant to excuse him (which demonstrates his intent in commencing the prosecution to be merely to serve his own ends, and not for the public good), he shall forfeit 10*l.*, shall stand two hours on the pillory, and shall be forever disabled to sue on any popular or penal statute.

Conspiracy.

15. A conspiracy also to indict an innocent man of felony falsely and maliciously who is accordingly indicted and acquitted, is a further abuse and perversion of public justice, for which the party injured may either have a civil action by writ of conspiracy (of which we spoke in the preceding book), or the conspirators, for there must be at least two to form a conspiracy, may be indicted at the suit of the king, and were by the ancient common law to receive what is called the *villenous* judgment, viz., to lose their *liberam legem*, whereby they are discredited and disabled as jurors or witnesses; to forfeit their goods and chattels, and lands for life; to have those lands wasted, their houses razed, their trees rooted up, and their own bodies committed to prison. But it now is the better opinion, that the villenous judgment is by long disuse become obsolete, it not having been pronounced for some ages; but instead thereof, the delinquents are usually sentenced to imprisonment, fine, and pillory. To this head may be referred the offence of sending letters threatening to accuse any person of a crime punishable with death, transportation, pillory, or other infamous punishment, with a view to extort from him any money or other valuable chattels. This is punishable, by statute 30 Geo. II. c. 24, at the discretion of the court, with fine, imprisonment, pillory, whipping, or transportation for seven years.

Perjury.

16. The next offence against public justice is when the suit is past its commencement, and come to trial. And that is, the crime of wilful and corrupt *perjury*: which is defined by Sir Edward Coke to be a crime committed when a *lawful* oath is administered, in some *judicial* proceeding, to a person who swears *wilfully*, *absolutely*, and *falsely* in a matter *material* to the issue or point in question. The law takes no notice of any perjury but such as is committed in some court of justice having power to administer an oath; or before some magistrate or proper officer invested with a similar authority, in some proceedings relative to a civil suit or a criminal prosecution: for it esteems all other oaths unnecessary, at least, and therefore will not punish the breach of them. For which reason it is much to be questioned, how far any magistrate is justifiable in taking a voluntary *affidavit in any extrajudicial matter*, as is now too frequent upon every petty occasion; since it is more than possible that by such idle oaths a man may frequently *in foro conscientiae* incur the guilt, and at the same time evade the temporal penalties of perjury. The perjury must also be corrupt (that is, committed *malo animo*), wilful, positive, and absolute; not upon surprise, or the like; it also must be in

some point material to the question in dispute; for if it only be in some trifling collateral circumstance, to which no regard is paid, it is no more penal than in the voluntary extrajudicial oaths before mentioned.

Subornation of Perjury.

Subornation of perjury is the offence of procuring another to take such a false oath as constitutes perjury in the principal. The punishment of perjury and subornation at common law has been various. It was anciently death: afterwards banishment or cutting out the tongue: then forfeiture of goods: and now it is fine and imprisonment, and never more to be capable of bearing testimony. But the statute 5 Eliz. c. 9 (if the offender be prosecuted thereon), inflicts the penalty of perpetual infamy, and a fine of 40*l.* on the suborner; and, in default of payment, imprisonment for six months, and to stand with both ears nailed to the pillory. Perjury itself is thereby punished with six months' imprisonment, perpetual infamy, and a fine of 20*l.*, or to have both ears nailed to the pillory. But the prosecution is usually carried on for the offence at common law; especially as to the penalties before inflicted, the statute 2 Geo. II. c. 25, superadds a power for the court to order the offender to be sent to the house of correction for a term not exceeding seven years, or to be transported for the same period, and makes it felony without benefit of clergy to return or escape within the time.

Bribery.

17. Bribery is the next species of offence against public justice; which is when a judge, or other person concerned in the administration of justice, takes any undue reward to influence his behaviour in his office. In England this offence of taking bribes is punished in inferior offices with fine and imprisonment; and in those who offer a bribe, though not taken, the same. But in judges, especially the superior ones, it has been always looked upon as so heinous an offence that the chief justice Thorpe was hanged for it in the reign of Edward III. By a statute 11 Hen. IV., all judges and officers of the king, convicted of bribery, shall forfeit treble the bribe, be punished at the king's will, and be discharged from the king's service forever.

Embracery.

18. Embracery is an attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like. The punishment for the person embracing is by fine and imprisonment; and for the juror so embraced, if it be by taking money, the punishment is (by divers statutes of the reign of Edward III.) perpetual infamy, imprisonment for a year, and forfeiture of the tenfold value.

False Verdict.

19. The *false verdict* of jurors, whether occasioned by embezzlement or not, was anciently considered as criminal, and therefore exemplarily punished by attain, in the manner formerly mentioned.

Negligence of Public Officers.

20. Another offence of the same species is the *negligence of public officers* intrusted with the administration of justice, as sheriffs, coroners, constables, and the like, which makes the offender liable to be fined; and in very notorious cases will amount to a forfeiture of his office, if it be a beneficial one. Also, the omitting to apprehend persons offering stolen iron, lead and other metals to sale is a misdemeanour, and punishable by a stated fine, or imprisonment, in pursuance of the statute 29 Geo. II. c. 30.

Oppression of Magistrates.

21. There is yet another offence against public justice which is a crime of deep malignity; and so much the deeper, as there are many opportunities of putting it in practice, and the power and wealth of the offenders may often deter the injured from a legal prosecution. This is the *oppression* and tyrannical partiality of judges, justices and other *magistrates*, in the administration and under the colour of their office. However, when prosecuted, either by impeachment in parliament, or by information in the court of king's bench (according to the rank of the offenders), it is sure to be severely punished with forfeiture of their offices (either consequential or immediate), fines, imprisonment, or other discretionary censure, regulated by the nature and aggravations of the offence committed.

Extortion.

22. Lastly, *extortion* is an abuse of public justice, which consists in any officer's unlawfully taking, by colour of his office, from any man any money or thing of value that is not due to him, or more than is due, or before it is due. The punishment is fine and imprisonment, and sometimes forfeiture of the office.

Chapter XI.**OF OFFENCES AGAINST PUBLIC PEACE.**

142-154.

We are next to consider offences against the public *peace*. These offences are either such as are an actual breach of the peace; or constructively so, by tending to make others break it. Both of these species are also either felonious, or not felonious. The felonious breaches of the peace are strained up to that degree of malignity by virtue of several modern statutes; and particularly:

Riotous Assembling and Unlawful Hunting.

1. The *riotous assembling* of *twelve* persons or more, and not dispersing upon proclamation.

2. By statute 1 Hen. VII. c. 7, *unlawful hunting* in any legal forest, park, or warren, not being the king's property, *by night*, or with *painted faces*, was declared to be single felony.

3. Also, by the statute, 9 Geo. I. c. 22, amended by statute 27 Geo. II. c. 15, knowingly to send any *letter* without a name, or with a fictitious name, *demanding* money, venison, or any other valuable thing, or *threatening* (without any demand) to kill any of the king's subjects, or to fire their houses, out-houses, barns, or ricks, is made felony without benefit of clergy. This offence was formerly high treason, by the statute 8 Hen. V. c. 6.

Destroying Locks, etc.

4. To pull down or destroy any *lock*, *sluice* or *floodgate*, erected by authority of parliament on a navigable river, is, by statute 1 Geo. II. st. 2, c. 19, made felony, punishable with transportation for seven years.

Affrays.

5. Affrays (from *affraier*, to terrify) are the fighting of two or more persons in some public place, to the terror of his majesty's subjects; for if the fighting be in private it is no *affray*, but an assault. Affrays may be suppressed by any private person present, who is justifiable in endeavouring to part the combatants, whatever consequence may ensue. But more especially the constable or other similar officer, however denominated, is bound to keep the peace, and to that purpose may break open doors to suppress an affray or apprehend the affrayers, and may either carry them before a justice or imprison them by his own authority for a convenient space, till the heat is over, and may then perhaps also make them find sureties for the peace. The punishment of common affrays is by fine and imprisonment, the measure of which must be regulated by the circumstances of the case. *Two* persons may be guilty of an affray: but,—

Riots.

6. *Riots*, *routs*, and *unlawful assemblies* must have *three* persons at least to constitute them. An *unlawful assembly* is when three or more do assemble themselves together to do an unlawful act, as to pull down enclosures, to destroy a warren, or the game therein, and part without doing it or making any motion towards it. A *rout* is where three or more meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences upon a right claimed of common or of way, and make some advances towards it. A *riot* is where three or more actually do an unlawful act of

violence, either with or without a common cause or quarrel; as, if they beat a man or hunt and kill game in another's park, chase, warren, or liberty, or do any other unlawful act with force and violence, or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner. The punishment of unlawful assemblies, if to the number of twelve, may be capital, according to the circumstances that attend it; but from the number of three to eleven is by fine and imprisonment only. The same is the case in riots and routs by the common law; to which the pillory, in very enormous cases, has been sometimes superadded.

Tumultuous Petitioning.

7. Nearly related to this head of riots is the offence of *tumultuous petitioning*, which was carried to an enormous height in the times preceding the grand rebellion.

Forcible Entry or Detainer.

8. An eighth offence against the public peace is that of a *forcible entry* or *detainer*, which is committed by violently taking or keeping possession of lands and tenements with menaces, force, and arms, and without the authority of law. This was formerly allowable to every person disseised, or turned out of possession, unless his entry was taken away or barred by his own neglect, or other circumstances, which were explained more at large in a former book. But this being found very prejudicial to the public peace, it was thought necessary by several statutes to restrain all persons from the use of such violent methods, even of doing themselves justice, and much more if they have no justice in their claim. So that the entry now allowed by law is a peaceable one; that forbidden is such as is carried on and maintained with force, with violence and unusual weapons.

Going Armed.

9. The offence of *riding* or *going armed* with dangerous or unusual weapons is a crime against the public peace, by terrifying the good people of the land, and is particularly prohibited by the statute of Northampton, 2 Edw. III. c. 3, upon pain of forfeiture of the arms and imprisonment during the king's pleasure.

Spreading False News.

10. *Spreading false news*, to make discord between the king and nobility, or concerning any great man of the realm, is punishable by common law with fine and imprisonment, which is confirmed by statutes.

False Prophecies.

11. *False and pretended prophecies*, with intent to disturb the peace, are equally unlawful, and more penal, as they raise enthusiastic jealousies in the people and terrify them with imaginary fears.

Challenges.

12. Besides actual breaches of the peace, anything that tends to provoke or excite others to break it is an offence of the same denomination. Therefore, *challenges to fight*, either by word or letter, or to be the bearer of such challenge, are punishable by fine and imprisonment, according to the circumstances of the offence.

Libels.

13. Of a nature very similar to challenges are *libels, libelli famosi*, which taken in their largest and most extensive sense, signify any writings, pictures, or the like, of an immoral or illegal tendency; but, in the sense under which we are now to consider them, are malicious defamations of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath or expose him to public hatred, contempt, and ridicule. The direct tendency of these libels is the breach of the public peace by stirring up the objects of them to revenge, and perhaps to bloodshed. The communication of a libel to any one person is a publication in the eye of the law; and therefore the sending of an abusive letter to a man is as much a libel as if it were openly printed, for it equally tends to a breach of the peace. For the same reason, it is immaterial, with respect to the essence of a libel, whether the matter of it be true or false, since the provocation, and not the falsity, is the thing to be punished criminally; though, doubtless, the falsehood of it may aggravate its guilt and enhance its punishment. In a civil action, we may remember, a libel must appear to be false as well as scandalous; for, if the charge be true, the plaintiff has received no private injury, and has no ground to demand a compensation for himself, whatever offence it may be against the public peace; and, therefore, upon a civil action, the truth of the accusation may be pleaded in bar of the suit. But, in criminal prosecution, the tendency which all libels have to create animosities and to disturb the public peace is the whole that the law considers. And, therefore, in such prosecutions the only points to be inquired into are, first, the making or publishing of the book or writing, and secondly, whether the matter be criminal; and if both these points are against the defendant, the offence against the public is complete. The punishment of such libellers, for either making, repeating, printing, or publishing the libel, is fine and such corporal punishment as the court in its discretion shall inflict, regarding the quantity of the offence and the quality of the offender.

Liberty of the Press.

In this and the other instances which we have lately considered, where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law, some

with a greater, others with a less degree of severity, the *liberty of the press*, properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publication, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment.

Chapter XII.

OF OFFENCES AGAINST PUBLIC TRADE.

154-161.

Offences against public *trade*, like those of the preceding classes, are either felonious or not felonious. Of the first sort are,—

Owling and Smuggling.

1. Owling; so called from its being usually carried on in the night, which is the offence of transporting wool or sheep out of this kingdom, to the detriment of its staple manufacture. This was forbidden at common law and more particularly by statute.

2. Smuggling, or the offence of importing goods without paying the duties imposed thereon by the laws of the customs and excise, is an offence generally connected and carried on hand in hand with the former. This is restrained by a great variety of statutes, which inflict pecuniary penalties and seizure of the goods for clandestine smuggling, and affix the guilt of felony, with transportation for seven years, upon more open, daring, and avowed practices.

Bankruptcy and Usury.

3. Another offence against public trade is fraudulent *bankruptcy*, which was sufficiently spoken of in a former volume.

4. Usury; which is an unlawful contract, upon the loan of money, to receive the same again with exorbitant increase.

Cheating.

5. Cheating is another offence more immediately against public trade; as that cannot be carried on without a punctilious regard to common honesty and faith between man and man. Hither therefore may be referred that prodigious multitude of statutes which are made to restrain and punish deceits in particular trades, and which are enumerated by Hawkins and Burn, but are chiefly of use among the traders themselves. The offence also of *breaking the assize* of bread, or the rules laid down by the law, and particularly by the statutes 31 Geo. II. c. 29, 3 Geo. III. c. 11, and 13 Geo. III. c. 62, for ascertaining its price in every given quantity, is reducible to this head of cheating: as is likewise, in a peculiar manner, the offence of selling by *false weights and measures*; the standard of which fell under our consideration in a former volume. Lastly, any deceitful practice, in cozening another by artful means, whether in matters of trade or otherwise, as by playing with false dice, or the like, is punishable with fine, imprisonment, and pillory. And, by the statutes 33 Hen. VIII. c. 1, and 30 Geo. II. c. 24, if any man defrauds another of any valuable chattels by colour of any false token, counterfeit letter, or false pretense, or pawns or disposes of another's goods without the consent of the owner, he shall suffer such punishment, by imprisonment, fine, pillory, transportation, whipping, or other corporal pain, as the court shall direct.

Forestalling the Market.

6. The offence of *forestalling* the market is also an offence against public trade. This, which (as well as the two following) is also an offence at common law, was described by statute 5 and 6 Edward VI. c. 14 to be the buying or contracting for any merchandise or victual coming in the way to market; or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price when there: any of which practices make the market dearer to the fair trader.

Regrating and Engrossing.

7. *Regrating* was described by the same statute to be the buying of corn or other dead victual, in any market, and selling it again in the same market, or within four miles of the place. For this also enhances the price of the provisions, as every successive seller must have a successive profit.

8. *Engrossing* was also described to be the getting into one's possession, or buying up, large quantities of corn or other dead victuals, with intent to sell them again. This must of course be

injurious to the public, by putting it in the power of one or two rich men to raise the price of provisions at their own discretion. And so the total engrossing of any other commodity, with an intent to sell it at an unreasonable price, is an offence indictable and finable at the common law.

Monopolies.

9. Monopolies are much the same offence in other branches of trade that engrossing is in provisions: being a license or privilege allowed by the king for the sole buying and selling, making, working, or using of anything whatsoever; whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before. These had been carried to an enormous height during the reign of Queen Elizabeth, and were heavily complained of by Sir Edward Coke, in the beginning of the reign of King James the First; but were in great measure remedied by statute 21 Jac. I. c. 3, which declares such monopolies to be contrary to law and void (except as to patents, not exceeding the grant of fourteen years, to the authors of new inventions; and except also patents concerning printing, saltpetre, gunpowder, great ordnance, and shot); and monopolists are punished with the forfeiture of treble damages and double costs to those whom they attempt to disturb; and, if they procure any action, brought against them for these damages, to be stayed by any extrajudicial order other than that of the court wherein it is brought, they incur the penalties of *praemunire*. Combinations also among victuallers or artificers to raise the price of provisions or any commodities, or the rate of labor, are in many cases severely punished by particular statutes.

Chapter XIII.

OF OFFENCES AGAINST THE PUBLIC HEALTH, AND THE PUBLIC POLICE OR ECONOMY.

161-176.

Quarantine. Selling Unwholesome Provisions.

The fourth species of offence more especially affecting the commonwealth are such as are against the public *health* of the nation; a concern of the highest importance, and for the preservation of which there are in many countries special magistrates or curators appointed.

The first offence mentioned relates to the location of persons infected with a plague, etc. The matter of quarantine and the laws with reference thereto are cited.

Offences Against Public Economy.

V. The last species of offences which especially affect the

commonwealth are those against the public *police* and *economy*. By the public police and economy I mean the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighborhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations. This head of offences must therefore be very miscellaneous, as it comprises all such crimes as especially affect public society, and are not comprehended under any of the four preceding species. These amount some of them to felony, and others to misdemeanours only. Among the former are,—

Clandestine Marriages.

1. The offence of *clandestine marriages*: 1. To solemnize marriage in any other place besides a church or public chapel wherein banns have been usually published, except by license from the archbishop of Canterbury; and 2. To solemnize marriage in such church or chapel without due proclamation of banns, or license obtained from a proper authority, do both of them not only render the marriage void, but subject the person solemnizing it to felony, punished by transportation for fourteen years; as, by three former statutes, he and his assistants were subject to a pecuniary forfeiture of 100*l*. 3. To make a false entry in a marriage-register; to alter it when made; to forge or counterfeit such entry, or a marriage license; to cause or procure, or act or assist in such forgery; to utter the same as true, knowing it to be counterfeit; or to destroy or procure the destruction of any register, in order to vacate any marriage or subject any person to the penalties of this act; all these offences knowingly and wilfully committed, subject the party to the guilt of felony without benefit of clergy.

Bigamy.

2. Another felonious offence with regard to this holy estate of matrimony is what some have corruptly called *bigamy*, which properly signifies being twice married, but is more justly denominated *polygamy*, or having a plurality of wives at once. Such second marriage, living the former husband or wife, is simply void, and a mere nullity, by the ecclesiastical law of England; and yet the legislature has thought it just to make it felony, by reason of its being so great a violation of the public economy and decency of a well ordered state. For polygamy can never be endured under any rational civil establishment, whatever specious reasons may be urged for it by the eastern nations, the fallaciousness of which has been fully proved by many sensible writers: but in northern countries the very nature of the climate seems to reclaim

against it. And with us in England it is enacted, by statute 1 Jac. I. c. 11, that if any person, being married, do afterwards marry again, the former husband or wife being alive, it is felony, but within the benefit of clergy. The first wife in this case shall not be admitted as a witness against her husband, because she is the true wife; but the second may, for she is indeed no wife at all; and so *vice versa* of a second husband. This act makes an exception to five cases in which such second marriage, though in the three first it is void, is yet no felony. 1. Where either party has been continually *abroad* for seven years, whether the party in England hath notice of the other's being living or no. 2. Where either of the parties hath been absent from the other seven years *within* this kingdom, and the remaining party hath no knowledge of the other's being alive within that time. 3. Where there is a divorce (or separation *a mensa et thoro*) by sentence in the ecclesiastical court. 4. Where the first marriage is declared absolutely void by any such sentence, and the parties loosed *a vinculo*. Or, 5. Where either of the parties was under the age of consent at the time of the first marriage; for in such case the first marriage was voidable by the disagreement of either party, which the second marriage very clearly amounts to. But if at the age of consent the parties had agreed to the marriage, which completes the contract, and is, indeed, the real marriage, and afterwards one of them should marry again, I should apprehend that such second marriage would be within the reason and penalties of the act.

The third and fourth offences mentioned are such as the wandering about the realm of idle soldiers and mariners, and as to Egyptians or gypsies.

Common Nuisances.

5. To descend next to offences whose punishment is short of death. *Common nuisances* are a species of offence against the public order and economical regimen of the state, being either the doing of a thing to the annoyance of all the king's subjects or the neglecting to do a thing which the common good requires. The nature of *common* nuisances and their distinction from *private* nuisances were explained in the preceding volume, when we considered more particularly the nature of the private sort, as a civil injury to individuals. I shall here only remind the student that common nuisances are such inconvenient or troublesome offences as annoy the whole community in general, and not merely some particular person, and therefore are indictable only, and not actionable, as it would be unreasonable to multiply suits by giving every man a separate right of action for what damnifies him in common only with the rest of his fellow subjects. Of this nature are, 1. Annoyances in *highways, bridges, and public rivers*, by rendering

the same inconvenient or dangerous to pass, either positively, by actual obstructions, or negatively, by want of reparations. For both of these, the person so obstructing, or such individuals as are bound to repair and cleanse them, or (in default of these last) the parish at large, may be indicted, distrained to repair and mend them, and in some cases fined. And a presentment thereof by a judge of assize, etc., or a justice of the peace, shall be in all respects equivalent to an indictment. Where there is a house erected or an inclosure made upon any part of the king's demesnes, or of a highway, or common street, or public water, or such like public things, it is properly called a *purpresture*. 2. All those kinds of nuisances (such as offensive trades and manufactures) which, when injurious to a private man, are actionable, are, when detrimental to the public, punishable by public prosecution, and subject to fine according to the quantity of the misdemeanour; and particularly the keeping of hogs in any city or market town is indictable as a public nuisance. All disorderly *inns*, or *ale-houses*, *bawdy houses*, *gaming houses*, *stage-plays* unlicensed, booths and stages for *rope-dancers*, *mountebanks*, and the like, are public nuisances, and may, upon indictment, be suppressed and fined. Inns in particular, being intended for the lodging and receipt of travellers, may be indicted, suppressed, and the inn-keepers fined, if they refuse to entertain a traveller without a very sufficient cause: for thus to frustrate the ends of their institution is held to be disorderly behaviour. 4. By statute 10 and 11 W. III. c. 17, all *lotteries* are declared to be public nuisances, and all grants, patents, or licenses for the same to be contrary to law. But, as state lotteries have for many years past, been found a ready mode for raising the supply, an act was made, 19 Geo. III. c. 21, to license and regulate the keepers of such lottery-offices. 5. The making and selling of *fireworks* and *squibs*, or throwing them about in any street, is, on account of the danger that may ensue to any thatched or timbered buildings, declared to be a common nuisance by statute 9 and 10 W. III. c. 7, and therefore is punishable by fine. And to this head we may refer (though not declared a common nuisance) the making, keeping, or carriage of too large a quantity of *gunpowder* at one time or in one place or vehicle, which is prohibited by statute 12 Geo. III. c. 61, under heavy penalties and forfeitures. 6. *Eaves-droppers*, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance, and presentable at the court-leet, or are indictable at the sessions, and punishable by fine and finding sureties for their good behaviour. 7. Lastly, a *common scold*, *communis rixatrix* (for our law-Latin confines it to the feminine gender), is a public nuisance to her neighborhood. For which of-

fence she may be indicted, and, if convicted, shall be sentenced to be placed in a certain engine of correction called the trebucket, castigatory, or a *cucking-stool*, which, in the Saxon language, is said to signify the scolding stool, though now it is frequently corrupted into *ducking-stool*, because the residue of the judgment is, that when she is so placed therein, she shall be plunged in the water for her punishment.

Idleness. Laws Against Luxury. Gaming.

6. Idleness in any person whatsoever is also a high offence against the public economy.

7. Under the head of public economy may also be properly ranked all sumptuary laws against *luxury*, and extravagant expenses in dress, diet, and the like; concerning the general utility of which to a state, there is much controversy among the political writers.

8. Next to that of luxury naturally follows the offence of *gaming*, which is generally introduced to supply or retrieve the expenses occasioned by the former.

Destroying Game.

Lastly, there is another offence, constituted by a variety of acts of parliament, which are so numerous and so confused, and the crime itself of so questionable a nature, that I shall not detain the reader with many observations thereupon. And yet it is an offence which the sportsmen of England seem to think of the highest importance, and a matter, perhaps the only one, of general and national concern, associations having been formed all over the kingdom to prevent its destructive progress. I mean the offence of destroying such beasts and fowls as are ranked under the denomination of *game*.

Chapter XIV. OF HOMICIDE. 176-205.

Homicide. Kinds.

Homicide, or the killing of any human creature, is of three kinds; *justifiable*, *excusable*, and *felonious*. The first has no share of guilt at all; the second very little; but the third is the highest crime against the law of nature that man is capable of committing.

I. Justifiable homicide is of divers kinds.

1. Such as is owing to some unavoidable *necessity*, without any will, intention, or desire, and without any inadvertence or negligence, in the party killing, and therefore without any shadow of blame. As, for instance, by virtue of such an office as obliges

one, in the execution of public justice, to put a malefactor to death who has forfeited his life by the laws and verdict of his country. This is an act of necessity, and even of civil duty, and therefore not only justifiable, but commendable, where the law requires it. But the law must *require* it, otherwise it is not justifiable: therefore, wantonly to kill the greatest of malefactors, a felon or a traitor, attainted or outlawed, deliberately, uncompelled and extra-judicially, is murder. And, further, if judgment of death be given by a judge not authorized by lawful commission, and execution is done accordingly, the judge is guilty of murder. Also, such judgment, when legal, must be executed by the proper officer or his appointed deputy; for no one else is *required* by law to do it, which requisition it is that justifies the homicide. If another person doth it of his own head, it is held to be murder, even though it be the judge himself. It must, further, be executed *servato juris ordine*; it must pursue the sentence of the court. If an officer beheads one who is adjudged to be hanged, or vice versa, it is murder, for he is merely ministerial, and therefore only justified when he acts under the authority and compulsion of the law; but if a sheriff changes one kind of death for another, he then acts by his own authority, which extends not to the commission of homicide, and, besides, this license might occasion a very gross abuse of his power. The king, indeed, may remit part of a sentence, as in the case of treason, all but the beheading: but this is no change, no introduction of a new punishment; and in the case of felony, where the judgment is *to be hanged*, the king (it hath been said) cannot legally order even a peer to be beheaded. But this doctrine will be more fully considered in a subsequent chapter.

Again: in some cases homicide is justifiable rather by the *permission* than by the absolute *command* of the law, either for the *advancement* of public justice, which without such indemnification would never be carried on with proper vigor; or in such instances where it is committed for the *prevention* of some atrocious *crime* which cannot otherwise be avoided.

Homicide for Public Justice.

2. Homicides committed for the *advancement* of public justice are:—1. Where an officer, in the execution of his office, either in a civil or criminal case, kills a person that assaults and resists him. 2. If an officer, or any private person, attempts to take a man charged with felony, and is resisted, and in the endeavor to take him kills him. 3. In case of a riot, or rebellious assembly, the officers endeavoring to disperse the mob are justifiable in killing them, both at common law, and by the riot act, 1 Geo. I. c. 5. 4. Where the prisoners in a gaol, or going to a gaol,

assault the gaoler or officer, and he in his defence kills any of them, it is justifiable for the sake of preventing an escape. 5. If trespassers in forests, parks, chases, or warrens will not surrender themselves to the keepers, they may be slain, by virtue of the statute 21 Edw. I. st. 2, *de malefactoribus in parcis*, and 3 and 4 W. and M. c. 10. But in all these cases there must be an apparent necessity on the officer's side, viz., that the party could not be arrested or apprehended, the riot could not be suppressed, the prisoners could not be kept in hold, the deerstealers could not but escape, unless such homicide were committed; otherwise, without such absolute necessity, it is not justifiable. 6. If the champions in a trial by battle killed either of them the other, such homicide was justifiable, and was imputed to the just judgment of God, who was thereby presumed to have decided in favor of the truth.

3. In the next place, such homicide as is committed for the *prevention* of any forcible and atrocious *crime* is justifiable by the law of nature; and also by the law of England, as it stood so early as the time of Bracton, and as it is since declared by statute 24 Hen. VIII. c. 5. If any person attempts a robbery or murder of another, or attempts to break open a house, *in the night time* (which extends also to an attempt to burn it), and shall be killed in such attempt, the slayer shall be acquitted and discharged. This reaches not to any crime unaccompanied with force, as picking of pockets, or the breaking open of any house *in the day time*, unless it carries with it an attempt of robbery also.

The English law likewise justifies a woman killing one who attempts to ravish her: and so too the husband or father may justify killing a man who attempts a rape upon his wife or daughter: but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other. And I make no doubt but the forcibly attempting a crime of a still more detestable nature may be equally resisted by the death of the unnatural aggressor. For the one uniform principle that runs through our own and all other laws seems to be this,—that where a crime in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting. But we must not carry this doctrine to the same visionary length that Mr. Locke does, who holds “that all manner of force without right upon a man's person puts him in a state of war with the aggressor; and, of consequence, that, being in such a state of war, he may lawfully kill him that puts him under this unnatural restraint.” However just this conclusion may be in a state of uncivilized nature, yet the law of England, like that of every other well-regulated community, is too tender of the public peace, too careful of the lives of the subjects, to adopt so contentious a system; nor will suffer with impunity any crime to be *prevented*

by death, unless the same, if committed, would also be *punished* by death.

In these instances of *justifiable* homicide, it may be observed that the slayer is in no kind of fault whatsoever, not even in the minutest degree; and is therefore to be totally acquitted and discharged, with commendation rather than blame. But that is not quite the case in *excusable* homicide, the very name whereof imports some fault, some error or omission; so trivial, however, that the law excuses it from the guilt of felony, though in strictness it judges it deserving of some little degree of punishment.

Excusable Homicide—Two Sorts.

II. Excusable homicide is of two sorts: either, *per infortunium*, by misadventure; or *se defendendo*, upon a principle of self-preservation. We will first see wherein these two species of homicide are distinct, and then wherein they agree.

Misadventure.

I. Homicide *per infortunium* or *misadventure* is where a man, doing a lawful act without any intention of hurt, unfortunately kills another: as where a man is at work with a hatchet, and the head thereof flies off and kills a stander-by; or where a person qualified to keep a gun is shooting at a mark and undesignedly kills a man: for the act is lawful, and the effect is merely accidental. So where a parent is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal; and happens to occasion his death, it is only misadventure; for the act of correction is lawful; but if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least, and in some cases (according to the circumstances) murder; for the act of immoderate correction is unlawful.

But to proceed: A tilt or tournament, the martial diversion of our ancestors, was, however, an unlawful act: and so are boxing and sword-playing, the succeeding amusement of their posterity; and therefore if a knight in the former case, or a gladiator in the latter, be killed, such killing is felony or manslaughter. But if the king command or permit such diversion, it is said to be only misadventure; for then the act is lawful. Likewise to whip another's horse whereby he runs over a child and kills him, it is held to be accidental in the rider, for he has done nothing unlawful: but manslaughter in the person who whipped him, for the act was a trespass, and at best a piece of idleness of inevitably dangerous consequence. And in general if death ensues in consequence of an idle, dangerous, and unlawful sport, as shooting or casting a stone in a town, or the barbarous diversion of cock-throwing, in these and similar cases the slayer is guilty of manslaughter, and not misadventure only, for these are unlawful acts.

Self-Defence.

2. Homicide in *self-defence* or *se defendendo*, upon a sudden affray, is also excusable, rather than justifiable, by the English law. This right of natural defence does not imply a right of attacking; for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot therefore legally exercise this right of preventive defence but in sudden and violent cases, when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore, to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible (or at least probable) means of escaping from his assailant.

It is frequently difficult to distinguish this species of homicide (upon *chance-medley* in self-defence) from that of manslaughter in the proper legal sense of the word. But the true criterion between them seems to be this: when both parties are actually combating at the time when the mortal stroke is given, the slayer is then guilty of manslaughter: but if the slayer has not begun to fight, or (having begun) endeavors to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence. For which reason the law requires that the person who kills another in his own defence should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant; and that not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. And though it may be cowardice, in time of war between two independent nations, to flee from an enemy, yet between two fellow-subjects the law countenances no such point of honor, because the king and his courts are the *vindices injuriarum*, and will give to the party wronged all the satisfaction he deserves. The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault will permit him, for it may be so fierce as not to allow him to yield a step without manifest danger of his life or enormous bodily harm, and then in his defence he may kill his assailant instantly. And this is the doctrine of universal justice as well as of the municipal law.

And as the *manner* of the defence, so is also the *time* to be considered; for, if the person assaulted does not fall upon the aggressor till the affray is over, or when he is running away, this is revenge, and not defence. Neither, under the colour of self-defence, will the law permit a man to screen himself from

the guilt of a deliberate murder: for if two persons, A and B, agree to fight a duel and A gives the first onset, and B retreats as far as he safely can and then kills A, this is murder, because of the previous malice and concerted design. But if A, upon a sudden quarrel, assaults B first, and upon B's returning the assault A really and *bona fide* flees, and, being driven to the wall, turns again upon B and kills him, this may be *se defendendo* according to some of our writers; though others have thought this opinion too favorable, inasmuch as the necessity to which he is at last reduced originally arose from his own fault. Under this excuse of self-defence the principal civil and natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the relation assisting being construed the same as the act of the party himself.

There is one species of homicide *se defendendo* where the party slain is equally innocent as he who occasions his death: and yet this homicide is also excusable, from the great universal principle of self-preservation which prompts every man to save his own life preferably to that of another, where one of them must inevitably perish. As among others, in that case mentioned by Lord Bacon, where two persons, being shipwrecked, and getting on the same plank, but finding it not able to save them both, one of them thrusts the other from it, whereby he is drowned. He who thus preserves his own life at the expense of another man's is excusable through unavoidable necessity and the principle of self-defence, since their both remaining on the same weak plank is a mutual though innocent attempt upon an endangering of each other's life.

Felonious Assault.

III. Felonious homicide is an act of a very different nature from the former, being the killing of a human creature, of any age or sex, without justification or excuse. This may be done either by killing one's self or another man.

The law of England wisely and religiously considers that no man hath a power to destroy life but by commission from God, the author of it: and, as the suicide is guilty of a double offence; one spiritual, in invading the prerogative of the Almighty and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has therefore ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on one's self. And this admits of accessories before the fact, as well as other felonies; for if one persuades another to kill himself, and he does so, the adviser is guilty of murder. A *felo*

de se, therefore, is he that deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death: as if, attempting to kill another, he runs upon his antagonist's sword; or shooting at another, the gun bursts and kills himself. The party must be of years of discretion and in his senses, else it is no crime. But this excuse ought not to be strained to that length to which our coroner's juries are apt to carry it, viz., that the very act of suicide is an evidence of insanity; as if every man who acts contrary to reason had no reason at all: for the same argument would prove every other criminal *non compos*, as well as the self-murderer. The law very rationally judges that every melancholy or hypochondriac fit does not deprive a man of the capacity of discerning right from wrong; which is necessary, as was observed in a former chapter, to form a legal excuse. And, therefore, if a real lunatic kills himself in a lucid interval, he is a *felo de se* as much as another man.

The other species of criminal homicide is that of killing another man. But in this there are also degrees of guilt which divide the offence into *manslaughter* and *murder*, the difference between which may be partly collected from what has been incidentally mentioned in the preceding articles, and principally consist in this,—that manslaughter, when voluntary, arises from the sudden heat of the passions, murder from the wickedness of the heart.

Manslaughter.

1. Manslaughter is therefore thus defined: the unlawful killing of another without malice, either express or implied: which may be either voluntary, upon a sudden heat, or involuntarily, but in the commission of some unlawful act. And hence it follows that in manslaughter there can be no accessories before the fact, because it must be done without premeditation.

Voluntary Manslaughter.

As to the first, or *voluntary* branch: if, upon a sudden quarrel, two persons fight, and one of them kills the other, this is manslaughter; and so it is if they, upon such an occasion, go out and fight in a field, for this is one continued act of passion, and the law pays that regard to human frailty as not to put a hasty and deliberate act upon the same footing with regard to guilt. So, also, if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, though this is not excusable *se defendendo*, since there is no absolute necessity for doing it to preserve himself, yet neither is it murder, for there is no previous malice, but it is manslaughter. But in this and in every other case of homicide upon provocation, if there be a suffi-

cient cooling-time for passion to subside and reason to interpose, and the person so provoked afterward kills the other, this is deliberate revenge and not heat of blood, and accordingly amounts to murder. So, if a man takes another in the act of adultery with his wife and kills him directly upon the spot, in England it is not absolutely ranked in the class of justifiable homicide, as in case of a forcible rape, but it is manslaughter. It is, however, the lowest degree of it; and therefore in such a case the court directed the burning in the hand to be gently inflicted, because there could not be a greater provocation. Manslaughter, therefore, on a sudden provocation, differs from excusable homicide *se defendendo* in this,—that in one case there is an apparent necessity for self-preservation to kill the aggressor, in the other no necessity at all, being only a sudden act of revenge.

Involuntary Manslaughter.

The second branch, or *involuntary* manslaughter, differs also from homicide excusable by misadventure in this,—that misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one. As, if two persons play at sword and buckler, unless by the king's command, and one of them kills the other, this is manslaughter, because the original act was unlawful, but it is not murder, for the one had no intent to do the other any personal mischief. So, where a person does an act lawful in itself, but in an unlawful manner, and without due caution and circumspection, as when a workman flings down a stone or piece of timber into the street and kills a man, this may be either misadventure, manslaughter, or murder, according to the circumstances under which the original act was done: if it were in a country village where few passengers are, and he calls out to all people to have a care, it is misadventure only; but if it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning; and murder if he knows of their passing and gives no warning at all, for then it is malice against all mankind. And in general, when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, or in its consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter.

Next, as to the *punishment* of this degree of homicide: the crime of manslaughter amounts to felony, but within the benefit of clergy; and the offender shall be burned in the hand and forfeit all his goods and chattels.

Murder.

2. We are next to consider the crime of deliberate and wilful *murder*.

Murder is now thus defined or rather described by Sir Edward Coke: "When a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied." The best way of examining the nature of this crime will be by considering the several branches of this definition.

First, it must be committed by a *person of sound memory and discretion*; for lunatics or infants, as was formerly observed, are incapable of committing any crime; unless in such cases where they show a consciousness of doing wrong, and of course a discretion or discernment between good and evil.

Next, it happens when a person of such sound discretion *unlawfully killeth*. The unlawfulness arises from the killing without warrant or excuse; and there must also be an actual killing to constitute murder; for a bare assault, with intent to kill, is only a great misdemeanour, though formerly it was held to be murder. The killing may be by poisoning, striking, starving, drowning, and a thousand other forms of death by which human nature may be overcome. And if a person be indicted for one species of killing, as by *poisoning*, he cannot be convicted by evidence of a totally different species of death, as by *shooting* with a pistol, or *starving*. But where they only differ in circumstance, as if a *wound* be alleged to be given with a sword, and it proves to have arisen from a staff, an axe, or a hatchet, this difference is immaterial. Of all species of deaths the most detestable is that of poisoning; because it can, of all others, be the least prevented either by manhood or forethought. And therefore, by the statute 22 Hen. VIII. c. 9, it was made treason, and a more grievous and lingering kind of death was inflicted on it than the common law allowed: namely, boiling to death; but this act did not live long, being repealed by 1 Edw. VI. c. 12. There was also, by the ancient common law, one species of killing held to be murder which may be dubious at this day; as there hath not been an instance wherein it has been held to be murder for many ages past: I mean by bearing false witness against another, with an express premeditated design to take away his life, so as the innocent person be condemned and executed. And there is no doubt but this is equally murder *in foro conscientiae* as killing with a sword; though the modern law (to avoid the danger of deterring witnesses from giving evidence upon capital prosecutions, if it must be at the peril of their own lives) has not yet punished it as such. If a man, however, does such an act of which the probable consequence may be, and eventually is, death, such killing may be mur-

der, although no stroke be struck by himself and no killing be primarily intended: as was the case of the unnatural son who exposed his sick father to the air, against his will, by reason whereof he died; of the harlot who laid her child under leaves in the orchard, where a kite struck it and killed it; and of the parish officers who shifted a child from parish to parish till it died for want of care and sustenance. So, too, if a man hath a beast that is used to do mischief, and he, knowing it, *suffers* it to go abroad, and it kills a man, even this is manslaughter in the owner: but if he had purposely *turned it loose*, though barely to frighten people and make what is called sport, it is with us (as in the Jewish law) as much murder as if he had incited a bear or a dog to worry them. If a physician or surgeon gives his patient a potion or plaster to cure him, which, contrary to expectation, kills him, this is neither murder nor manslaughter, but misadventure; and he shall not be punished criminally, however liable he might formerly have been to a civil action for neglect or ignorance: but it hath been holden that if it be not a *regular* physician or surgeon who administers the medicine or performs the operation, it is manslaughter at the least. Yet Sir Matthew Hale very justly questions the law of this determination. In order also to make the killing murder, it is requisite that the party die within a year and a day after the stroke received, or cause of death administered; in the computation of which the whole day upon which the hurt was done shall be reckoned the first.

Further, the person killed must be "*a reasonable creature in being, and under the king's peace,*" at the time of the killing. Therefore to kill an alien, a Jew, or an outlaw, who are all under the king's peace and protection, is as much murder as to kill the most regular-born Englishman: except he be an alien enemy in time of war. To kill a child in its mother's womb is now no murder, but a great misprision: but if the child be born alive and dieth by reason of the potion or bruises it received in the womb, it seems by the better opinion to be murder in such as administered or gave them. But as there is one case where it is difficult to prove the child's being born alive, namely, in the case of the murder of bastard children by the unnatural mother, it is enacted, by statute 21 Jac. I. c. 27, that if any woman be delivered of a child which if born alive should by law be a bastard, and endeavors privately to conceal its death by burying the child or the like, the mother so offending shall suffer death as in the case of murder, unless she can prove by one witness at least, that the child was actually born dead. But I apprehend it has of late years been usual with us in England, upon trials for this offence, to require some sort of presumptive evidence that the child was

born alive before the other constrained presumption (that the child whose death is concealed was therefore killed by his parent) is admitted to convict the prisoner.

Lastly, the killing must be committed *with malice aforethought*, to make the crime of murder. This is the grand criterion which now distinguishes murder from other killing; and this malice prepense, *malitia praecogitata*, is not so properly spite or malevolence to the deceased in particular, as any evil design in general; the dictate of a wicked, depraved and malignant heart; *un disposition a faire un male chose*; and it may be either *express* or *implied* in law. Express malice is when one, with a sedate deliberate mind and formed design, doth kill another: which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm. This takes in the case of deliberate duelling, where both parties meet avowedly with an intent to murder: thinking it their duty as gentlemen, and claiming it as their right, to wanton with their own lives and those of their fellow-creatures; without any warrant or authority from any power either divine or human, but in direct contradiction to the laws both of God and man: and therefore the law has justly fixed the crime and punishment of murder on them and on their seconds also. Also, if even upon a sudden provocation one beats another in a cruel and unusual manner so that he dies, though he did not intend his death, yet he is guilty of murder by express malice; that is, by an express evil design, the genuine sense of *malitia*. As when a park-keeper tied a boy, that was stealing wood, to a horse's tail, and dragged him along the park; when a master corrected his servant with an iron bar, and a schoolmaster stamped on his scholar's belly, so that each of the sufferers died, these were justly held to be murders, because, the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of slaughter. Neither shall he be guilty of a less crime who kills another in consequence of such a willful act as shows him to be an enemy to all mankind in general; as going deliberately, and with an intent to do mischief, upon a horse used to strike, or coolly discharging a gun among a multitude of people. So if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is universal malice. And if two or more come together to do an unlawful act against the king's peace, of which the probable consequence might be bloodshed, as to beat a man, to commit a riot, or to rob a park, and one of them kills a man; it is murder in them all, because of the unlawful act, *malitia praecogitata*, or evil intended beforehand.

Also in many cases where no malice is expressed the law will imply it, as, where a man wilfully poisons another; in such a deliberate act the law presumes malice, though no particular enmity can be proved. And if a man kills another suddenly, without any or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause. No affront by words or gestures only is a sufficient provocation so as to excuse or extenuate such acts of violence as manifestly endanger the life of another. But if the person so provoked had unfortunately killed the other by beating him in such a manner as showed only an intent to chastise and not to kill him, the law so far considers the provocation of contumelious behaviour as to adjudge it only manslaughter, and not murder. In like manner, if one kills an officer of justice, either civil or criminal, in the execution of his duty, or any of his assistants, endeavoring to conserve the peace, or any private person endeavoring to suppress an affray or apprehend a felon, knowing his authority or the intention with which he interposes, the law will imply malice, and the killer shall be guilty of murder. And if one intends to do another felony, and undesignedly kills a man, this is also murder. Thus, if one shoots at A and misses *him*, but kills B, this is murder, because of the previous felonious intent, which the law transfers from one to the other. The same is the case where one lays poison for A, and B, against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murder. So, also, if one gives a woman with child a medicine to procure abortion, and it operates so violently as to kill the woman; this is murder in the person who gave it. It were endless to go through all the cases of homicide which have been adjudged either expressly or impliedly malicious: these, therefore, may suffice as a specimen; and we may take it for a general rule that all homicide is malicious, and of course amounts to murder, unless where *justified* by the command or permission of the law, *excused* on the account of accident or self-preservation, or *alleviated* into manslaughter by being either the involuntary consequence of some act not strictly lawful, or (voluntary) occasioned by some sudden and sufficiently violent provocation. And all these circumstances of justification, excuse, or alleviation, it is incumbent on the prisoner to make out to the satisfaction of the court and jury; the latter of whom are to decide whether the circumstances alleged are proved to have actually existed, the former how far they extend to take away or mitigate the guilt. For all homicide is presumed to be malicious until the contrary appeareth upon evidence.

The punishment of murder and that of manslaughter was for-

merly one and the same, both having the benefit of clergy; so that none but unlearned persons, who least knew the guilt of it, were put to death for this enormous crime. But now, by several statutes, the benefit of clergy is taken away from murderers through malice prepense, their abettors, procurers, and counsellors.

Chapter XV.

OF OFFENCES AGAINST THE PERSONS OF INDIVIDUALS.

205-220.

Having in the preceding chapter considered the principal crime or public wrong that can be committed against a private subject, namely, by destroying his life, I proceed now to inquire into such other crimes and misdemeanours as more peculiarly affect the security of his person while living.

Of these some are felonious, and in their nature capital; others are simply misdemeanours, and punishable with a lighter animadversion. Of the felonies, the first is that of *mayhem*.

Mayhem.

I. *Mayhem*, *mayhemium*, was in part considered, in the preceding book, as a civil injury; but it is also looked upon in a criminal light by the law, being an atrocious breach of the king's peace, and an offence tending to deprive him of the aid and assistance of his subjects. For mayhem is properly defined to be, as we may remember, the violently depriving another of the use of such of his members as may render him the less able either in fighting to defend himself or to annoy his adversary. And, therefore, the cutting off or disabling or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts the loss of which in all animals abates their courage, are held to be mayhems. But the cutting off his ear or nose, or the like, are not held to be mayhems at common law, because they do not weaken, but only disfigure him.

The last statute, but by far the most severe and effectual of all, is that 22 and 23 Car. II. c. 1, called the Coventry act, being occasioned by an assault on Sir John Coventry in the street, and slitting his nose, in revenge (as was supposed) for some obnoxious words uttered by him in Parliament. By this statute it is enacted that if any person shall of malice aforethought and by lying in wait unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member, of any other person, *with intent to maim or disfigure him*, such person, his counsellors, aiders, and abettors, shall be guilty of felony without benefit of clergy.

Thus much for the felony of mayhem: to which may be added the offence of wilfully and maliciously shooting at any person in any dwelling house or other place; an offence of which the probable consequence may be either killing or maiming him.

Forcible Abduction.

II. The second offence, more immediately affecting the personal security of individuals, relates to the female part of his majesty's subjects; being that of their *forcible abduction* and *marriage*: which is vulgarly called *stealing an heiress*. For, by statute 3 Hen. VII. c. 2, it is enacted that if any person shall for lucre take any woman, being maid, widow, or wife, and having substance either in goods or lands, or being heir-apparent to her ancestors, contrary to her will, and afterwards she be married to such misdoer, or by his consent to another, or defiled; such person, his procurers and abettors, and such as knowingly receive such woman, shall be deemed principal felons.

Rape.

III. A third offence against the female part also of his majesty's subjects, but attended with greater aggravation than that of forcible marriage, is the crime of *rape*, *raptus mulierum*, or the carnal knowledge of a woman forcibly and against her will.

By statute Westm. 2, c. 34, and by statute 18 Eliz. c. 7, it is made felony without benefit of clergy; as is also the abominable wickedness of carnally knowing or abusing any woman child under the age of ten years: in which case the consent or non-consent is immaterial, as by reason of her tender years she is incapable of judgment and discretion.

A male infant under the age of fourteen years is presumed by law incapable to commit a rape, and therefore, it seems, cannot be found guilty of it.

The law of England holds it to be felony to force even a concubine or harlot; because the woman may have forsaken that unlawful course of life.

As to the material facts requisite to be given in evidence and proved upon an indictment of rape; first, the party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony.

Moreover if the rape be charged to be committed on an infant under twelve years of age, she may still be a competent witness if she hath sense and understanding to know the nature and obligation of an oath, or even to be sensible of the wickedness of telling a deliberate lie. Nay, though she hath not, it is thought by Sir Matthew Hale that she ought to be heard without oath, to give

the court information; and others have held that what the child told her mother or other relations may be given in evidence, since the nature of the case admits frequently of no better proof. But it is now settled [Brazier's case, before the twelve judges, P. 19, Geo. III.] that no hearsay evidence can be given of the declaration of a child who hath not capacity to be sworn, nor can such child be examined in court without oath; and that there is no determinate age at which the oath of the child ought either to be admitted or rejected. Yet, where the evidence of children is admitted, it is much to be wished, in order to render their evidence credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion. There may be, therefore, in many cases of this nature, witnesses who are competent, that is who may be admitted to be heard, and yet, after being heard, may prove not to be credible or such as the jury is bound to believe.

Crime Against Nature.

IV. What has been here observed, especially with regard to the manner of proof, which ought to be more clear in proportion as the crime is the more detestable, may be applied to another offence of a still deeper malignity,—the infamous *crime against nature*, committed either with man or beast.

This the voice of nature and of reason and the express law of God determined to be capital. And this offence was made felony without benefit of clergy by statute 25 Hen. VIII. c. 6, revived and confirmed by 5 Eliz. c. 17.

Inferior Offences.

These are all the felonious offences more immediately against the personal security of the subject. The inferior offences or misdemeanours that fall under this head are *assaults, batteries, wounding, false imprisonment, and kidnapping.*

Assaults, Batteries, Wounding.

V., VI., VII. With regard to the nature of the three first of these offences in general, I have nothing further to add to what has already been observed in the preceding book of these commentaries, when we consider them as private wrongs or civil injuries, for which a satisfaction or remedy is given to the party aggrieved. But taken in a public light, as a breach of the king's peace, an affront to his government, and a damage done to his subjects, they are also indictable and punishable with fines and imprisonment, or with other ignominious corporal penalties, where they are committed with any very atrocious design; as in case of an assault with intent to murder, or with an intent to commit either of the crimes last spoken of.

False Imprisonment.

VIII. The two remaining crimes and offences against the person of his majesty's subjects are infringements of their natural liberty; concerning the first of which, *false imprisonment*, its nature and incidents, I must content myself with referring the student to what was observed in the preceding volume, when we considered it as a mere civil injury. Inferior degrees of the same offence of false imprisonment are also punishable by indictment (like assaults and batteries), and the delinquent may be fined and imprisoned. And, indeed, there can be no doubt but that all kinds of crimes of public nature, all disturbances of the peace, all oppressions and other misdemeanours whatsoever, of a notoriously evil example, may be indicted at the suit of the king.

Kidnapping.

IX. The other remaining offence, that of *kidnapping*, being the forcible abduction or stealing away of a man, woman, or child from their own country and sending them into another, the common law of England has punished with fine, imprisonment and pillory.

Chapter XVI.
OF OFFENCES AGAINST THE HABITATIONS OF INDIVIDUALS.

220-229.

Arson.

The only two offences that more immediately affect *habitations* of individuals or private subjects are those of *arson* and *burglary*.

I. Arson, *ab ardendo*, is malicious and wilful burning the house or outhouse of another man.

1. Not only the bare dwelling-house, but all outhouses that are parcel thereof, though not contiguous thereto, nor under the same roof, as barns and stables, may be the subject of arson. And this by the common law, which also accounted it felony to burn a single barn in the field, if filled with hay or corn, though not parcel of the dwelling-house. The burning of a stack of corn was anciently likewise accounted arson. The offence of arson (strictly so called) may be committed by wilfully setting fire to one's own house, provided one's neighbor's house is thereby also burned; but if no mischief is done but to one's own, it does not amount to felony, though the fire was kindled with intent to burn another's. For, by the common law, no intention to commit a felony amounts to the same crime, though it does in some cases, by particular statutes. However, such wilfully firing one's own house *in a*

town is a high misdemeanour, and punishable by fine, imprisonment, pillory, and perpetual sureties for the good behaviour. And if a landlord or reversioner sets fire to his own house, of which another is in possession under a lease from himself or from those whose estate he hath, it shall be accounted arson; for during the lease the house is the property of the tenant.

2. As to what shall be said to be a *burning*, so as to amount to arson, a bare intent, or attempt to do it by actually setting fire to a house, unless it absolutely *burns*, does not fall within the description of *incendit et combussit*, which were words necessary in the days of law-Latin to all indictments of this sort. But the burning and consuming of any part is sufficient, though the fire be afterwards extinguished. Also it must be a *malicious* burning; otherwise it is only a trespass; and therefore no negligence or mischance amounts to it. For which reason, though an unqualified person, by shooting with a gun, happens to set fire to the thatch of a house, this Sir Matthew Hale determines not to be felony, contrary to opinions of former writers, but it was made a felony by the general acts of Edward VI. and Queen Mary: and now the punishment of all capital felonies is uniform, namely, by hanging.

Burglary.

II. Burglary, or nocturnal housebreaking, *burgi latrocinium*, has always been looked upon as a very heinous offence.

The definition of a burglar, as given by Sir Edward Coke, is "he that by night breaketh and entereth into a mansion-house with intent to commit a felony." In this definition there are four things to be considered: the *time*, the *place*, the *manner*, and the *intent*.

1. The *time* must be by night, and not by day, for in the day-time there is no burglary. As to what is reckoned night and what day, for this purpose, anciently the day was accounted to begin only at sunrising and to end immediately upon sunset; but the better opinion seems to be that if there be daylight or *crepusculum* enough, begun or left, to discern a man's face withal, it is no burglary. But this does not extend to moonlight, for then many midnight burglaries would go unpunished.

2. As to the *place*. It must be, according to Sir Edward Coke's definition, in a *mansion-house* and, therefore, to account for the reason why breaking open a church is burglary, as it undoubtedly is, he quaintly observes that it is *domus mansionalis Dei*. But it does not seem absolutely necessary that it should in all cases be a mansion-house, for it may also be committed by breaking the gates or walls of a *town* in the night. And therefore we may safely conclude that the requisite of its being *domus man-*

sionalis is only in the burglary of a private-house, which is the most frequent, and in which it is indispensably necessary, to form its guilt, that it must be in a mansion or dwelling-house. For no distant barn, warehouse, or the like, are under the same privileges, nor looked upon as a man's castle of defence; nor is a breaking open of houses wherein no man resides, and which therefore for the time being are not mansion-houses, attended with the same circumstances of midnight terror. A house, however, wherein a man sometimes resides, and which the owner hath only left for a short season, *animo revertendi*, is the object of burglary, though no one be in it at the time of the act committed. And if the barn, stable, or warehouse be parcel of the mansion-house, and within the same common fence, though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all its branches and appurtenances, if within the curtilage or homestall. A chamber in a college or an inn of court, where each inhabitant hath a distinct property, is to all other purposes as well as this, the mansion-house of the owner. So also is a room or lodging in any private house the mansion for the time being of the lodger, if the owner doth not himself dwell in the house, or if he and the lodger enter by different outward doors. But if the owner himself lies in the house, and has but one outward door, at which he and his lodgers enter, such lodgers seem only to be inmates, and all their apartments to be parcel of the one dwelling-house of the owner. But if I hire a shop, parcel of another man's house, and work or trade in it, but never lie there, it is no dwelling-house, nor can burglary be committed therein, for by the lease it is severed from the rest of the house, and therefore is not the dwelling-house of him who occupies the other part; neither can I be said to dwell therein when I never lie there. Neither can burglary be committed in a tent or booth erected in a market or fair, though the owner may lodge therein; for the law regards thus highly nothing but permanent edifices; a house or church, the wall or gate of a town; and though it may be the choice of the owner to lodge in so fragile a tenement, yet his lodging there no more makes it burglary to break it open than it would be to uncover a tilted wagon in the same circumstances.

3. As to the *manner* of committing burglary: there must be both a breaking and an entry to complete it. But they need not both be done at once; for if a hole be broken one night, and the same breakers enter the next night through the same, they are burglars. There must in general be an actual breaking; not a mere legal *clausum fregit* (by leaping over invisible ideal boundaries, which may constitute a civil trespass), but a substantial

and forcible irruption. As at least by breaking or taking out the glass of, or otherwise opening a window, picking a lock or opening it with a key; nay, by lifting up the latch of a door, or unloosing any other fastening which the owner has provided. But if a person leaves his doors or windows open, it is his own folly or negligence, and if a man enters therein it is no burglary; yet, if he afterwards unlocks an inner or chamber door, it is so. But to come down a chimney is held a burglarious entry; for that is as much closed as the nature of things will permit. So, also, to knock at a door, and upon opening it to rush in with a felonious intent; or, under pretence of taking lodgings, to fall upon the landlord and rob him; or to procure a constable to gain admittance, in order to search for traitors, and then to bind the constable and rob the house; all these entries have been adjudged burglarious, though there was no actual breaking; for the law will not suffer itself to be trifled with by such evasions, especially under the cloak of legal process. And so, if a servant opens and enters his master's chamber-door with a felonious design, or if any other person lodging in the same house or any public inn opens and enters another's door with such evil intent, it is burglary. Nay, if the servant conspires with a robber and lets him into the house by night, this is burglary in both; for the servant is doing an unlawful act, and the opportunity afforded him of doing it with greater ease rather aggravates than extenuates the guilt. As for the entry, any the least degree of it, with any part of the body, or with an instrument held in the hand, is sufficient; as, to step over the threshold, to put a hand or a hook in at a window to draw out goods, or a pistol to demand one's money, are all of them burglarious entries. The entry may be before the breaking, as well as after: for, by statute 12 Anne, c. 7, if a person enters into the dwelling-house of another without breaking in, either by day or by night, with intent to commit felony, or being in such a house shall commit any felony, and shall in the night break out of the same, this is declared to be burglary. It is universally agreed that there must be both a breaking either in fact or by implication, and also an entry, in order to complete the burglary.

4. As to the *intent*; it is clear that such breaking and entry must be with a felonious intent, otherwise it is only a trespass. And it is the same whether such intention be actually carried into execution, or only demonstrated by some attempt or overt act, of which the jury is to judge. And therefore such a breach and entry of a house as has been before described, by night, with intent to commit a robbery, a murder, a rape, or any other felony, is burglary; whether the thing be actually perpetrated or not. Nor does it make any difference whether the offence were felony at

common law, or only created so by statute; since that statute which makes an offence felony gives it incidentally all the properties of a felony at common law.

Thus much for the nature of burglary, which is a felony at common law, but within the benefit of clergy.

Chapter XVII.

OF OFFENCES AGAINST PRIVATE PROPERTY.

229-251.

The next and last species of offences against private subjects are such as more immediately affect their property. Of which there are two which are attended with a breach of the peace; *larceny* and *malicious mischief*; and one that is equally injurious to the rights of property, but attended with no act of violence, which is the crime of *forgery*. Of these three in their order.

Larceny.

I. Larceny, or *theft*, by contraction for latrociny, *latrocinium*, is distinguished by the law into two sorts: the one called *simple larceny*, or plain theft unaccompanied with any other atrocious circumstance; and *mixed* or *compound larceny*, which also includes in it the aggravation of a taking from one's house or person.

Simple Larceny.

And, first, of *simple larceny*, which, when it is the stealing of goods above the value of twelvepence, is called *grand larceny*; when of goods to that value, or under, is *petit larceny*.

Simple larceny is "the felonious taking and carrying away of the personal goods of another."

1. It must be a *taking*. This implies the consent of the owner to be wanting. Therefore no delivery of the goods from owner to the offender, upon trust, can ground a larceny. As if A lends B a horse, and he rides away with him; or if I send goods by a carrier, and he carries them away; these are no larcenies. But if the carrier opens a bale or pack of goods, or pierces a vessel of wine, and takes away part thereof, or if he carries it to the place appointed and afterwards takes away the whole, these are larcenies; for here the *animus furandi* is manifest; since in the first case he had otherwise no inducement to open the goods, and in the second the trust was determined, the delivery having taken its effect. But bare non-delivery shall not, of course, be intended to arise from a felonious design, since that may happen from a variety of other accidents. Neither by the common law was it larceny in any servant to run away with the goods committed to him to keep, but only a breach of civil trust. But, by statute 33 Hen. VI. c. I, the servants of persons deceased, accused of embez-

zling their master's goods, may, by writ out of chancery (issued by the advice of the chief justices and chief baron, or any two of them) and proclamation made thereupon, be summoned to appear personally in the court of king's bench to answer their master's executors in any civil suit for such goods, and shall, on default of appearance, be attainted of felony. And, by statute 21 Hen. VIII. c. 7, if any servant embezzles his master's goods to the value of forty shillings, it is made felony; except in apprentices, and servants under eighteen years old. But if he had not the possession, but only the care and oversight, of the goods, as the butler of the plate, the shepherd of the sheep, and the like, the embezzling of them is felony at common law. So if a guest robs his inn or tavern of a piece of plate, it is larceny; for he hath not the possession delivered to him, but merely the use; and so it is declared to be by statutes 3 and 4 W. and M. c. 9, if a lodger runs away with the goods from his ready-furnished lodgings. Under some circumstances also a man may be guilty of felony in taking his own goods; as if he steals them from a pawnbroker, or any one to whom he hath delivered and entrusted them, with intent to charge such bailee with the value: or if he robs his own messenger on the road, with intent to charge the hundred with the loss according to the statute of Winchester.

2. There must not only be a taking, but a *carrying away*. A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation or carrying away. As, if a man be leading another's horse out of a close, and be apprehended in the fact; or if a guest, stealing goods out of an inn, has removed them from his chamber down-stairs: these have been adjudged sufficient carrying away to constitute a larceny. Or if a thief intending to steal plate, takes it out of a chest in which it was and lays it down upon the floor, but is surprised before he can make his escape with it, this is larceny.

3. This taking and carrying away must also be *felonious*; that is, done *animo furandi*: or, as the civil law expresses it, *lucri causa*. This requisite, besides excusing those who labour under incapacities of mind or will (of whom we spoke sufficiently at the entrance of this book), indemnifies also mere trespassers and other petty offenders. As, if a servant takes his master's horse without his knowledge and brings him home again; if a neighbour takes another's plough that is left in the field and uses it upon his own land, and then returns it; if, under color of arrear of rent where none is due, I distrain another's cattle or seize them: all these are misdemeanours and trespasses, but no felonies.

4. This felonious taking and carrying away must be *of the personal goods of another*; for if they are things *real*, or savour

of the realty, larceny at the common law cannot be committed of them. Lands, tenements, and hereditaments (either corporeal or incorporeal) cannot in their nature be taken and carried away. And of things likewise that adhere to the freehold, as corn, grass, trees and the like, or lead upon a house, no larceny could be committed, by the rules of the common law, but the severance of them was, and in many things is still, merely a trespass, which depended on a subtlety in the legal notions of our ancestors. These things were parcel of the real estate, and therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immovable. And if they were severed by violence, so as to be changed into movables, and at the same time by one and the same continued act carried off by the person who severed them, they could never be said to be taken *from the proprietor* in this their newly acquired state of mobility (which is essential to the nature of larceny), being never, as such, in the actual or constructive possession of any one but of him who committed the trespass. He could not in strictness be said to have taken what at that time were the personal goods of another, since the very act of taking was what turned them into personal goods. But if the thief severs them at *one* time, whereby the trespass is completed, and they are converted into personal chattels in the constructive possession of him on whose soil they are left or laid, and come again at *another* time, when they are so turned into personalty, and takes them away, it is larceny: and so it is if the owner or any one else has severed them. Stealing ore out of mines is also no larceny, upon the same principle of adherence to the freehold. Upon nearly the same principle the stealing of writings relating to a real estate is no felony, but a trespass; because they concern the land, or (according to our technical language) *savour* of the *realty*, and are considered as part of it by the law, so that they descend to the heir, together with the lands which they concern.

Bonds, bills, and notes, which concern mere *choses in action*, were also at the common law held not to be such goods whereof larceny might be committed, being of no intrinsic value, and not importing any property in *possession* of the person from whom they are taken. Larceny also could not at common law be committed of treasure-trove or wreck till seized by the king or him who hath the franchise; for till such seizure no one hath a determinate property therein.

Larceny also cannot be committed of such animals in which there is no property either absolute or qualified; as of beasts that are *ferae naturae* and unreclaimed, such as deer, hares, and coney in a forest, chase, or warren; fish in an open river or pond; or wild fowls at their natural liberty. But if they are reclaimed or

confined and may serve for food, it is otherwise, even at common law; for of deer so enclosed in a park that they may be taken at pleasure, fish in a trunk, and pheasants or partridges in a mew, larceny may be committed. It is also said that if swans be lawfully marked it is felony to steal them, though at large in a public river; and that it is likewise felony to steal them, though unmarked, if in any private river or pond: otherwise it is only a trespass. But of all valuable domestic animals, as horses and other beasts of draught, and of all animals *domitæ naturæ*, which serve as food, as neat or other cattle, swine, poultry, and the like, and of their fruit or produce, taken from them while living, as milk or wool, larceny may be committed; and also of the flesh of such as are either *domitæ* or *feræ naturæ*, when killed. As to those animals which do not serve for food, and which therefore the law holds to have no intrinsic value, as dogs of all sorts, and other creatures kept for whim and pleasure, though a man may have a base property therein and maintain a civil action for the loss of them, yet they are not of such estimation as that the crime of stealing them amounts to larceny.

Notwithstanding, however, that no larceny can be committed unless there be some property in the thing taken, and an owner; yet, if the owner be unknown, provided there be a property, it is larceny to steal it, and an indictment will lie, for the goods of the person unknown. In like manner as among the Romans the *lex Hostilia de furtis* provided that a prosecution for theft might be carried on without the intervention of the owner. This is the case of stealing a shroud out of a grave; which is the property of those, whoever they were, that buried the deceased; but stealing the corpse itself, which has no owner (though a matter of great indecency) is no felony unless some of the grave-clothes be stolen with it.

Compound Larceny.

Mixed or *compound* larceny is such as has all the properties of the former, but is accompanied with either one or both of the aggravations of a taking from one's *house* or *person*. First, therefore, of larceny from the *house*, and then of larceny from the *person*.

From the House.

I. Larceny from the *house*, though it seems to have a higher degree of guilt than simple larceny, yet it is not at all distinguished from the other at common law, unless where it is accompanied with the circumstance of breaking the house by night, and then we have seen that it falls under another description, viz., that of burglary.

From the Person.

2. Larceny from the *person* is either by *privately* stealing or by open and violent assault, which is usually called *robbery*.

Robbery.

Open and violent larceny from the *person*, or *robbery*, the *rapina* of the civilians, is the felonious and forcible taking from the person of another of goods or money to any value by violence or putting him in fear. 1. There must be a taking, otherwise it is no robbery. A mere attempt to rob was indeed held to be felony so late as Henry the Fourth's time, but afterwards it was taken to be only a misdemeanour, and punishable with fine and imprisonment, till the statute 7 Geo. II. c. 21, which makes it a felony (transportable for seven years) unlawfully and maliciously to assault another with any offensive weapon or instrument, or by menaces or by other forcible or violent manner to demand any money or goods, with a felonious intent to rob. If the thief, having once taken a purse, returns it, still it is a robbery; and so it is whether the taking be strictly from the person of another, or in his presence only; as where a robber by menaces and violence puts a man in fear, and drives away his sheep, or his cattle before his face. But if the taking be not either directly from his person or in his presence, it is no robbery. 2. It is immaterial of what value the thing taken is: a penny as well as a pound thus forcibly extorted makes a robbery. 3. Lastly, the taking must be by force or a previous putting in fear, which makes the violation of the person more atrocious than privately stealing. This previous violence or putting in fear is the criterion that distinguishes robbery from other larcenies; for if one privately steals sixpence from the person of another, and afterwards keeps it by putting him in fear, this is no robbery, for the fear is subsequent; neither is it capital, as privately stealing, being under the value of tweldepence. Not that it is indeed necessary, though usual, to lay in the indictment that the robbery was committed by *putting in fear*: it is sufficient if laid to be done by *violence*. And when it is laid to be done by putting in fear, this does not imply any great degree of terror or affright in the party robbed: it is enough that so much force or threatening by word or gesture be used as might create an apprehension of danger, or induce a man to part with his property without or against his consent. Thus, if a man be knocked down without previous warning and stripped of his property while senseless, though strictly he cannot be said to be *put in fear*, yet this is undoubtedly a robbery. Or, if a person with a sword drawn begs an alms, and I give it him through mistrust and apprehension of violence, this is a felonious robbery. So if, under a pretence of sale, a man forcibly extorts money from another, neither shall this subterfuge avail him.

Malicious Mischief.

II. *Malicious mischief*, or damage, is the next species of injury to private property which the law considers as a public crime. This is such as is done, not *animo furandi*, or with an intent of gaining by another's loss, which is some, though a weak, excuse, but either out of a spirit of wanton cruelty or black and diabolical revenge. In which it bears a near relation to the crime of arson; for as that affects the habitation, so this does the other property, of individuals. And therefore any damage arising from this mischievous disposition, though only a trespass at common law, is now by a multitude of statutes made penal in the highest degree.

Forgery.

III. Forgery, or the *crimen falsi*, is an offence which was punished by the civil law with deportation or banishment, and sometimes with death. It may with us be defined at common law to be "the fraudulent making or alteration of a writing to the prejudice of another man's right," for which the offender may suffer fine, imprisonment, and pillory. And also, by a variety of statutes, a more severe punishment is inflicted on the offender in many particular cases, which are so multiplied of late as almost to become general.

Chapter XVIII.
OF THE MEANS OF PREVENTING OFFENCES.

251-257.

Preventive Justice.

Preventive justice consists in obliging those persons whom there is probable ground to suspect of future misbehaviour to stipulate with and to give full assurance to the public that such offence as is apprehended shall not happen, by finding pledges or securities for keeping the peace, or for their good behaviour.

The Security.

I. This security consists in being bound, with one or more sureties, in a recognizance or obligation to the king, entered on record, and taken in some court or by some judicial officer; whereby the parties acknowledging themselves to be indebted to the crown in the sum required (for instance, 100*l.*), with condition to be void and of none effect if the party shall appear in court on such a day, and in the mean time shall keep the peace, either generally towards the king and all his liege people, or particularly, also, with regard to the person who craves the security. Or, if it be for the good behaviour, then on condition that he shall demean

and behave himself well (or be of good behaviour), either generally or specially, for the time therein limited, as for one or more years, or for life.

2. Any justices of the peace, by virtue of their commission, or those who are *ex officio* conservators of the peace, as was mentioned in a former volume, may demand such security according to their own discretion; or it may be granted at the request of any subject, upon due cause shown, provided such demandant be under the king's protection.

3. A recognizance may be discharged either by the demise of the king, to whom the recognizance is made; or by the death of the principal party bound thereby, if not before forfeited; or by order of the court to which such recognizance is certified by the justices (as the quarter sessions, assizes, or king's bench), if they see sufficient cause: or in case he at whose request it was granted, if granted upon a private account, will release it, or does not make his appearance to pray that it may be continued.

I shall now consider them separately; and first, shall show for what cause such a recognizance, with sureties for the *peace*, is grantable; and then, how it may be forfeited.

1. Any justice of the peace may, *ex officio*, bind all those to keep the peace who in his presence make any affray, or threaten to kill or beat another, or contend together with hot and angry words, or go about with unusual weapons or attendance, to the terror of the people; and all such as he knows to be common barretors; and such as are brought before him by the constable for a breach of the peace in his presence; and all such persons as, having been before bound to the peace, have broken it and forfeited their recognizances. Also, wherever any private man hath just cause to fear that another will burn his house, or do him a corporal injury by killing, imprisoning, or beating him, or that he will procure others so to do, he may demand surety of the peace against such person: and every justice of the peace is bound to grant it, if he who demands it will make oath that he is actually under fear of death or bodily harm, and will show that he has just cause to be so by reason of the other's menaces, attempts, or having lain in wait for him, and will also further swear that he does not require such surety out of malice, or for mere vexation. This is called *swearing the peace* against another; and if the party does not find such sureties as the justice in his discretion shall require, he may immediately be committed till he does.

2. Such recognizance for keeping the peace, when given, may be forfeited by any actual violence, or even an assault or menace to the person of him who demanded it, if it be a special recognizance; or if the recognizance be general, by any unlawful

action, whatsoever, that either is or tends to a breach of the peace; or, more particularly, by any one of the many species of offence which were mentioned as crimes against the public peace in the eleventh chapter of this book; or by any private violence committed against any of his majesty's subjects. But a bare trespass upon the lands or goods of another, which is a ground for a civil action unless accompanied with a wilful breach of the peace, is no forfeiture of the recognizance.

1. First, then, the justices are empowered, by the statute 34 Edw. III. c. 1, to bind over to the good behaviour towards the king and his people all them *that be not of good fame*, wherever they be found; to the intent that the people be not troubled nor endamaged, nor the peace diminished, nor merchants and others, passing by the highways of the realm, be disturbed nor put in the peril which may happen by such offenders. Under the general words of this expression, *that be not of good fame*, it is holden that a man may be bound to his good behaviour for causes of scandal, *contra bonos mores*, as well as *contra pacem*; as, for haunting bawdy-houses with women of bad fame, or for keeping such women in his own house; or for words tending to scandalize the government, or in abuse of the officers of justice, especially in the execution of their office. Thus also a justice may bind over all night-walkers; eaves-droppers; such as keep suspicious company, or are reported to be pilferers or robbers; such as sleep in the day and wake in the night; common drunkards; whoremasters; the putative fathers of bastards; cheats; idle vagabonds; and other persons whose misbehaviour may reasonably bring them within the general words of the statute as persons not of good fame: an expression, it must be owned, of so great a latitude as to leave much to be determined by the discretion of the magistrate himself. But if he commits a man for want of sureties, he must express the cause thereof with convenient certainty, and take care that such cause be a good one.

2. A recognizance for the good behaviour may be forfeited by all the same means as one for the security of the peace may be; and also by some others. As by going armed with unusual attendance, to the terror of the people; by speaking words tending to sedition; or by committing any of those acts of misbehaviour which the recognizance was intended to prevent. But not by barely giving fresh cause of suspicion of that which perhaps may never actually happen: for though it is just to compel suspected persons to give security to the public against misbehaviour that is apprehended; yet it would be hard, upon such suspicion, without the proof of any actual crime, to punish them by a forfeiture of their recognizance.

Chapter XIX.

OF COURTS OF A CRIMINAL JURISDICTION.

258-280.

High Court of Parliament.

1. The high court of *parliament* is the supreme court in the kingdom, not only for the making, but also for the execution of laws, by the trial of great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment. As for acts of parliament to attain particular persons of treason or felony, or to inflict pains and penalties beyond or contrary to the common law, to serve a special purpose, I speak not of them, being to all intents and purposes new laws, made *pro re nata*, and by no means an execution of such as are already in being. But an impeachment before the lords by the commons of Great Britain, in parliament, is a prosecution of the already known and established law, and has been frequently put in practice; being a presentment to the most high and supreme court of criminal jurisdiction by the most solemn grand inquest of the whole kingdom. A commoner cannot, however, be impeached before the lords for any capital offence, but only for high misdemeanours. A peer may be impeached for any crime. The articles of impeachment are a kind of bills of indictment, found by the house of commons, and afterwards tried by the lords, who are, in case of misdemeanours, considered not only as their own peers, but as the peers of the whole nation.

Court of Lord High Steward.

2. The court of the *lord high steward* of Great Britain is a court instituted for the trial of peers indicted for treason or felony, or for misprision of either.

Court of King's Bench.

3. The court of *king's bench*, concerning the nature of which we partly inquired in the preceding book, was (we may remember) divided into a *crown* side and *plea* side. And on the crown side or crown office it takes cognizance of all criminal causes, from high treason down to the most trivial misdemeanour or breach of the peace. Into this court also indictments from all inferior courts may be removed by writ of *certiorari*, and tried either at bar or at nisi prius by a jury of the county out of which the indictment is brought. The judges of this court are the supreme coroners of the kingdom, and the court itself is the principal court of criminal jurisdiction (though the two former are of greater dignity) known to the laws of England.

Court of Chivalry.

4. The court of *chivalry*, of which we also formerly spoke as a military court or court of honour, when held before the earl marshal only, is also a criminal court when held before the lord high constable of England jointly with the earl marshal. And then it has jurisdiction over pleas of life and member, arising in matters of arms and deeds of war, as well out of the realm as within it.

Court of Admiralty.

5. The high court of *admiralty*, held before the lord high admiral of England or his deputy, styled the judge of the admiralty, is not only a court of civil but also of criminal jurisdiction. This court hath cognizance of all crimes and offences committed either upon the sea or on the coasts out of the body or extent of any English county, and, by statute 15 Ric. II. c. 3, of death and mayhem happening in great ships being and hovering in the main streams of great rivers, below the bridges of the same rivers, which are then a sort of ports or havens.

These five courts may be held in any part of the kingdom, and their jurisdiction extends over crimes that arise throughout the whole of it, from one end to the other. What follow are also of a general nature, and universally diffused over the nation, but yet are of a local jurisdiction, and confined to particular districts. Of which species are,—

Courts of Oyer and Terminer.

6, 7. The courts of *oyer* and *terminer* and the general *gaol* delivery, which are held before the king's commissioners, among whom are usually two judges of the courts at Westminster, twice in every year in every county of the kingdom except the four northern ones, where they are held only once, and London and Middlesex, wherein they are held eight times.

Court of Quarter Sessions.

8. The court of general *quarter sessions* of the peace is a court that must be held in every county once in every quarter of a year. It is held before two or more justices of the peace, one of which must be of the *quorum*. The jurisdiction of this court, by statute 34 Edw. III. c. 1, extends to the trying and determining all felonies and trespasses whatsoever, though they seldom if ever try any greater offence than small felonies within the benefit of clergy.

Sheriff's Tourn.

9. The *sheriff's tourn*, or rotation, is a court of record held twice every year, within a month after Easter and Michaelmas, before the sheriff, in different parts of the county; being indeed

only the turn of the sheriff to keep a court-leet in each respective hundred: this therefore is the great court-leet of the county, as the county-court is the court-baron; for out of this, for the ease of the sheriff, was it taken.

Court-Leet.

10. The *court-leet*, or *view of frankpledge*, which is a court of record, held once in the year, and not oftener, within a particular hundred, lordship, or manor, before the steward of the leet: being the king's court, granted by charter to the lords of those hundreds or manors.

Court of Coroner.

11. The court of the *coroner* is also a court of record, to inquire when any one dies in prison, or comes to a violent or sudden death, by what manner he came to his end. And this he is only entitled to do *super visum corporis*.

Court of Clerk of the Market.

12. The court of the *clerk of the market* is incident to every fair and market in the kingdom, to punish misdemeanours therein, as a court of *pie poudre* is to determine all disputes relating to private or civil property.

Chapter XX.

OF SUMMARY CONVICTIONS.

280-289.

Summary Proceedings.

By a *summary* proceeding I mean principally such as is directed by several acts of parliament (for the common law is a stranger to it, unless in the case of contempts) for the conviction of offenders and the infliction of certain penalties created by those acts of parliament. In these there is no intervention of a jury, but the party accused is acquitted or condemned by the suffrage of such person only as the statute has appointed for his judge.

I. Of this summary nature are all trials of offences and, frauds contrary to the laws of the *excise* and other branches of the *revenue*, which are to be inquired into and determined by the commissioners of the respective departments, or by justices of the peace in the country.

II. Another branch of summary proceedings is that before *justices of the peace*, in order to inflict divers petty pecuniary mulcts, and corporal penalties, denounced by act of parliament for many disorderly offences, such as common swearing, drunkenness, vagrancy, idleness, and a vast variety of others, for which I must refer the student to the justice-books formerly cited, and which used to be formerly punished by a verdict of a jury in the court-leet.

The process of these summary convictions, it must be owned, is extremely speedy. Though the courts of common law have thrown in one check upon them by making it necessary to *summon* the party accused before he is condemned. After this summons the magistrate, in summary proceedings, may go on to examine one or more witnesses, as the statute may require, upon oath, and then make his conviction of the offender in writing: upon which he usually issues his warrant either to apprehend the offender, in case corporal punishment is to be inflicted on him; or else to levy the penalty incurred by distress and sale of his goods.

III. To this head of summary proceedings may also be properly referred the method, immemorially used by the superior courts of justice, of punishing contempts by *attachment*, and the subsequent proceedings thereon.

The contempts that are thus punished are either *direct*, which openly insult or resist the powers of the courts or the persons of the judges who preside there, or else are *consequential*, which (without such gross insolence or direct opposition) plainly tend to create a universal disregard of their authority. The principal instances of either sort that have been usually punishable by attachment are chiefly of the following kinds: 1. Those committed by inferior judges and magistrates, by acting unjustly, oppressively, or irregularly in administering those portions of justice which are entrusted to their distribution, or by disobeying the king's writs issuing out of the superior courts by proceeding in a cause after it is put a stop to or removed by writ of prohibition, *certiorari*, error, *supersedeas*, and the like; for, as the king's superior courts (and especially the court of king's bench) have a general superintendence over all inferior jurisdictions, any corrupt or iniquitous practices of subordinate judges are contempts of that superintending authority whose duty it is to keep them within the bounds of justice. 2. Those committed by sheriffs, bailiffs, gaolers, and other officers of the court, by abusing the process of the law or deceiving the parties; by any acts of oppression, extortion, collusive behaviour, or culpable neglect of duty. 3. Those committed by attorneys and solicitors, who are also officers of the respective courts, by gross instances of fraud and corruption, injustice to their clients, or other dishonest practice; for the malpractice of the officers reflects some dishonour on their employers, and if frequent or unpunished, creates among the people a disgust against the courts themselves. 4. Those committed by jurymen in collateral matters relating to the discharge of their office, such as making default when summoned, refusing to be sworn or to give any verdict, eating or drinking without the leave of the court, and especially at the cost of either party, and other misbehaviour

or irregularities of a similar kind; but not in mere exercise of their judicial capacities, as by giving a false or erroneous verdict.

5. Those committed by witnesses, by making default when summoned, refusing to be sworn or examined, or prevaricating in their evidence when sworn.

6. Those committed by parties to any suit or proceeding before the court, as by disobedience to any rule or order made in the progress of a cause, by non-payment of costs awarded by the court upon a motion, or by non-observance of awards duly made by arbitrators or umpires after having entered into a rule for submitting to such determination. Indeed, the attachment for most of this species of contempts, and especially for non-payment of costs and non-performance of awards, is to be looked upon rather as a civil execution for the benefit of the injured party, though carried on in the shape of a criminal process for a contempt of the authority of the court. And therefore it has been held that such contempts, and the process thereon, being properly the civil remedy of individuals for a private injury, are not released or affected by a general act of pardon.

7. Those committed by any other persons under the degree of a peer, and even by peers themselves, when enormous and accompanied with violence, such as forcible *rescous* and the like, or when they import disobedience to the king's great prerogative writs of prohibition, *habeas corpus*, and the rest. Some of these contempts may arise in the face of the court, as by rude and contumelious behaviour; by obstinacy, perverseness, or prevarication; by breach of the peace, or any wilful disturbance whatever; others in the absence of the party, as by disobeying or treating with disrespect the king's writ, or the rules or process of the court, by perverting such writ or process to the purposes of private malice, extortion, or injustice; by speaking or writing contemptuously of the court or judges, acting in their judicial capacity; by printing false accounts (or even true ones without proper permission) of causes then depending in judgment; and by anything, in short, that demonstrates a gross want of that regard and respect which once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people.

If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination. But in matters that arise at a distance, and of which the court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, if the judges upon *affidavit* see sufficient ground to suspect that a contempt has been committed, they either make a rule on the suspected party to show cause why an attachment should not issue against him, or, in very

flagrant instances of contempt, the attachment issues in the first instance; as it also does if no sufficient cause be shown to discharge; and thereupon the court confirms and makes absolute the original rule. This process of attachment is merely intended to bring the party into court; and, when there, he must either stand committed, or put in bail, in order to answer upon oath to such *interrogatories* as shall be administered to him for the better information of the court with respect to the circumstances of the contempt. These interrogatories are in the nature of a charge or accusation, and must by the course of the court be exhibited within the first four days: and if any of the interrogatories are improper, the defendant may refuse to answer it, and move the court to have it struck out. If the party can clear himself upon oath he is discharged, but, if perjured, may be prosecuted for the perjury. If he confesses the contempt, the court will proceed to correct him by fine or imprisonment, or both, and sometimes by a corporal or infamous punishment. If the contempt be of such nature that, when the fact is once acknowledged, the court can receive no further information by interrogatories than it is already possessed of (as in the case of a *rescous*), the defendant may be admitted to make such simple acknowledgment, and receive his judgment without answering to any interrogatories; but if he wilfully and obstinately refuses to answer, or answers in an evasive manner, he is then clearly guilty of a high and repeated contempt, to be punished at the discretion of the court.

Chapter XXI.

OF ARRESTS.

289-296.

Order of Proceedings.

We are now to consider the regular and ordinary method of proceeding in the courts of criminal jurisdiction; which may be distributed under twelve general heads, following each other in progressive order, viz., 1. Arrest; 2. Commitment, and bail; 3. Prosecution; 4. Process; 5. Arraignment, and its incidents; 6. Plea, and issue; 7. Trial, and conviction; 8. Clergy; 9. Judgment, and its consequences; 10. Reversal of judgment; 11. Reprieve, or pardon; 12. Execution; all of which will be discussed in the subsequent part of this book.

Arrest. Warrant.

An arrest is the apprehending or restraining of one's person, in order to be forthcoming to answer an alleged or suspected crime. To this arrest all persons whatsoever are, without distinction, equally liable in all criminal cases; but no man is to be ar-

rested unless charged with such a crime as will at least justify holding him to bail when taken. And in general, an arrest may be made in four ways: 1. By warrant; 2. By an officer without warrant; 3. By a private person also without warrant; 4. By a hue and cry.

1. A warrant may be granted in extraordinary cases by the privy council, or secretaries of state; but ordinarily by justices of the peace. This they may do in any cases where they have a jurisdiction over the offence, in order to compel the person accused to appear before them. And this extends undoubtedly to all treasons, felonies, and breaches of the peace; and also to all such offences as they have power to punish by statute. 1. That a justice of the peace hath power to issue a warrant to apprehend a person *accused* of felony, though not yet *indicted*; and 2. That he may also issue a warrant to apprehend a person *suspected* of felony, though the original suspicion be not in himself, but in the party that prays his warrant; because he is a competent judge of the probability offered to him of such suspicion. But in both cases it is fitting to examine upon oath the party requiring a warrant, as well to ascertain that there is a felony or other crime actually committed, without which no warrant should be granted; as also to *prove* the cause and probability of suspecting the party against whom the warrant is prayed. This warrant ought to be under the hand and seal of the justice, should set forth the time and place of making, and the cause for which it is made, and should be directed to the constable or other peace-officer (or, it may be, to any private person by name), requiring him to bring the party, either generally before any justice of the peace for the county, or only before the justice who granted it; the warrant in the latter case being called a *special* warrant. A *general* warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its uncertainty; for it is the duty of the magistrate, and ought not to be left to the officer to judge of the ground of suspicion. And a warrant to apprehend all persons guilty of a crime therein specified is no legal warrant; for the point upon which its authority rests is a fact to be decided upon a subsequent trial, namely, whether the person apprehended thereupon be really guilty or not. It is therefore, in fact, *no* warrant at all, for it will not justify the officer who acts under it; whereas a warrant properly penned (even though the magistrate who issues it should exceed his jurisdiction), will, by statute 24 Geo. II. c. 44, at all events indemnify the officer who executes the same ministerially. And when a warrant is received by the officer he is bound to execute it so far as the jurisdiction of the magistrate and himself extends. A warrant from the chief or other justice

of the court of king's bench extends all over the kingdom, and is *tested or dated England*; not *Oxfordshire, Berks*, or other particular county. But a warrant of the justice of the peace in one county, as *Yorkshire*, must be backed, that is signed, by a justice of the peace in another, as *Middlesex*, before it can be executed there. Formerly, regularly speaking, there ought to have been a fresh warrant in every fresh county; but the practice of backing warrants had long prevailed without law, and was at last authorized by statutes 23 Geo. II. c. 26, and 24 Geo. II. c. 55.

Arrest Without Warrant.

2. Arrests by *officers without warrant* may be executed,—1. By a justice of the peace, who may himself apprehend, or cause to be apprehended, by word only, any person committing a felony or breach of the peace in his presence. 2. The sheriff, and 3. The coroner, may apprehend any felon within the county without warrant. 4. The constable, of whose office we formerly spoke, hath great original and inherent authority with regard to arrests. He may, without warrant, arrest any one for breach of the peace committed in his view, and carry him before a justice of the peace. And in case of felony *actually* committed, or dangerous wounding, whereby felony is likely to ensue, he may upon probable suspicion arrest the felon, and for that purpose is authorized (as upon a justice's warrant) to break open doors, and even to kill the felon, if he cannot otherwise be taken; and if he or his assistants be killed in attempting such arrests, it is murder in all concerned. 5. Watchmen, either those appointed by the statute of Winchester, 13 Edw. I. c. 4, to keep watch and ward in all towns from sunsetting to sunrising, or such as are mere assistants to the constable, may *virtute officii* arrest all offenders, and particularly nightwalkers, and commit them to custody till the morning.

3. Any private person (and *a fortiori* a peace-officer) that is present when any felony is committed, is bound by the law to arrest the felon, on pain of fine and imprisonment if he escapes through the negligence of the standers-by. And they may justify breaking open the doors upon following such felon; and if *they kill him*, provided he cannot be otherwise taken, it is justifiable; though if *they are killed* in endeavoring to make such arrest, it is murder. Upon probable suspicion, also, a private person may arrest the felon or other person so suspected, but he cannot justify breaking open doors to do it; and if either party kill the other in the attempt, it is manslaughter and no more. It is no more because there is no malicious design to kill; but it amounts to so much, because it would be of most pernicious consequence if, under pretence of suspected felony any private person might break open a house or kill another, and also because such arrest upon

suspicion is barely *permitted* by the law, and not *enjoined*, as in the case of those who are present when a felony is committed.

Hue and Cry.

4. Upon *hue* and *cry* raised upon a felony committed. It is the old common law process of pursuing with horn and with voice all felons and such as have dangerously wounded another.

Chapter XXII.

OF COMMITMENT AND BAIL.

296-301.

When a delinquent is arrested by any of the means mentioned in the preceding chapter, he ought regularly to be carried before a justice of the peace; and how he is there to be treated, I shall next show, under the second head, of *commitment* and *bail*.

Examination. Bail.

The justice before whom such prisoner is brought is bound immediately to *examine* the circumstances of the crime alleged; and to this end, by statute 2 and 3 Ph. and M. c. 10, he is to take in writing the examination of such prisoner and the information of those who bring him: and if upon this inquiry it manifestly appears that either no such crime was committed or that the suspicion entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge him. Otherwise he must either be committed to prison or give bail; that is, put in securities for his appearance to answer the charge against him. This commitment, therefore, being only for safe custody, wherever bail will answer the same intention, it ought to be taken, as in most of the inferior crimes; but in felonies and other offences of a capital nature no bail can be a security equivalent to the actual custody of the person. What the nature of bail is hath been shown in the preceding book, viz., a delivery or bailment of a person to his sureties, upon their giving (together with himself) sufficient security for his appearance; he being supposed to continue in their friendly custody, instead of going to gaol. In civil cases we have seen that every defendant isailable; but in criminal matters it is otherwise. Let us therefore inquire in what cases the party accused ought or ought not to be admitted to bail.

And, first, to refuse or delay to bail any personailable is an offence against the liberty of the subject in any magistrate by the common law, as well as by the statute Westm. 1, 3 Edw. I. c. 15, and the *habeas corpus* act, 31 Car. II. c. 2. And, lest the intention of the law should be frustrated by the justice requiring bail to a greater amount than the nature of the case demands, it is expressly declared, by statute 1 W. and M. st. 2, c. 1, that excessive

bail ought not to be required; though what bail should be called excessive must be left to the courts, on considering the circumstances of the case, to determine. And, on the other hand, if the magistrate takes insufficient bail he is liable to be fined if the criminal doth not appear. Bail may be taken either in court, or in some particular cases by the sheriff, coroner, or other magistrate, but most usually by the justices of the peace. Regularly, in all offences, either against the common law or act of parliament, that are below felony, the offender ought to be admitted to bail, unless it be prohibited by some special act of parliament.

Let us next see who may *not* be admitted to bail, or what offences are *not* bailable. And here I shall not consider any one of those cases in which bail is ousted by statute from prisoners *convicted* of particular offences; for then such imprisonment without bail is part of their sentence and punishment. But where the imprisonment is only for safe custody *before* the conviction, and not for punishment *afterwards*, in such cases bail is ousted or taken away wherever the offence is of a very enormous nature; for then the public is entitled to demand nothing less than the highest security that can be given, viz., the body of the accused, in order to insure that justice shall be done upon him if guilty. Such persons therefore, as the author of the Mirror observes, have no other sureties but the four walls of the prison. By the ancient common law, before and since the conquest, all felonies were bailable, till murder was excepted by statute; so that persons might be admitted to bail before conviction almost in every case. But the statute Westm. 1, 3 Edw. I. c. 15, takes away the power of bailing in treason and in divers instances of felony. The statutes 23 Hen. VI. c. 9, and 1 and 2 P. and M. c. 13, give further regulations in this matter; and upon the whole we may collect that no justice of the peace can bail: 1. Upon an accusation of treason; nor, 2. Of murder; nor, 3. In case of manslaughter, if the prisoner be clearly the slayer, and not barely suspected to be so; or if any indictment be found against him; nor, 4. Such as, being committed for felony, have broken prison; because it not only carries a presumption of guilt, but is also superadding one felony to another; 5. Persons outlawed; 6. Such as have abjured the realm; 7. Approvers, of whom we shall speak in a subsequent chapter, and persons by them accused; 8. Persons taken with the mainour, or in the fact of felony; 9. Persons charged with arson; 10. Excommunicated persons, taken by writ *de excommunicato capiendo*: all of which are clearly not admissible to bail by the justices. Others are of a dubious nature, as, 11. Thieves openly defamed and known; 12. Persons charged with other felonies, or manifest and enormous offences, not being of good fame; and 13. Acces-

sories to felony, that labour under the same want of reputation. These seem to be in the discretion of the justices, whether bailable or not. The last class are such as *must* be bailed upon offering sufficient surety; as, 14. Persons of good fame charged with a bare suspicion of manslaughter or other inferior homicide; 15. Such persons being charged with petit larceny or any felony not before specified; or, 16. With being accessory to any felony. Lastly, it is agreed that the court of king's bench (or any judge thereof in time of vacation) may bail for any crime whatsoever, be it treason, murder, or any other offence, according to the circumstances of the case. And herein the wisdom of the law is very manifest. To allow bail to be taken commonly for such enormous crimes would greatly tend to elude the public justice; and yet there are cases (though they rarely happen) in which it would be hard and unjust to confine a man in prison, though accused even of the greatest offence. The law has therefore provided one court, and only one, which has a discretionary power of bailing in any case: except only, even to this high jurisdiction, and of course to all inferior ones, such persons as are committed by either house of parliament, so long as the session lasts; or such as are committed for contempts by any of the king's superior courts of justice.

Mittimus.

Upon the whole, if the offence be not bailable, or the party cannot find bail, he is to be committed to the county gaol by the *mittimus* of the justice, or warrant under his hand and seal, containing the cause of his commitment; there to abide till delivered by due course of law. But this imprisonment, as has been said, is only for safe custody, and not for punishment: therefore in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters, nor subjected to other hardships than such as are absolutely requisite for the purpose of confinement only; though what are so requisite must too often be left to the discretion of the gaolers, who are frequently a merciless race of men, and, by being conversant in scenes of misery, steeled against any tender sensation. Yet the law (as formerly held) would not justify them in fettering a prisoner unless where he was unruly or had attempted to escape.

Chapter XXIII.

OF THE SEVERAL MODES OF PROSECUTION.

301-318.

The next step towards the punishment of offenders is their prosecution, or the manner of their formal accusation. And this

is either upon a previous finding of the fact by an inquest or grand jury; or without such previous finding. The former way is either by *presentment* or *indictment*.

Presentment.

I. A presentment, *generally* taken, is a very comprehensive term, including not only presentments properly so called, but also inquisitions of office and indictments by a grand jury. A presentment, *properly* speaking, is the notice taken by a grand jury of any offence from their own knowledge or observation, without any bill of indictment laid before them at the suit of the king: as the presentment of a nuisance, a libel, and the like; upon which the officer or the court must afterwards frame an indictment before the party presented can be put to answer it. An inquisition of office is the act of a jury summoned by the proper officer to inquire of matters relating to the crown upon evidence laid before them.

Indictment—Grand Jury.

II. An *indictment* is a written accusation of one or more persons of a crime or misdemeanour preferred to, and presented upon oath by, a grand jury. To this end the sheriff of every county is bound to return to every session of the peace, and every commission of *oyer* and *terminer*, and of general gaol-delivery, twenty-four good and lawful men of the county, some out of every hundred, to inquire, present, do, and execute all those things which on the part of our lord the king shall then and there be commanded them. They ought to be freeholders, but to what amount is uncertain. As many as appear upon this panel are sworn upon the grand jury to the amount of twelve at the least, and not more than twenty-three; that twelve may be a majority. This grand jury are previously instructed in the articles of their inquiry by a charge from the judge who presides upon the bench. They then withdraw, to sit and receive indictments, which are preferred to them in the name of the king, but at the suit of any private prosecutor; and they are only to hear evidence on behalf of the prosecution: for the finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire upon their oaths whether there be sufficient cause to call upon the party to answer it. A grand jury, however, ought to be thoroughly persuaded of the truth of an indictment so far as their evidence goes, and not to rest satisfied merely with remote probabilities; a doctrine that might be applied to very oppressive purposes.

The grand jury are sworn to inquire only for the body of the county, *pro corpore comitatus*; and therefore they cannot regularly inquire of a fact done out of that county for which they are sworn,

unless particularly enabled by an act of parliament. And to so high a nicety was this matter anciently carried, that where a man was wounded in one county and died in another, the offender was at common law indictable in neither, because no complete act of felony was done in any one of them; but, by statute 2 and 3 Edw. VI. c. 24, he is now indictable in the county where the party died. And, by statute 2 Geo. II. c. 21, if the stroke or poisoning be in England, and the death upon the sea or out of England, or *vice versa*, the offenders and their accessories may be indicted in the county where either the death, poisoning, or stroke shall happen. And so in some other cases, as particularly, where treason is committed out of the realm, it may be inquired of in any county within the realm, as the king shall direct, in pursuance of statutes 26 Hen. VIII. c. 13, 33 Hen. VIII. c. 23, 35 Hen. VIII. c. 2, and 5 and 6 Edw. VI. c. 11. But, in general, all offences must be inquired into as well as tried in the county where the fact is committed. Yet, if larceny be committed in one county and the goods carried into another, the offender may be indicted in either, for the offence is complete in both, or he may be indicted in England for larceny in Scotland and carrying the goods with him into England, or *vice versa*; or for receiving in one part of the united kingdom goods that have been stolen in another. But for robbery, burglary, and the like, he can only be indicted where the fact was actually committed; for though the carrying away and keeping of the goods is a continuation of the original taking, and is therefore larceny in the second county, yet it is not a robbery or burglary in that jurisdiction.

Finding.

When the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to endorse on the back of the bill "*ignoramus*," or, we know nothing of it; intimating that, though the facts might possibly be true, that truth did not appear to them; but now they assert in English more absolutely "not a true bill," or (which is the better way) "not found," and then the party is discharged without further answer. But a fresh bill may afterwards be preferred to a subsequent grand jury. If they are satisfied of the truth of the accusation, they then endorse upon it "a true bill," anciently "*bila vera*." The indictment is then said to be found, and the party stands indicted. But to find a bill there must at least twelve of the jury agree. But if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree; and the indictment, when so found, is publicly delivered into court.

Indictments must have a precise and sufficient certainty. By statute 1 Hen. V. c. 5, all indictments must set forth the Christian

name, surname, and addition of the state and degree, mystery, town or place, and the county of the offender; and all this to identify his *person*. The *time* and *place* are also to be ascertained by naming the day and township in which the fact was committed; though a mistake in these points is in general not held to be material, provided the *time* be laid previous to the finding of the indictment, and the *place* to be within the jurisdiction of the court, unless where the place is laid, not merely as a *venue*, but as part of the description of the fact. But sometimes the *time* may be very material, where there is any limitation in point of time assigned for the prosecution of offenders, as by the statute 7 Will. III. c. 3, which enacts that no prosecution shall be had for any of the treasons or misprisions therein mentioned (except an assassination designed or attempted on the person of the king), unless the bill of indictment be found within three years after the offence committed; and in case of murder, the time of the death must be laid within a year and a day after the mortal stroke was given. The offence itself must also be set forth with clearness and certainty; and in some crimes particular words of art must be used, which are so appropriated by the law to express the precise idea which it entertains of the offence, that no other words, however synonymous they may seem, are capable of doing it. Thus, in treason the facts must be laid to be done "treasonably and against his allegiance," anciently "*proditorie et contra ligeantiae suae debitum*," else the indictment is void. In indictments for murder it is necessary to say that the party indicted "murdered," not "killed," or "slew," the other; which, till the late statute, was expressed in Latin by the word "*murdravit*." In all indictments for felonies the adverb "feloniously," "*felonice*," must be used; and for burglaries, also, "*burglariter*," or, in English, "burglariously:" and all these to ascertain the intent. In rapes the word "*rapuit*" or "ravished" is necessary, and must not be expressed by any periphrasis, in order to render the crime certain. So in larcenies, also, the words "*felonice cepit et asportavit*, feloniously took and carried away," are necessary to every indictment, for these only can express the very offence. Also, indictments for murder, the length and depth of the wound should in general be expressed, in order that it may appear to the court to have been of a mortal nature; but if it goes through the body, then its dimensions are immaterial, for that is apparently sufficient to have been the cause of the death. Also, where a limb or the like is absolutely cut off, there such description is impossible. Lastly, in indictments the *value* of the thing which is the subject or instrument of the offence must sometimes be expressed. In indictments for larcenies this is necessary, that it may appear whether it be

grand or petit larceny, and whether entitled or not to the benefit of clergy; in homicide of all sorts it is necessary, as the weapon with which it is committed is forfeited to the king as a deodand.

The only species of proceeding at the suit of the king, without a previous indictment or presentment by a grand jury, now seems to be that of *information*.

Informations.

III. Informations are of two sorts: first, those which are partly at the suit of the king, and partly at that of a subject; and secondly, such as are only in the name of the king. The former are usually brought upon penal statutes, which inflict a penalty upon conviction of the offender, one part to the use of the king, and another to the use of the informer, and are a sort of *qui tam* actions (the nature of which was explained in a former book), only carried on by a criminal instead of a civil process.

The informations that are exhibited in the name of the king alone are also of two kinds: first, those which are truly and properly his own suits, and filed *ex officio* by his own immediate officer, the attorney general; secondly, those in which, though the king is the nominal prosecutor, yet it is at the relation of some private person or common informer; and they are filed by the king's coroner and attorney in the court of king's bench, usually called the master of the crown-office, who is for this purpose the standing officer of the public. The objects of the king's own prosecutions, filed *ex officio* by his own attorney-general, are properly such enormous misdemeanours as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offences so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal; which power, thus necessary not only to the ease and safety but even to the very existence of the executive magistrate, was originally reserved in the great plan of the English constitution, wherein provision is wisely made for the due preservation of all its parts. The objects of the other species of informations, filed by the master of the crown-office upon the complaint or relation of a private subject, are any gross and notorious misdemeanours, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the government (for those are left to the care of the attorney-general), but which, on account of their magnitude or pernicious example, deserve the most public animadversion. And when an information is filed, either thus, or by the attorney-general *ex officio*, it must be tried by a petit jury of the county where the offence arises; after which,

if the defendant be found guilty, the court must be resorted to for his punishment.

But these informations (of every kind) are confined by the constitutional law to mere misdemeanors only; for, whenever any capital offence is charged, the same law requires that the accusation be warranted by the oath of twelve men before the party shall be put to answer it.

There is one species of informations still further regulated by statute 9 Anne, c. 20, viz., those in the nature of a writ of *quo warranto*; which was shown, in the preceding book, to be a remedy given to the crown against such as had usurped or intruded into any office or franchise. The modern information tends to the same purpose as the ancient writ, being generally made use of to try the civil rights of such franchises; though it is commenced in the same manner as other informations are, by leave of the court or at the will of the attorney-general, being properly a criminal prosecution, in order to fine the defendant for his usurpation as well as to oust him from his office, yet usually considered at present as merely a civil proceeding.

Chapter XXIV.

OF PROCESS UPON AN INDICTMENT.

318-322.

When Offender Has Fled.

We are next, in the fourth place, to inquire into the manner of issuing *process*, after indictment found, to bring in the accused to answer it. We have hitherto supposed the offender to be in custody before the finding of the indictment, in which case he is immediately (or as soon as convenience permits) to be arraigned thereon. But if he hath fled or secretes himself in capital cases, or hath not in smaller misdemeanours been bound over to appear at the assizes or sessions, still an indictment may be preferred against him in his absence; since, were he present, he could not be heard before the grand jury against it. And if it be found, then process must issue to bring him into court; for the indictment cannot be tried unless he personally appears, according to the rules of equity in all cases, and the express provision of statute 28 Edw. III. c. 3, in capital ones, that no man shall be put to death without being brought to answer by due process of law.

For Petit Misdemeanours.

The proper process on an indictment for any petit misdemeanour, or on penal statute, is a writ of *venire facias*, which is in the nature of a summons to cause the party to appear. And if by

the return to such *venire* it appears that the party hath lands in the county whereby he may be distrained, then a *distress infinite* shall be issued from time to time till he appears. But if the sheriff returns that he hath no lands in his bailiwick (then, upon his non-appearance), a writ of *capias* shall issue, which commands the sheriff to take his body and have him at the next assizes: and if he cannot be taken upon the first *capias*, a second and third shall issue, called an *alias* and a *pluries capias*. But on indictments for treason or felony a *capias* is the first process; and for treason or homicide only one shall be allowed to issue, or two in the case of other felonies, by statute 25 Edw. III. c. 14, though the usage is to issue only one in any felony, the provisions of this statute being in most cases found impracticable. And so, in the case of misdemeanours, it is now the usual practice for any judge of the court of king's bench, upon certificate of an indictment found, to award a writ of *capias* immediately, in order to bring in the defendant.

Chapter XXV.

OF ARRAIGNMENT AND ITS INCIDENTS.

322-332.

When the offender either appears voluntarily to an indictment, or was before in custody, or is brought in upon criminal process to answer it in the proper court, he is immediately to be *arraigned* thereon; which is the fifth stage of criminal prosecution.

The Arraignment.

To arraign is nothing else but to call the prisoner to the bar of the court, to answer to the matter charged upon him in the indictment. The prisoner is to be called to the bar by his name; and it is laid down in our ancient books that, though under an indictment of the highest nature, he must be brought to the bar without irons or any manner of shackles or bonds, unless there be evident danger of an escape, and then he may be secured with irons.

When he is brought to the bar, he is called upon by name to hold up his hand: which, though it may seem a trifling circumstance, yet is of this importance, that by the holding up of his hand *constat de persona*, he owns himself to be of that name by which he is called. However, it is not an indispensable ceremony; for, being calculated merely for the purpose of identifying the person, any other acknowledgment will answer the purpose as well: therefore, if the prisoner obstinately and contemptuously refuse to hold up his hand, but confesses he is the person named, it is fully sufficient.

Then the indictment is to be read to him distinctly in the English tongue (which was law even while all other proceedings were in Latin), that he may fully understand his charge. After which it is to be demanded of him whether he be guilty of the crime whereof he stands indicted, or not guilty. By the old common law the accessory could not be arraigned till the principal was attainted, unless he chose it: for he might waive the benefit of the law; and therefore principal and accessory might, and may still, be arraigned, and plead, and also be tried together. But otherwise, if the principal had never been indicted at all, and stood mute, had challenged above thirty-five jurors peremptorily, had claimed the benefit of clergy, had obtained a pardon, or had died before attainder, the accessory in any of these cases could not be arraigned; for *non constitit* whether any felony was committed or no, till the principal was attainted; and it might so happen that the accessory should be convicted one day and the principal acquitted the next, which would be absurd. However, this absurdity could only happen where it was possible that a trial of the principal might be had subsequent to that of the accessory; and therefore the law still continues that the accessory shall not be tried so long as the principal remains liable to be tried hereafter. But, by statute I Anne, c. 9, if the principal be once convicted, and before attainder (that is, before he receives judgment of death or outlawry) he is delivered by pardon, the benefit of clergy, or otherwise; or if the principal stands mute, or challenges peremptorily above the legal number of jurors, so as never to be convicted at all; in any of these cases in which no subsequent trial can be had of the principal, the accessory may be proceeded against as if the principal felon had been attainted; for there is no danger of future contradiction. And upon the trial of the accessory, as well after as before the conviction of the principal, it seems to be the better opinion, and founded on the true spirit of justice, that the accessory is at liberty (if he can) to controvert the guilt of his supposed principal, and to prove him innocent of the charge, as well in point of fact as in point of law.

When a criminal is arraigned, he either *stands mute*, or *confesses* the fact; which circumstances we may call *incidents* to the arraignment; or else he *pleads* to the indictment, which is to be considered as the next stage of proceedings. But, first, let us observe these incidents to the arraignment, of standing mute or confession.

Standing Mute.

I. Regularly, a prisoner is said to stand mute when, being arraigned for treason or felony, he either, 1. Makes no answer at all; or, 2. Answers foreign to the purpose, or with such matter as

is not allowable; and will not answer otherwise; or, 3. Upon having pleaded not guilty refuses to put himself upon the country. If he says nothing, the court ought, *ex officio*, to empanel a jury to inquire whether he stands obstinately mute, or whether he be dumb, *ex visitatione Dei*. If the latter appears to be the case, the judges of the court (who are to be of counsel for the prisoner, and to see that he hath law and justice) shall proceed to the trial, and examine all points as if he had pleaded not guilty. But whether judgment of death can be given against such a prisoner who hath never pleaded, and can say nothing in arrest of judgment, is a point yet undetermined.

If he be found to be obstinately mute (which a prisoner hath been held to be that hath cut out his own tongue), then, if it be on an indictment of high treason, it hath long been clearly settled that standing mute is equivalent to a conviction, and he shall receive the same judgment and execution. And as in this the highest crime, so also is the lowest species of felony, viz., in petit larceny, and in all misdemeanours, standing mute hath always been equivalent to conviction. But upon appeal or indictments for other felonies, or petit treason, the prisoner was not, by the ancient law, looked upon as convicted so as to receive judgment for the felony, but should for his obstinacy have received the terrible sentence of *penance*, or *peine* (which, as will appear presently, was probably nothing more than a corrupted abbreviation of *prisone*) *forte et dure*.

The English judgment of penance for standing mute was as follows: that the prisoner be remanded to the prison from whence he came, and put into a low, dark chamber, and there be laid on his back on the bare floor, naked, unless where decency forbids; that there be placed upon his body as great a weight of iron as he could bear, and more; that he have no sustenance, save only, on the first day, three morsels of the worst bread; and, on the second day, three draughts of standing water, that should be nearest to the prison-door; and in this situation this should be alternately his daily diet, *till he died*, or (as anciently the judgment ran) *till he answered*.

The law was, that by standing mute and suffering this heavy penance, the judgment, and of course the corruption of the blood and escheat of the *lands*, were saved in felony and petit treason, though not the forfeiture of the *goods*: and therefore this lingering punishment was probably introduced in order to extort a plea; without which it was held that no judgment of death could be given; and so the lord lost his escheat. But in high treason, as standing mute is equivalent to a conviction, the same judgment, the same corruption of blood, and the same forfeitures always

attended it, as in other cases of conviction. And very lately, to the honour of our laws, it hath been enacted, by statute 12 Geo. III. c. 20, that every person who being arraigned for felony or piracy shall stand mute or not answer directly to the offence shall be convicted of the same, and the same judgment and execution (with all their consequences in every respect) shall be thereupon awarded as if the person had been convicted by verdict or confession of the crime. And thus much for the demeanour of a prisoner upon his arraignment by standing mute; which now in all cases amounts to a constructive confession.

Confession of the Indictment.

II. The other incident to arraignment, exclusive of the plea, is the prisoner's actual *confession* of the indictment. Upon a simple and plain confession, the court hath nothing to do but to award judgment; but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject; and will generally advise the prisoner to retract it and plead to the indictment.

It hath also been usual for the justice of the peace, by whom any persons charged with felony are committed to gaol, to admit some one of their accomplices to become a witness (or, as it is generally termed, king's evidence) against his fellows; upon an implied confidence, which the judges of gaol-delivery have usually countenanced and adopted, that if such accomplice makes a full and complete discovery of that and of all other felonies to which he is examined by the magistrate, and afterwards gives his evidence without prevarication or fraud, he shall not himself be prosecuted for that or any other previous offence of the same degree.

Chapter XXVI.

OF PLEA AND ISSUE.

332-342.

We are now to consider the plea of the prisoner, or defensive matter alleged by him on his arraignment, if he does not confess or stand mute. This is either. 1. A plea to the jurisdiction; 2. A demurrer; 3. A plea in abatement; 4. A special plea in bar; or, 5. The general issue.

Plea to Jurisdiction.

I. A plea to the *jurisdiction* is where an indictment is taken before a court that has no cognizance of the offence; as if a man be indicted for a rape at the sheriff's tourn, or for treason at the quarter sessions; in these or similar cases, he may except to the jurisdiction of the court, without answering at all to the crime alleged.

Demurrer to Indictment.

II. A demurrer to the indictment. This is incident to criminal cases as well as civil when the fact alleged is allowed to be true, but the prisoner joins issue upon some point of law in the indictment, by which he insists that the fact, as stated, is not felony, treason, or whatever the crime is alleged to be. Thus, for instance, if a man were indicted for *feloniously* stealing a greyhound, which is an animal in which no valuable property can be had, and therefore it is no felony, but only civil trespass, to steal it: in this case the party indicted may demur to the indictment: denying it to be felony, though he confesses the act of taking it.

Plea in Abatement.

III. A plea in *abatement* is principally for a *misnomer*, a wrong name, or false addition to the prisoner. And if either fact is found by a jury, then the indictment shall be abated, as writs or declarations may be in civil actions, of which we spoke at large in the preceding book. But in the end there is little advantage accruing to the prisoner by means of these dilatory pleas; because if the exception be allowed, a new bill of indictment may be framed, according to what the prisoner in his plea avers to be his true name and addition. For it is a rule upon all pleas in abatement that he who takes advantage of a flaw must at the same time show how it may be amended. Let us, therefore, next consider a more substantial kind of plea, viz.:

Special Plea in Bar.

IV. Special pleas in *bar*; which go to the merits of the indictment, and give a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alleged. These are of four kinds: a former acquittal, a former conviction, a former attainder, or a pardon. There are many other pleas which may be pleaded in bar of an appeal; but these are applicable to both appeals and indictments.

Plea of Autrefoits Acquit.

1. First, the plea of *autrefoits acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence. And hence, it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime.

Plea of Autrefoits Convict.

2. Secondly, the plea of *autrefoits convict*, or a former conviction for the same identical crime, though no judgment was ever

given, or perhaps will be (being suspended by the benefit of clergy or other causes), is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime. Hereupon it has been held that a conviction of manslaughter, on an appeal or an indictment, is a bar even in another appeal, and much more in an indictment of murder; for the fact prosecuted is the same in both, though the offences differ in colouring and in degree.

Plea of Autrefoits Attaint.

3. Thirdly, the plea of *autrefoits attainé*, or a former attainder, which is a good plea in bar, whether it be for the same or any other felony. For wherever a man is attainted of felony by judgment of death, either upon a verdict or confession, by outlawry, or heretofore by abjuration, and whether upon an appeal or an indictment, he may plead such attainder in bar to any subsequent indictment, or appeal for the same or for any other felony.

Plea of Pardon.

4. Lastly, a pardon may be pleaded in bar; as at once destroying the end and purpose of the indictment by remitting that punishment which the prosecution is calculated to inflict.

Plea of Not Guilty.

V. The general issue, or plea of *not guilty*, upon which plea alone the prisoner can receive his final judgment of death. In case of an indictment of felony or treason, there can be no special justification put in by way of plea. As, on an indictment for murder, a man cannot *plead* that it was in his own defence against a robber on the highway, or a burglar; but he must plead the general issue, not guilty, and give this special matter in evidence. For (besides that these pleas do in effect amount to the general issue, since, if true, the prisoner is most clearly not guilty) as the facts in treason are laid to be done *proditorie et contra ligeantiae suae debitum*, and in felony, that the killing was done *felonice*; these charges of a traitorous or felonious intent are the points and very *gist* of the indictment, and must be answered, directly by the general negative, not guilty; and the jury upon the evidence will take notice of any defensive matter and give their verdict accordingly, as effectually as if it were, or could be, specially pleaded. So that this is, upon all accounts, the most advantageous plea for the prisoner.

When the prisoner has thus pleaded not guilty, *non culpabilis*, or *nient culpable*, which was formerly used to be abbreviated upon the minutes thus, "*non (or nient) cul.*," the clerk of the assize, or clerk of the arraigns, on behalf of the crown, replies that the pris-

oner is guilty, and that he is ready to prove him so. This is done by two monosyllables, in the same spirit of abbreviation, "*cul. prit.*," which signifies first, that the prisoner is guilty (*cul. culpable*, or *culpabilis*), and then that the king is ready to prove him so, *prit*, *praesto sum*, or *paratus verificare*. This is therefore a replication on behalf of the king *viva voce* at the bar; which was formerly the course in all pleadings, as well in civil as in criminal causes. And that was done in the concisest manner; for when the pleader intended to demur he expressed his demurrer in a single word, "*judgment*," signifying that he demanded judgment whether the writ, declaration, plea, etc., either in form or matter, were sufficiently good in law: and if he meant to rest on the truth of the facts pleaded, he expressed that also in a single syllable, "*prit*," signifying that he was ready to prove his assertions: as may be observed from the year-books and other ancient repositories of law. By this replication the king and the prisoner are therefore at issue.

The joining of issue, which, though now usually entered on the record, is not otherwise joined in any part of the proceedings, seems to be clearly the meaning of this obscure expression, which has puzzled our most ingenious etymologists, and is commonly understood as if the clerk of the arraigns, immediately on plea pleaded, had fixed an opprobrious name on the prisoner by asking him, "*culprit*, how wilt thou be tried?" For immediately upon issue joined it is inquired of the prisoner by what trial he will make his innocence appear. This form has at present reference to appeals and approvals only wherein the appellee has his choice either to try the accusation by battle or by jury.

Upon indictments, since the abolition of ordeal, there can be no other trial but by jury, *per pais* or by the country: and therefore, if the prisoner refuses to put himself upon the inquest in the usual form, that is, to answer that he will be tried by God and the country, if a commoner, and if a peer, by God and his peers; the indictment, if in treason, is taken *pro confesso*; and the prisoner, in cases of felony, is adjudged to stand mute, and if he perseveres in his obstinacy shall now be convicted of the felony.

When the prisoner has thus put himself upon his trial, the clerk answers, in the humane language of the law, which always hopes that the party's innocence rather than his guilt may appear, "God send thee a good deliverance." And then they proceed as soon as conveniently may be to the trial; the manner of which will be considered at large in the next chapter.

Chapter XXVII.
OF TRIAL AND CONVICTION.

342-365.

The author names and describes as the four first methods of trial: 1. Ordeal. 2. Morsel of execration. 3. Battle. 4. By the peers of Great Britain in the Court of Parliament or the Court of the Lord High Steward.

Trial by Jury.

V. The trial by jury or the country, *per patriam*, is also, that trial by the peers of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the great charter: "*nullus liber homo capiatur, vel imprisonetur, aut exulet, aut aliquo alio modo destruat, nisi per legale iudicium parium suorum, vel per legem terrae.*"

When a prisoner on his arraignment hath pleaded *not guilty*, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors, *liberos et legales homines, de vicineto*; that is, freeholders, without just exception, and of the *visne* or neighborhood; which is interpreted to be of the county where the fact is committed.

In cases of high treason, whereby corruption of blood may ensue (except treason in counterfeiting the king's coin or seals), or misprision of such treason, it is enacted, by statute 7, W. III. c. 3, first, that no person shall be tried for any such treason, except an attempt to assassinate the king, unless the indictment be found within three years after the offence committed; next, that the prisoner shall have a copy of the indictment (which includes the caption), but not the names of the witnesses, five days at least before the trial; that is, upon the true construction of the act, before his arraignment, for then is the time to take any exceptions thereto by way of plea or demurrer; thirdly, that he shall also have a copy of the panel of jurors two days before his trial; and, lastly, that he shall have the same compulsive process to bring in his witnesses for him as was usual to compel their appearance *against* him. And by statute 7 Anne, c. 21 (which did not take place till after the decease of the late pretender), all persons indicted for high treason or misprision thereof shall have not only a copy of the indictment, but a list of all the witnesses to be produced, and of the jurors impanelled, with their professions and places of abode, delivered to him ten days before the trial, and in the presence of two witnesses, the better to prepare him to make his challenges and defence. But this last act, so far as it affected indictments for the inferior species of high treason, respecting the coin and the royal seals, is repealed by the statute 6 Geo. III. c. 53, else it had been impossible to have tried those offences in the same circuit in which

they are indicted: for ten clear days between the finding and the trial of the indictment will exceed the time usually allotted for any session of *oyer* and *terminer*. And no person indicted for felony is, or (as the law stands) ever can be, entitled to such copies before the time of his trial.

When the trial is called on, the jurors are to be sworn, as they appear, to the number of twelve, unless they are challenged by the party.

Challenges.

Challenges may here be made, either on the part of the king, or on that of the prisoner, and either to the whole array, or to the separate polls, for the very same reasons that they may be made in civil causes. Challenges *for cause* may be without stint in both criminal and civil trials. But in criminal cases, or at least in capital ones, there is, *in favorem vitæ*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all, which is called a *peremptory* challenge.

This privilege of peremptory challenges, though granted to the prisoner, is denied to the king by the statute 33 Edw. I. st. 4, which enacts that the king shall challenge no jurors without assigning a cause certain, to be tried and approved by the court. However, it is held that the king need not assign his cause of challenge till all the panel is gone through, and unless there cannot be a full jury without the person so challenged; and then, and not sooner, the king's counsel must show the cause, otherwise the juror shall be sworn.

The peremptory challenges of the prisoner must, however, have some reasonable boundary; otherwise he might never be tried. This reasonable boundary is settled by the common law to be the number of thirty-five; that is, one under the number of three full juries. For the law judges that five-and-thirty are fully sufficient to allow the most timorous man to challenge through mere caprice; and that he who peremptorily challenges a greater number, or three full juries, has no intention to be tried at all. And therefore it dealt with one who peremptorily challenges above thirty-five, and will not retract his challenge, as with one who stands mute or refuses his trial, by sentencing him to the *peine forte et dure* in felony, and by attainting him in treason. And so the law stands at this day with regard to treason of any kind.

But by statute 22 Hen. VIII. c. 14 (which with regard to felonies, stands unrepealed by statute 1 and 2 Ph. and M. c. 10), by this statute, I say, no person arraigned for felony can be admitted to make any more than *twenty* peremptory challenges. But how if the prisoner will peremptorily challenge twenty-one? what shall be done? The old opinion was, that judgment of *peine forte*

et dure should be given, as where he challenged thirty-six at the common law; but the better opinion seems to be that such challenge shall only be disregarded and overruled.

If by reason of challenges or the default of the jurors, a sufficient number cannot be had of the original panel, a *tales* may be awarded as in civil causes, till the number of twelve is sworn, "well and truly to try, and true deliverance make, between our sovereign lord the king and the prisoner whom they have in charge; and a true verdict to give according to their evidence."

When the jury is sworn, if it be a cause of any consequence, the indictment is usually opened, and the evidence marshaled, examined and enforced by the counsel for the crown, or prosecution. But it is a settled rule at common law that no counsel shall be allowed a prisoner upon his trial, upon the general issue in any capital crime, unless some point of law shall arise proper to be debated. A rule which (however it may be palliated under cover of that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner; that is, shall see that the proceedings against him are legal and strictly regular) seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law. For upon what face of reason can that assistance be denied to save the life of a man which yet is allowed him in prosecutions for every petty trespass? Nor indeed is it, strictly speaking, a part of our ancient law; for the Mirror, having observed the necessity of counsel in civil suits, "who know how to forward and defend the cause, by the rules of law and customs of the realm," immediately afterwards subjoins, "and more necessary are they for defence upon indictments and appeals of felony than upon other venial causes." And the judges themselves are so sensible of this defect that they never scruple to allow a prisoner counsel to instruct him what questions to ask, or even to ask questions for him, with respect to matters of fact; for as to matters of law arising on the trial, they are *entitled* to the assistance of counsel. But, lest this indulgence should be intercepted by superior influence in the case of state criminals, the legislature has directed, by statute 7 W. III. c. 3, that persons *indicted* for such high treason as works a corruption of the blood, or misprision thereof (except treason in counterfeiting the king's coin or seals), may make their full defence by counsel, not exceeding two, to be named by the prisoner and assigned by the court or judge; and the same indulgence, by statute 20 Geo. II. c. 30, is extended to parliamentary *impeachments* for high treason, which were excepted in the former act.

The doctrine of evidence upon pleas of the crown is in most respects the same as that upon civil actions. There are, however,

a few leading points wherein, by several statutes and resolutions, a difference is made between civil and criminal evidence.

First, in all cases of high treason, petit treason and misprision of treason, by statutes 1 Edw. VI. c. 12, and 5 and 6 Edw. VI. c. II, *two* lawful witnesses are required to convict a prisoner; unless he shall willingly and without violence *confess* the same. By statute 1 and 2 Ph. and M. c. 10, a further exception is made to treasons in counterfeiting the king's seals or signatures, and treasons concerning coin current within this realm: and more particularly, by c. 11, the offences of importing counterfeit foreign money current in this kingdom, and impairing, counterfeiting, or forging any current coin. The statutes 8 and 9 W. III. c. 25, and 15 and 16 Geo. II. c. 28, in their subsequent extensions of this species of treason, do also provide that the offenders may be indicted, arraigned, tried, convicted, and attainted by the like evidence and in such manner and form as may be had and used against offenders for counterfeiting the king's money. But, by statute 7 W. III. c. 3, in prosecutions for those treasons to which that act extends, the same rule (of requiring *two* witnesses) is again enforced; with this addition, that the *confession* of the prisoner, which shall countervail the necessity of such proof, must be in *open court*. In the construction of which act, it hath been holden that a confession of the prisoner taken out of court, before a magistrate or person having competent authority to take it, and proved by two witnesses, is sufficient to convict him of treason. But hasty, unguarded confessions, made to persons having no such authority, ought not to be admitted as evidence under this statute. And indeed, even in cases of felony at the common law, they are the weakest and most suspicious of all testimony: ever liable to be obtained by artifice, false hopes, promises of favor, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence. By the same statute, 7 W. III., it is declared that both witnesses must be to the same overt act of treason, or one to one overt act and the other to another overt act, of the same species of treason, and not of distinct heads or kinds; and no evidence shall be admitted to prove any overt act not expressly laid in the indictment. In cases of indictments for perjury this doctrine is better founded; and there our law adopts it; for one witness is not allowed to convict a man for perjury; because then there is only one oath against another. In cases of treason also there is the accused's oath of allegiance to counterpoise the information of a single witness; and that may perhaps be one reason why the law requires a double testimony to convict him; though the principal reason undoubtedly is to secure the subject

from being sacrificed to fictitious conspiracies, which have been the engines of profligate and crafty politicians in all ages.

Secondly, though from the reversal of Colonel Sidney's attainder by act of parliament, in 1689, it may be collected that the mere similitude of hand-writing in two papers shown to a jury, without other concurrent testimony, is no evidence that both were written by the same person; yet undoubtedly the testimony of witnesses, well acquainted with the party's hand, that they believe the paper in question to have been written by him, is evidence to be left to a jury.

Thirdly, by statute 21 Jac. I. c. 27, a mother of a bastard child, concealing its death, must prove by one witness that the child was born dead; otherwise such concealment shall be evidence of her having murdered it.

Fourthly, all presumptive evidence of felony should be admitted cautiously; for the law holds that it is better that ten guilty persons escape than that one innocent suffer. And Sir Matthew Hale in particular lays down two rules most prudent and necessary to be observed: 1. Never to convict a man for stealing the goods of a person unknown, merely because he will give no account how he came by them, unless an actual felony be proved of such goods; and, 2. Never to convict any person of murder or manslaughter till at least the body be found dead; on account of two instances he mentions where persons were executed for the murder of others who were then alive but missing.

Lastly, it was an ancient and commonly-received practice (derived from the civil law, and which also to this day obtains in the kingdom of France) that as counsel was not allowed to any prisoner accused of a capital crime, so neither should he be suffered to exculpate himself by the testimony of any witnesses. At length, by statute 7 W. III. c. 3, the same measure of justice was established throughout all the realm in cases of treason within the act; and it was afterwards declared, by statute 1 Anne, st. 2, c. 9, that in all cases of treason and felony all witnesses *for* the prisoner should be examined upon oath, in like manner as the witnesses *against* him.

When the evidence on both sides is closed, and indeed when any evidence hath been given, the jury cannot be discharged (unless in case of evident necessity) till they have given in their verdict: but are to consider of it, and deliver it in, with the same forms as upon civil causes; only they cannot, in a criminal case which touches life or member, give a *privy* verdict. But the judges may adjourn while the jury are withdrawn to confer, and return to receive the verdict in open court. And such public or open verdict may be either general, guilty, or not guilty; or special, setting

forth all the circumstances of the case and praying the judgment of the court, whether for instance, on the facts stated, it be murder, manslaughter, or no crime at all. This is where they *doubt* the matter of law, and therefore *choose* to leave it to the determination of the court; though they have an unquestionable right of determining upon all the circumstances and finding a general verdict, if they think proper so to hazard a breach of their oaths: and if their verdict be notoriously wrong they may be punished and the verdict set aside by attaint at the suit of the king, but not at the suit of the prisoner. But the practice heretofore in use of fining, imprisoning, or otherwise punishing jurors merely at the discretion of the court, for finding their verdict contrary to the direction of the judge, was arbitrary, unconstitutional, and illegal. Yet in many instances where contrary to evidence, the jury have found the prisoner guilty, their verdict hath been mercifully set aside and a new trial granted by the court of king's bench: for in such case, as hath been said, it cannot be set right by attaint. But there hath yet been no instance of granting a new trial where the prisoner was *acquitted* upon the first.

If the jury therefore find the prisoner not guilty, he is then forever quit and discharged of the accusation, except he be appealed of felony within the time limited by law. And upon such his acquittal or discharge for want of prosecution, he shall be immediately set at large without payment of any fee to the gaolor. But if the jury find him guilty, he is then said to be *convicted* of the crime whereof he stands indicted; which conviction may accrue two ways, either by his confessing the offence and pleading guilty, or by his being found so by the verdict of his country.

When the offender is thus convicted, there are two collateral circumstances that immediately arise: 1. On a conviction (or even upon an acquittal where there was a reasonable ground to prosecute, and in fact a *bona fide* prosecution) for any grand or petit larceny or other felony, the reasonable expenses of prosecution, and also, if the prosecutor be poor, a compensation for his trouble and loss of time are, by statutes 25 Geo. II. c. 36, and 18 Geo. III. c. 19, to be allowed him out of the county stock, if he petitions the judge for that purpose: and by statute 27 Geo. II. c. 3, explained by the same statute (18 Geo. III. c. 19), all persons appearing upon recognizance or *subpoena* to give evidence, whether any indictment be preferred or no, and as well without conviction as with it, are entitled to be paid their charges, with a further allowance (if poor) for their trouble and loss of time. 2. On a conviction of larceny in particular, the prosecutor shall have restitution of his goods, by virtue of the statute 21 Hen. VIII. c. 11. For by the common law there was no restitution of

goods upon an indictment, because it is at the suit of the king only; and therefore the party was enforced to bring an appeal of robbery, in order to have his goods again. But it being considered that the party prosecuting the offender by indictment deserves to the full as much encouragement as he who prosecutes by appeal, this statute was made, which enacts that if any person be convicted of larceny by the evidence of the party robbed, he shall have full restitution of his money, goods and chattels, or the value of them out of the offender's goods, if he has any, by a writ to be granted by the justices. And, the construction of this act having been in great measure conformable to the law of appeals, it has therefore in practice superseded the use of appeals in larceny. For instance, as formerly upon appeals, so now upon indictments of larceny, this writ of restitution shall reach the goods so stolen, notwithstanding the property of them is endeavored to be altered by sale in market-overt. And though this may seem somewhat hard upon the buyer, yet the rule of law is that "*spoliatus debet, ante omnia, restitui*," especially when he has used all the diligence in his power to convict the felon. And, since the case is reduced to this hard necessity, that either the owner or the buyer must suffer, the law prefers the right of the owner, who has done a meritorious act by pursuing a felon to condign punishment, to the right of the buyer, whose merit is only negative, that he has been guilty of no unfair transaction. And it is now usual for the court, upon the conviction of a felon, to order, without any writ, immediate restitution of such goods as are brought into court to be made to the several prosecutors. Or, else, secondly, without such writ of restitution, the party may peaceably retake his goods, wherever he happens to find them, unless a new property be fairly acquired therein. Or, lastly, if the felon be convicted and pardoned, or be allowed his clergy, the party robbed may bring his action of trover against him for his goods and recover a satisfaction in damages. But such action lies not before prosecution, for so felonies would be made up and healed; and also recaption is unlawful, if it be done with intention to smother or compound the larceny; it then becoming the heinous offence of theft-bote, as was mentioned in a former chapter.

Chapter XXVIII.

OF THE BENEFIT OF CLERGY.

365-375.

This chapter is omitted, as Benefit of Clergy is obsolete. It was abolished in England by statute 7 and 8 Geo. IV. ch. 23. It was a privilege in the nature of an exemption from capital punishment, anciently allowed in England to criminals in holy orders, afterwards extended to the laity, as a mode of mitigating the severity of the penal law. It was probably never allowed in cases of high treason, or of misdemeanour.

Chapter XXIX.
OF JUDGMENT AND ITS CONSEQUENCES.

375-390.

When, upon a capital charge, the jury have brought in their verdict, guilty, in the presence of the prisoner, he is, either immediately, or at a convenient time soon after, asked by the court if he has anything to offer why judgment should not be awarded against him. And in case the defendant be found guilty of a misdemeanour (the trial of which may, and does usually, happen in his absence, after he has once appeared), a *capias* is awarded and issued to bring him in to receive his judgment; and if he absconds, he may be prosecuted even to outlawry. But whenever he appears in person, upon either a capital or inferior conviction, he may at this period, as well as at his arraignment, offer any exceptions to the indictment in *arrest* or stay of judgment; as for want of sufficient certainty in setting forth either the person, the time, the place, or the offence. And if the objections be valid, the whole proceedings shall be set aside; but the party may be indicted again. And we may take notice: 1: That none of the statutes of *jeofails*, for amendment of errors, extend to indictments or proceedings in criminal cases; and therefore a defective indictment is not aided by a verdict, as defective pleadings in civil cases are. 2. That in favor of life great strictness has at all times been observed in every point of an indictment.

A pardon, also, as has been before said, may be pleaded in arrest of judgment, and it has the same advantage when pleaded here as when pleaded upon arraignment, viz.: the saving the attainer, and of course the corruption of blood; which nothing can restore but parliament, when a pardon is not pleaded till after sentence.

Praying the benefit of clergy may also be ranked among the motions in arrest of judgment.

If all these resources fail, the court must pronounce that judgment which the law hath annexed to the crime, and which hath been constantly mentioned, together with the crime itself, in some or other of the former chapters.

Attainder.

When sentence of death, the most terrible and highest judgment in the laws of England, is pronounced, the immediate inseparable consequence from the common law is *attainder*. For when it is now clear beyond all dispute that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society, the law sets a note of infamy upon him, puts him out of its protection, and takes no fur-

ther care of him than barely to see him executed. He is then called attaint, *attinctus*, stained or blackened. He is no longer of any credit or reputation, he cannot be a witness in any court; neither is he capable of performing the functions of another man; for, by an anticipation of his punishment, he is already dead in law. This is after *judgment*; for there is a great difference between a man *convicted* and *attainted*: though they are frequently through inaccuracy confounded together. After conviction only a man is liable to none of these disabilities; for there is still in contemplation of law a possibility of his innocence. Something may be offered in arrest of judgment; the indictment may be erroneous, which will render his guilt uncertain, and thereupon the present conviction may be quashed; he may obtain a pardon or be allowed the benefit of clergy; both which suppose some latent sparks of merit which plead in extenuation of his fault. But when judgment is once pronounced, both law and fact conspire to prove him completely guilty; and there is not the remotest possibility left of anything to be said in his favour. Upon judgment, therefore, of death, and not before, the attainder of a criminal commences: or upon such circumstances as are equivalent to judgment of death; as judgment of outlawry on a capital crime pronounced for absconding or fleeing from justice, which tacitly confesses the guilt. And therefore, either upon judgment of outlawry, or of death, for treason or felony, a man shall be said to be attained.

Consequences of Attainder. Forfeiture.

The consequence of attainder are forfeiture and corruption of blood.

I. Forfeiture is two-fold, of real and personal estates. First, as to real estates: By attainder in high treason a man forfeits to the king all his lands and tenements of inheritance, whether fee-simple or fee-tail, and all his rights of entry on lands and tenements which he had at the time of the offence committed, or at any time afterwards, to be forever vested in the crown; and also the profits of all lands and tenements which he had in his own right for life or years, so long as such interest shall subsist. This forfeiture relates backwards to the time of the treason committed, so as to avoid all intermediate sales and encumbrances, but not those before the fact.

In petit treason and felony, the offender also forfeits all his chattel interests absolutely, and the profits of all estates of freehold during life: and, after his death, all his lands and tenements, in fee-simple, (but not those in tail) to the crown, for a very short period of time; for the king shall have them for a year and a day, and may commit therein what waste he pleases, which is called

the king's *year, day and waste*. This year, day and waste are now usually compounded for, but otherwise they regularly belong to the crown; and after their expiration, the land would have naturally descended to the heir (as in gavelkind tenure it still does), did not its feudal quality intercept such descent and give it by way of escheat to the lord. These forfeitures for felony do also arise only upon attainder; and therefore a *felo de se* forfeits no land of inheritance or freehold, for he never is attained as a felon. They likewise relate back to the time of offence committed, as well as forfeiture for treason, so as to avoid all intermediate charges and conveyances. This may be hard upon such as have unwarily engaged with the offender: but the cruelty and reproach must lie on the part, not of the law, but of the criminal, who has thus knowingly and dishonestly involved others in his own calamities.

The forfeiture of goods and chattels accrues in every one of the higher kinds of offence: in high treason or misprision thereof, petit treason, felonies of all sorts, whether clergyable or not, self-murder, or felony *de se*, petit larceny, standing mute, and the above-mentioned offences of striking, etc., in Westminster hall. For *flight*, also, on an accusation of treason, felony, or even petit larceny, whether the party be found guilty or acquitted, if the jury find the flight, the party shall forfeit his goods and chattels.

There is a remarkable difference or two between the forfeiture of lands and of goods and chattels. 1. Lands are forfeited upon *attainder*, and not before: goods and chattels are forfeited by *conviction*. Because in many of the cases where goods are forfeited there is never any attainder, which happens only where judgment of death or outlawry is given; therefore in those cases the forfeiture must be upon conviction or not at all; and being necessarily upon conviction in those, it is so ordered in all other cases, for the law loves uniformity. 2. In outlawries for treason or felony, lands are forfeited only by the judgment; but the goods and chattels are forfeited by a man being first put in the *exigent*, without staying till he is *quinto exactus*, or finally outlawed; for the secreting himself so long from justice is construed a flight in law. The forfeiture of lands has relation to the time of the fact committed, so as to avoid all subsequent sales and encumbrances; but the forfeiture of goods and chattels has no relation backwards, so that those only which a man has at the time of conviction shall be forfeited.

Corruption of Blood.

II. Another immediate consequence of attainder is the *corruption of blood*, both upwards and downwards, so that an attainted person can neither inherit lands or other hereditaments

from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir; but the same shall escheat to the lord of the fee, subject to the king's superior right of forfeiture: and the person attainted shall also obstruct all descents to his posterity, wherever they are obliged to derive a title through him to a remoter ancestor.

This is one of those notions which our laws have adopted from the feudal constitutions at the time of the Norman conquest.

Chapter XXX. OF REVERSAL OF JUDGMENT.

390-394.

We are next to consider how judgments, with their several connected consequences of attainder, forfeiture, and corruption of blood, may be set aside. There are two ways of doing this: either by falsifying or reversing the judgment, or else by reprieve or pardon.

Reversing Without Writ.

A judgment may be falsified, reversed or avoided, in the first place, *without a writ of error*, for matters foreign to or *dehors* the record, that is, not apparent upon the face of it; so that they cannot be assigned for error in the superior court, which can only judge from what it appears in the record itself; and therefore if the whole record be not certified, or not truly certified, by the inferior court, the party injured thereby (in both civil and criminal cases) may allege a *diminution* of the record, and cause it to be rectified. Thus, if any judgment whatever be given by persons who had no good commission to proceed against the person condemned, it is void, and may be falsified by showing the special matter without writ of error. As where a commission issues to A and B and twelve others, or any two of them, of which A or B shall be one, to take and try indictments, and any of the other twelve proceed without the interposition or presence of either A or B: in this case all proceedings, trials, convictions, and judgments are void for want of a proper authority in the commissioners, and may be falsified upon bare inspection without the trouble of a writ of error; it being a high misdemeanour in the judges so proceeding, and little, if anything, short of murder in them all, in case the person so attainted be executed and suffer death. So likewise if a man purchases land of another, and afterwards the vendor is, either by outlawry or his own confession, convicted or attainted of treason or felony previous to the sale or alienation, whereby such land becomes liable to forfeiture or escheat, now, upon any trial, the purchaser is at liberty, without bringing any

writ of error, to falsify not only the time of the felony or treason supposed, but the very point of the felony or treason itself, and is not concluded by the confession or the outlawry of the vendor, though the vendor himself is concluded, and not suffered now to deny the fact, which he has by confession or flight acknowledged. But if such attainder of the vendor was by verdict, on the oath of his peers, the alienee cannot be received to falsify or contradict the *fact* of the crime committed, though he is at liberty to prove a mistake in *time*, or that the offence was committed after the alienation, and not before.

Reversing by Writ.

Secondly, a judgment may be reversed by *writ of error*; which lies from all inferior criminal jurisdictions to the court of king's bench, and from the king's bench to the house of peers; and may be brought for notorious mistakes in the judgment or other part of the record; as where a man is found guilty of perjury and receives the judgment of felony; or for other less palpable errors, such as an irregularity, omission, or want of form in the process of outlawry; or proclamations; the want of a proper *addition* to the defendant's name, according to the statute of additions; for not properly naming the sheriff or other officer of the court, or not duly describing where his county court was held; for laying an offence committed in the time of the late king to be done against the peace of the present; and for other similar causes, which (though allowed out of tenderness to life and liberty) are not much to the credit or advancement of the national justice. These writs of error to reverse judgments in case of misdemeanours are not to be allowed, of course, but on sufficient probable cause shown to the attorney-general; and then they are understood to be grantable of common right and *ex debito justitiæ*. But writs of error to reverse attainders in capital cases are only allowed *ex gratia*; and not without express warrant under the king's sign-manual, or at least by the consent of the attorney-general. These, therefore, can rarely be brought by the party himself, especially where he is attainted for an offence against the state; but they may be brought by his heir or executor after his death, in more favorable times; which may be some consolation to his family. But the easier and more effectual way is,

Lastly, to reverse the attainder by act of parliament. This may be and hath been frequently done upon motives of compassion, or perhaps from the zeal of the times, after a sudden revolution in the government, without examining too closely into the truth or validity of the errors assigned. And sometimes, though the crime be universally acknowledged and confessed, yet the merits of the criminal's family shall after his death obtain a resti-

tution in blood, honours, and estate, or some or one of them, by act of parliament; which (so far as it extends) has all the effect of reversing the attainer without casting any reflections upon the justice of the preceding sentence.

The effect of falsifying or reversing an outlawry is, that the party shall be in the same plight as if he had appeared upon the *capias*: and, if it be before plea pleaded, he shall be put to plead to the indictment; if after conviction, he shall receive the sentence of the law; for all the other proceedings, except only the process of outlawry for his non-appearance, remain good and effectual as before. But when judgment pronounced upon conviction is falsified or reversed, all former proceedings are absolutely set aside, and the party stands as if he had never been at all accused; restored in his credit, his capacity, his blood, and his estates; with regard to which last, though they be granted away by the crown, yet the owner may enter upon the grantee with as little ceremony as he might enter upon a disseisor. But he still remains liable to another prosecution for the same offence; for the first being erroneous, he never was in jeopardy thereby.

Chapter XXXI.

OF REPRIEVE AND PARDON.

394-403.

The only other remaining ways of avoiding the execution of the judgment are by a reprieve or a pardon; whereof the former is temporary only, the latter permanent.

Reprieve.

I. A reprieve (from *reprendre*, to take back) is the withdrawing of a sentence for an interval of time, whereby the execution is suspended. This may be, first, *ex arbitrio judicis*, either before or after judgment: as where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offence be within clergy; or sometimes, if it be a small felony, or any favorable circumstances appear in the criminal's character, in order to give room to apply to the crown for either an absolute or conditional pardon. These arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their session be finished and their commission expired; but this rather by common usage than of strict right.

Reprieves may also be *ex necessitate legis*: as where a woman is capitally convicted and pleads her pregnancy; though this is no cause to stay the judgment, yet is to respite the execution till she be delivered.

Another cause of regular reprieve is, if the offender becomes *non compos* between the judgment and the award of execution; for regularly, as was formerly observed, though a man be *compos* when he commits a capital crime, yet if he becomes *non compos* after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he shall not be ordered for execution: for "*furi- osus solo furore punitur,*" and the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings. It is therefore an invariable rule, when any time intervenes between the attainder and the award of execution, to demand of the prisoner what he hath to allege why execution should not be awarded against him; and if he appears to be insane, the judge in his discretion may and ought to reprieve him. Or the party may *plead* in bar of execution: which plea may be either pregnancy, the king's pardon, an act of grace, or diversity of person, viz., that he is not the same as was attainted, and the like. In this last case a jury shall be impanelled to try this collateral issue, namely, the identity of his person; and not whether guilty or innocent; for that has been decided before. And in these collateral issues the trial shall be *instanter*, and no time allowed the prisoner to make his defence or produce his witnesses, unless he will make oath that he is not the person attainted: neither shall any peremptory challenges of the jury be allowed the prisoner; though formerly such challenges were held to be allowable whenever a man's life was in question.

The King's Pardon.

II. If neither pregnancy, insanity, non-identity, nor other plea will avail to avoid the judgment and stay the execution consequent thereupon, the last and surest resort is in the king's most gracious *pardon*; the granting of which is the most amiable prerogative of the crown.

Under this head of pardons, let us briefly consider: 1. The *object* of pardon; 2. The *manner* of pardoning; 3. The method of *allowing* a pardon; 4. The *effect* of such pardon when allowed.

Object of Pardon.

1. And, first, the king may pardon all offences merely against the crown or the public: excepting, 1. That, to preserve the liberty of the subject, the committing any man to prison out of the realm is, by the *habeas corpus* act, 31 Car. II. c. 2, made a *præmunire*, unpardonable even by the king. Nor, 2, can the king pardon where private justice is principally concerned in the prosecution of offenders: "*non potest rex gratiam facere cum injuria et damno aliorum.*" Therefore, in appeals of all kinds (which are

the suit, not of the king, but of the party injured), the prosecutor may release, but the king cannot pardon. Neither can he pardon a common nuisance while it remains unredressed, or so as to prevent an abatement of it, though afterwards he may remit the fine: because though the prosecution is vested in the king to avoid multiplicity of suits, yet (during its continuance) this offence savours more of the nature of a private injury to each individual in the neighbourhood than of a *public* wrong. Neither, lastly, can the king pardon an offence against a popular or penal statute after information brought: for thereby the informer hath acquired a private property in his part of the penalty.

There is also a restriction of a peculiar nature that affects the prerogative of pardoning in case of parliamentary impeachments: viz., that the king's pardon cannot be *pleaded* to any such impeachment so as to impede the inquiry and stop the prosecution of great and notorious offenders. But, after the impeachment has been solemnly heard and determined, it is not understood that the king's royal grace is further restrained or abridged.

Manner of Pardoning.

2. As to the *manner* of pardoning. 1. First, it must be under the *great* seal. A warrant under the privy seal, or sign-manual, though it may be a sufficient authority to admit the party to bail in order to plead the king's pardon, when obtained in proper form, yet is not of itself a complete irrevocable pardon. 2. Next, it is a general rule that wherever it may reasonably be presumed the king is deceived, the pardon is void. Therefore any suppression of truth, or suggestion of falsehood, in a charter of pardon will vitiate the whole; for the king was misinformed. 3. General words have also a very imperfect effect in pardons. A pardon of all felonies will not pardon a conviction of attainder or felony (for it is presumed the king knew not of those proceedings), but the conviction of attainder must be particularly mentioned; and a pardon of felonies will not include piracy, for that is no felony punishable at the common law. 4. It is also enacted, by statute 13 Ric. II. st. 2, c. 1, that no pardon for treason, murder, or rape shall be allowed unless the offence be particularly specified therein; and particularly in murder it shall be expressed whether it was committed by lying in wait, assault, or malice prepense. Under these and a few other restrictions, it is a general rule that a pardon shall be taken most beneficially *for* the subject, and most strongly against the king.

Conditional Pardon.

A pardon may also be *conditional*; that is, the king may extend his mercy upon what terms he pleases, and may annex to his

bounty a condition, either precedent or subsequent, on the performance whereof the validity of the pardon will depend; and this by the common law. Which prerogative is daily exerted in the pardon of felons on condition of being confined to hard labor for a stated time, or of transportation to some foreign country for life or for a term of years; such transportation or banishment being allowable and warranted by the *habeas corpus* act, 31 Car. II. c. 2, § 14, and both the imprisonment and transportation rendered more easy and effectual by statutes 8 Geo. III. c. 15, and 19 Geo. III. c. 74.

3. With regard to the manner of *allowing* pardons, we may observe that a pardon by act of parliament is more beneficial than by the king's charter; for a man is not bound to plead it, but the court must *ex officio* take notice of it; neither can he lose the benefit of it by his own *laches* or negligence, as he may of the king's charter of pardon. The king's charter of pardon must be specially pleaded, and that at a proper time; for if a man is indicted, and has a pardon in his pocket, and afterwards puts himself upon his trial by pleading the general issue, he has waived the benefit of such pardon. But if a man avails himself thereof as soon as by course of law he may, a pardon may either be pleaded upon arraignment, or in arrest of judgment, or, in the present stage of proceedings, in bar of execution.

The Effect of Pardon.

4. Lastly, the *effect* of such pardon by the king is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains his pardon; and not so much to restore his former, as to give him a new credit and capacity. But nothing can restore or purify the blood when once corrupted, if the pardon be not allowed till after attainder, but the high and transcendent power of parliament. Yet if a person attainted receives the king's pardon, and afterwards hath a son, that son may be heir to his father, because the father, being made a new man, might transmit new inheritable blood; though had he been born before the pardon he could never have inherited at all.

Chapter XXXII. OF EXECUTION.

403-407.

Execution, how Performed.

There now remains nothing to speak of but *execution*; the completion of human punishment. And this in all cases, as well

capital as otherwise, must be performed by the legal officer, the sheriff or his deputy; whose warrant for so doing was anciently by precept under the hand and seal of the judge, as it is still practiced in the court of the lord high steward upon the execution of a peer; though in the court of the peers in parliament it is done by a writ from the king. Afterwards it was established that in case of life the judge may command execution to be done without any writ. And now the usage is for the judge to sign the calendar, or list of all the prisoners' names, with their separate judgments in the margin, which is left with the sheriff. As for a capital felony, it is written opposite the prisoners' name, "let him be hanged by the neck;" formerly, in the days of Latin and abbreviation, "*sus per coll.*" for "*suspendatour per collum.*" And this is the only warrant that the sheriff has for so material an act as taking away the life of another. It may certainly afford matter of speculation that in civil causes there should be such a variety of writs of execution to recover a trifling debt, issued in the king's name, and under the seal of the court without which the sheriff cannot legally stir one step; and yet that the execution of a man, the most important and terrible task of any, should depend upon a marginal note.

The sheriff, upon receipt of his warrant, is to do execution within a convenient time; which in the country is also left at large. In London, indeed, a more solemn and becoming exactness is used, both as to the warrant of execution and the time of executing thereof: for the recorder, after reporting to the king in person the case of the several prisoners, and receiving his royal pleasure that the law must take its course, issues his warrant to the sheriffs, directing them to do execution on the day and at the place assigned.

The sheriff cannot alter the manner of the execution by substituting one death for another, without being guilty of felony himself, as has been formerly said. It is held also by Sir Edward Coke and Sir Matthew Hale that even the king cannot change the punishment of the law by altering the hanging or burning into beheading; though when beheading is part of the sentence the king may remit the rest. And notwithstanding some examples to the contrary, Sir Edward Coke stoutly maintains that "*judicandum est legibus, non exemplis.*" But others have thought, and more justly, that this prerogative, being founded in mercy, and immemorially exercised by the crown, is part of the common law.

To conclude: it is clear that if, upon judgment to be hanged by the neck until he is dead, the criminal be not thoroughly killed, but revives, the sheriff must hang him again. For the former hanging was no execution of the sentence.

Chapter XXXIII.**OF THE RISE, PROGRESS AND GRADUAL IMPROVEMENTS, OF THE LAWS OF ENGLAND.****407-end.**

This chapter contains a historical review of the rise, progress and gradual improvements of the laws of England, and is omitted.

THE END.

Translation of Latin Words and Phrases Occurring In this Abridgment.

(Words occurring several times are translated but once.)

Page.		
3	Viva voce,	By word of mouth.
3	Ex post facto,	After the fact.
4	In futuro,	At a future period.
5	Mala in se,	Things evil in themselves.
9	Leges non scriptae,	Unwritten laws.
12	Lex mercatoria,	The law merchant.
12	Malus usus abolendus est,	A bad custom should be abolished.
14	Corpus juris civilis,	The body of civil law.
15	Leges sub graviore lege,	Laws subject to a more weighty law.
15	Ex Officio,	In the course of duty; by virtue of office.
15	In perpetuum rei testimonium,	As a lasting testimony of the thing.
16	Ut res magis valeat, quam pereat,	That the whole subject matter may rather operate than be annulled.
16	Leges posteriores priores contrarias abrogant,	New laws repeal those preceding which are contrary to them.
16	Quod populus postremum jussit, id juratum esto,	Let that which the people have last decreed be considered as law.
19	Divisum imperium,	A divided authority.
27	Habeas corpus,	That you have the body.
27	Confirmatio cartarum,	A confirmation of the charters.
27	Residuum,	The remainder.
28	Se defendendo,	In self defense.
28	Per minas,	By threats.
29	Nullus liber homo aliquo modo destruitur, nisi per legale iudicium parium suorum aut per legem terrae,	No freeman shall be deprived of life but by the lawful judgment of his peers, or by the law of the land.
30	Ne exeat regno,	Let him not leave the kingdom.
32	Nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam,	To none will we sell, to none deny, to none delay either right or justice.
33	In bonis, in terris, vel persona,	Either in his goods, lands, or person.
36	Caput, principium et finis,	The head, beginning and end.
40	Supersedeas,	That you forbear.
40	Contra pacem domini regis,	Against the king's peace.
41	Ad tractandum et consilium impendendum,	For consulting and giving advice.
41	Ad consentiendum,	For consenting.
41	Praemunire,	To forewarn or to summon.
45	Sub silentio,	Tacitly, or in silence.
45	Mutatis mutandis,	The respective differences being allowed for—or, being altered according to the circumstances of the case.

46	Le roi le veut,	The king wills it.
46	Solt fait comme il est desire,	Be it as it is desired.
46	Le roy s' avisera,	The king will advise upon it.
52	Nullum tempus occurrit regi,	No time runs against the king.
52	Laches,	Neglect.
52	Ipsa facto,	By the act itself.
52	Eo instanti,	From that moment—immediately.
54	Durante bene placito,	During pleasure.
54	Quamdiu bene se gesserint,	So long as they shall have conducted themselves uprightly.
60	Ferae naturae,	Of wild nature.
61	De idiota inquirendo,	Of inquiring concerning an idiot.
61	Non compos mentis,	Not in his right mind.
62	Custodiam comitatus,	The custody of the county.
63	Posse comitatus,	The power of the county.
64	Super visum corporis,	On the view of the body.
66	Trinoda necessitas,	The threefold obligation.
66	Expeditio contra hostem, arcium constructio, et pontium reparatio,	Going against the enemy, construction of towers and reparation of bridges.
71	Post-liminium,	A return of one who had gone to sojourn elsewhere or had been taken by the enemy, to his own country, right and estate again.—A recovery.
71	Ex donatione regis,	By the gift of the king.
74	Intra moenia,	Within the walls.
75	Pro tempore,	For a time.
76	Nam, qui facit per alium, facit per se,	For he who does a thing by the agency of another does it himself.
77	Nam, qui non prohibet cum prohibere possit, jubet,	For he who does not forbid a crime while he may, sanctions it.
77	Quoad hoc,	As to this.
78	Pro salute animae,	For the health of the soul.
78	Consensus, non concubitus, facit nuptias,	Consent, not cohabitation, makes marriage.
79	Ab initio,	From the beginning.
79	Pro salute animarum,	For the health of their souls.
80	Habiles ad matrimonium,	Fit for marriage.
80	Per verba de praesenti,	By words in the present tense.
80	Per verba de futuro,	By words of the future tense.
80	In facie ecclesiae,	In the face of the church.
81	Juris positivi,	Of positive law.
81	Juris naturalis aut divini,	Of natural or divine law.
81	A vinculo matrimonii,	From the bond of matrimony.
81	A mensa et thoro,	From the bed and board.
82	De estoveriis habendis,	Of recovering estovers.
83	Nemo in propria causa testis esse debet,	No one should be a witness in his own cause.
83	Nemo tenetur seipsum accusare,	No one is bound to accuse himself.
84	Aliter quam ad virum, ex causa regiminis et castigationis uxoris suae, licite et rationabiliter pertinet,	Otherwise than lawfully and reasonably belongs to the husband for the due government and correction of his wife.
84	Pater est quem nuptiae demonstrant,	The nuptials show who is the father.

87	In loco parentis,	In the place of a parent.
88	De ventre inspiciendo,	For inspecting whether a woman be pregnant.
88	Infra annum luctus,	Within the year of mourning.
89	Extra quatuor maria,	Beyond the four seas.
89	Praesumitur pro legitimatione,	The presumption is in favor of legitimacy.
90	Filius nullius,	The son of no one.
90	Filius populi,	The son of the people.
91	Tutor,	A teacher.
91	Curator,	A guardian.
93	Prima facie,	On the first appearance.
93	Prochein amy,	Next friend—next of kin to an infant.
93	Doli capax,	Capable of deceit.
93	Maliâ supplet ætatem,	Malice is held equivalent to age.
95	Universitates,	Universities.
95	Collegia,	Colleges.
97	Creamus, erigimus, fundamus, incorporamus,	We create, we erect, we found, we incorporate.
100	In mortua manu,	In a dead hand.
117	Officina gentium,	The storehouse of nations.
119	Dedi et concessi,	I have given and granted.
120	Devenio vester homo,	I become your man.
121	Incertam et caducam hereditatem relevabat,	It raised up the uncertain and fallen inheritance.
121	In infinitum,	For ever.
125	In capite,	In chief, or of the king.
126	Maritagium,	Marriage.
127	Scutagium,	Scutage.
130	Valor maritagii,	The value of marriage.
131	A manendo,	From remaining.
131	Dominus manerii,	The lord of the manor.
132	A villa,	From a village.
134	Villanum socagium,	Villein socage.
139	Nam nemo est hæres viventis,	For no one is the heir of the living.
139	Stricti juris,	Of strict right.
140	De donis,	Of gifts.
141	De donis conditionalibus,	Of conditional gifts.
142	Per formam doni,	By the form of the gift.
143	E converso,	On the other hand.
144	Pia fraus,	Pious fraud.
146	Pur auter vie,	For the life of another.
147	Actus Dei nemini facit injuriam,	The act of God injures no man.
148	Duranta viduitate,	During widowhood.
150	Impotentia excusat legem,	Want of power excuses the law.
151	Ubi nullum matrimonium, ibi nullus dos,	Where there is no marriage there is no dower due.
152	In transitu,	Passing through his hands.
152	Ad ostium ecclesiae,	At the church door.
153	Ex assensu patris,	By assent of the father.
155	Id certum est, quod certum reddi potest,	That is certain which can be made certain.
158	Instar omnium,	Equal to all.
164	De mercatoribus,	Of merchants.
170	Nemo est hæres viventis,	No one is heir to the living.

173	Accessorium non ducit, sed sequitur, suum principale,	The accessory does not precede, but follows his principal.
176	Per my et per tout,	By half and by all.
176	Per tout, et non per my,	By all and not by the half.
179	Jus accrescendi,	The right of survivorship.
184	Consanguineous,	Relations.
185	In infinitum,	Without limit.
186	In feudis vere antiquis,	In fees really ancient.
187	Jure representationis,	By right of representation.
187	Sub modo,	In a particular way or in a certain degree.
189	Ut feudum paternum,	As a paternal fee.
189	Ut feudum antiquum,	As an ancient fee.
190	Propter defectum sanguinis,	Through failure of issue.
190	Propter delictum tenentis,	Through the fault of the tenant.
191	Bastard eigne,	An elder son born before the marriage of his parents.
191	Mulier puisne-filius mulieratus,	A legitimate son, whose elder brother is illegitimate.
191	Mulier,	A wife.
193	Cestui que vie,	The one during whose life the estate was held.
195	Terra firma,	Firm land.
195	De minimis non curat lex,	The law takes not cognizance of small things.
197	De novo,	Anew.
198	In mortua manu,	In a dead hand.
199	De religiosis,	Of religious persons.
199	Ad quod damnum,	At what loss.
200	Cestui que use,	Him to whose use the estate is granted.
209	Greek,	By way of pre-eminence.
209	Instar dentium,	Like teeth.
210	Bona fide,	In good faith.
211	Habendum et tenendum,	To have and to hold.
211	Tenendum per servitium militare, in burgagio, in libero socagio,	To hold by military service, in burgage, in free socage.
214	Donatio feudi,	The gift of a fee.
216	Nam quod semel meum est, amplius meum esse non potest,	For what is once mine, cannot be mine more fully.
217	Pares debent interesse investiture feudi, et non alii,	The peers, and no others, should be present at the investiture of the fee.
220	In esse,	In being.
223	Æquitas sequitur legem,	Equity follows law.
228	Custos rotulorum,	Keeper of the rolls.
229	Simplex obligatio,	A simple obligation.
229	Malum in se,	Evil in itself.
233	Sur cognizance de droit, come, ceo, etc.,	On the acknowledgment of the right, as that, etc.
233	Sur done, grant, et render,	On the gift, grant and surrender.
233	Sur cognizance de droit tantum,	On the acknowledgment of the right only.
233	Sur concessit,	On the grant.
237	Actors fabulae,	Actors of the fiction.

241	Quoties in verbis nulla est ambiguitas, ibi nulla exposito contra verba fienda est,	Where there is no ambiguity in the words, they should be construed according to their obvious meaning.
244	Partus sequitur ventrem, . . .	The offspring follows the condition of the mother.
244	Per industriam, propter impotentiam, propter privilegium,	By industry, by impotency in the animal, by privilege.
244	Per industriam hominis, . . .	By the industry of a man.
244	Domitæ naturæ,	Of a tame nature.
244	Feræ naturæ,	Of a wild nature.
245	Animum revertendi,	The intention of returning.
245	Impotentia,	Impossibility.
261	Ex contractu,	Arising from a contract.
261	Quasi ex contractu,	From something in the nature of a contract.
266	In foro conscientia,	Before the tribunal of conscience.
274	De rationabili parte bonorum,	Of the reasonable part, or share, of the goods.
274	In pios usus,	To pious uses.
275	Non compotes,	Not in their right senses.
275	Animum testandi,	Testamentary discretion.
276	Liberum animum testandi,	Free will in making their testament.
276	Felo de se,	A self-murderer.
277	In extremis,	In his last moments.
278	Querela inofficiosi testamenti,	Complaint of an unnatural will.
279	In ventre sa mere,	In the mother's womb.
279	Durante absentia,	During absence.
279	Pendente lite,	Pending a suit.
279	Cum testamento annexo,	With the will annexed.
279	Terminus a quo,	The limit from which.
280	Ad colligendum bona defuncti,	For collecting the goods of the deceased.
280	De bonis non,	Of the goods not administered.
284	Solvendum in futuro,	To be paid at a future period.
285	Collatio bonorum,	Equalizing the estates or goods.
292	Catalla otiosa,	Chattels not privileged from distraint.
294	Pro hac vice,	For this occasion.
300	Apprenticii ad legem,	Apprentices to the law.
303	Capitalis justiciarius totius Angliæ,	Chief judiciary of all England.
304	Communia placita non sequantur curiam regis, sed teneantur in aliquo loco certo,	Let not the common pleas follow the king's court, but be held in some fixed place.
304	Aula regia—aula regis,	The king's bench.
305	Puisne,	Younger.
305	Ubiunque fuerimus in Angliâ,	In whatever part of England we shall be.
306	In fictione juris semper subsistit æquitas,	In a fiction of law there always remains equity.
306	Dernier resort,	The last resort.
307	Jura regalia,	Regal rights.
307	Jura fiscalia,	Fiscal rights.
307	Quo minus sufficiens existit,	Whereby he is less able.
308	Monstrans de droit,	Showing of right.
309	Officina justitiæ,	The magazine of justice.

309	Ex debito justitiæ,	As due to justice.
311	Nisi prius,	Unless before.
314	In fraudem legis,	Unlawfully.
317	Procedendo ad iudicium, . . .	For proceeding to judgment.
319	Coram non iudice,	Before a judge unauthorized to take cognizance of the affair.
319	Ad aliud examen,	To another examination or trial.
326	Damnium absque injuria, . . .	Damage without a wrong.
326	De odio et atia,	Of hatred and ill will.
326	De homine replegiando,	Of replevying a man.
326	Habeas corpus ad respondendum,	That you have the body to answer.
328	At satisfaciendum,	To satisfy.
328	Ad prosequendum, testificandum, de-	
	liberandum, etc.,	To prosecute, testify, deliberate, etc.
328	Habeas corpus ad testificandum,	That you have the body for a witness.
329	Habeas corpus cum causa, . . .	That you have the body with the cause of detention.
329	Habeas corpus ad subjiciendum,	That you have the body to answer.
330	Ad faciendum et recipiendum, .	To do and receive.
330	De uxore rapta et abducta, . .	For the ravishment and abduction of his wife.
331	Per quod consortium amisit, . .	By which means he lost his wife.
331	De filio, vel filia, raptio vel abducto.	For the ravishment or abduction of the son or daughter.
334	Replegiari facias,	That you cause to be replevied.
335	De proprietate probanda,	For proving the ownership.
336	Animo furandi,	With a design of stealing them.
339	Indebitatus assumpsit,	Being indebted he undertook.
339	Pro tanto,	For so much.
340	Debet et detinet,	He owes and detains.
343	Quantum valebat,	As much as it was worth.
343	Ex æquo et bono,	By equity and right.
349	In statu quo,	In its original state.
351	Novel disseisin,	New disseisin.
353	Ejectione firmæ,	Of ejection from the land.
353	Quare ejecit infra terminum, . .	Why he hath ejected within the term.
357	Quare clausum querentis fregit, .	Wherefore he broke the plaintiff's close.
357	Quantum,	Quantity.
358	In foro contentioso,	In a court of litigation.
358	Continuando,	By continuation.
360	Sic utere tuo, ut alienum non laedas,	So use your property that you do not injure that of another.
362	Quod permittat prosternere, . .	That he permit to abate or put down.
363	Estreperement pendente placito, .	Waste pending the suit.
363	Ne faciat vastum vel estreperementum	
	pendente placito dicto indiscusso,	That he do not permit waste or devastation during the continuance of the suit.
364	Ratione tenuræ,	By reason of the tenure.
366	Per quod,	By which.
366	Quod permittat,	That he permit.
368	Quo warranto,	By what warrant.
369	Mandamus,	Command.
374	Capias ad respondendum,	That you take him to answer.
375	Exigi facias,	That you cause to be required.
375	Alias,	As formerly.
375	Pluries,	As more than once.

375	Quinto exactus,	Required for the fifth time.
375	Capias utlagatum,	That you take the outlaw.
378	Ad libitum,	At pleasure.
379	Retraxit,	He hath withdrawn.
380	Contestatio litis,	The opening of a case before witnesses.
381	In rerum natura,	In the nature of things.
381	Ex delicto,	From wrong.
381	Ex contractu,	From contract.
384	Son assault demesne,	That it was the plaintiff's assault.
389	Audita querela,	The complaint heard.
391	De fidelitate,	On his fidelity.
391	De credulitate,	On their belief.
394	Propter honoris respectum, propter de- fectum, propter affectum, propter de- lictum,	On account of dignity, on account of in- competency, on account of partiality, on account of the commission of some of- fense.
394	Omni exceptione majores,	Above all exception.
394	Voir dire, veritatem dicere,	To speak the truth.
396	Subpoena ad testificandum,	A subpoena to give evidence.
399	Non sequitur clamorem suum,	He does not pursue his claim.
404	Nil debet,	He owes nothing.
404	Quod partes replacent,	That the parties may repudiate.
405	Consideratum est per curiam,	It is considered by the court.
409	Habere facias seisinam,	That you give him seisin.
409	Habere facias possessionem,	That you give him possession.
411	In arcta et salva custodia,	In close and safe custody.
411	Fieri facias,	That you cause to be made.
416	Iloc quidem perquam durum est, sed ita lex scripta est,	This indeed is very hard, but such is the written law.
418	Secundum aequum et bonum,	According to right and justice.
418	Quae relicta sunt et tradita,	Which are left and handed down to us,
422	Non est inventus,	He is not found.
422	Pro confesso,	As acknowledged.
431	Mala prohibita,	Crimes because prohibited.
432	Doli incapax,	Incapable of deceit.
433	Doli capax,	Capable of deceit.
433	Furiosus furore solum punitur,	A madman is punished by his madness alone.
433	Compos mentis,	Of sane mind.
434	Voluntarius daemon,	A voluntary madman.
434	Ignorantia juris, quod quisque tenetur scire, neminem excusat,	Ignorance of the law, which every one is bound to know, excuses no one.
435	Mala in se,	Crimes in themselves.
438	Propter odium delicti,	On account of the heinousness of the offense.
438	Quae de minimis non curat,	Which does not take cognizance of slight matters.
438	Accessoriam sequitur naturam sui prin- cipalis,	The accessory follows the condition of his principal.
443	Hostis humani generis,	An enemy to mankind.
448	Imperium in imperio,	A government within a government.

448	Praemunire,	To forewarn.
453	De frangentibus prisonam,	Concerning those breaking prison.
456	Crimen falsi,	Forgery.
457	In foro conscientiae,	At the tribunal of conscience.
470	Servato juris ordine,	According to the order of the court.
471	De malefactoribus in parcia,	Of trespassers in parks.
472	Per infortunium,	Through misfortune.
479	Un disposition a faire un male chose,	A disposition to commit a bad action.
484	Ab ardendo,	From burning.
485	Incendit et combussit,	Burns and consumes.
485	Crepusculum,	Twilight.
485	Domus mansionalis Dei,	The mansion house of God.
486	Animo revertendi,	With the intention of returning.
486	Clausum fregit,	He broke the close.
489	Animo furandi,	With an intention of stealing.
489	Lucri causa,	For the sake of gain.
491	Lex Hostilia de furtis,	The Hostilian law concerning theft.
495	Contra bonos mores,	Against good morals.
495	Contra pacem,	Against the peace.
496	Pro re nata,	For present emergency.
498	Super visum corporis,	On view of the body.
501	Rescous,	Resistance to lawful authority.
503	Virtute officii,	By virtue of office.
505	De excommunicato capiendo,	For taking an excommunicated person.
506	Mittimus,	We send or commit.
509	Proditore et contra ligeantiae suae debitum,	Traitorously and against his due allegiance.
509	Felonice,	Feloniously.
512	Constat de persona,	There is evidence of the person.
513	Non constitit,	It is not evident.
514	Ex visitatione Dei,	By the visitation of God.
514	Forte et dure,	Strong and hard.
519	Nullus liber homo capiatur, vel im- prisonetur aut exulet, aut aliquo alio modo destruat, nisi per legale judi- cium parium suorum, vel per legem terrae,	No free man may be taken or imprisoned or exiled or in any manner deprived of life, but by the lawful judgment of his peers or by the law of the land.
519	Liberos et legales homines, de vici- neto,	Free and lawful men of the vicinity.
520	In favorem vitae,	In favor of life.
525	Spoliatus debet, ante omnia, restitui.	Restitution should be made to the person robbed before all others.
530	Ex gratia,	By favor.
531	Ex arbitrio judicis,	At the will of the judge.
531	Ex necessitate legis,	From legal necessity.
532	Furiosus solo furore punitur,	A madman is punished by his madness alone.
532	Non potest rex gratiam facere cum injuria et damno aliorum,	The king cannot confer a favor to the in- jury and loss of others.
535	Judicandum est legibus, non exemplis,	We must judge by the laws and not by examples.

Dates of Leading Events In the History of English Law.

- 550 Gavelkind.
- 590 British laws translated into Saxon.
- 605 or 887 Court of Chancery said to have been instituted.
- 690 Saxon laws of Ina published.
- 886 Trial by jury.
- 886 or 890 Alfred frames a code of laws.
- 925 Coroners first mentioned.
- 1042 Edward the Confessor.
- 1050-1065 Edward collects the laws.
- 1066 William I.
- 1067 or 1070 Court of Chancery refounded.
- 1070 Introduction of the feudal system.
- 1076 Justices of the peace appointed.
- 1080 or 1085 Domesday book commenced.
- 1085 Distinction first arose between lay and ecclesiastical courts.
- 1086 Domesday book completed.
- 1087 William II.
- 1100 Henry I. crowned. Restores Saxon laws.
- 1100 Power of bequeathing lands by last will and testament was confirmed to English subjects.
- 1135 Stephen.
- 1136 Stephen's charter of general liberties.
- 1138 Civil law introduced into England.
- 1154 Henry II.
- 1154 Confirmation of Stephen's charter.
- 1175 " " "
- 1164 Constitutions of Clarendon.
- 1171 Conquest of Ireland.
- 1176 England divided into six circuits.
- 1181 Glanvil digests the law.
- 1189 Richard I.
- 1195 Maritime laws of Richard I.
- 1199 John.
- 1205 First summons of barons by writ.
- 1215 June 15. Magna Charta.
- 1215 Common pleas fixed at Westminster.
- 1216 Henry III.
- 1235-6 Provisions of Merton. Parliament of Merton.
- 1265 First assembly of the commons as a confirmed representation.
- 1267 Statute of Marlbro.
- 1272 Edward I.
- 1275 Statutes of Westminster, also 1285 and 1290.
- 1278 Statute of Gloucester, the earliest statute of which any record exists.
- 1279 Statute of mortmain.
- 1280 Quo warranto.
- 1283 Wales united to England.
- 1283 Statute of merchants.
- 1284 Statutes of Wales. Statutes of Winchester.
- 1289 Quo warranto.
- 1294 First regular parliament.
- 1296 Scotland subdued.

- 1297 Statutes forbidding the levying of taxes without the consent of parliament.
 1306 Statute of praemunire.
 1307 Edward II.
 1326 Edward III.
 1341 Usury prohibited.
 1362 Law pleadings in English.
 1377 Richard II.
 1399 Henry IV.
 1413 Henry V.
 1430 Henry VI.
 1461 Edward IV.
 1483 Edward V.
 1483 Richard III.
 1483 Statutes first printed.
 1484 Valuable statutes enacted.
 1485 Henry VII.
 1509 Henry VIII.
 1534 Henry VIII, styled "Head of the Church."
 Pope's authority in England abolished.
 1539 Statute of six articles.
 1547 Edward VI.
 1553 Mary.
 1558 Elizabeth.
 1603 James I.
 1623 Statute of Limitations.
 1625 Charles I.
 1653 Oliver Cromwell.
 1658 Richard Cromwell.
 1660 Charles II.
 1679 Habeas Corpus act.
 1685 James II.
 1689 William and Mary.
 1702 Anne.
 1705 Promissory notes made assignable.
 1707 Union of two kingdoms under title of Great Britain.
 1714 George I.
 1727 George II.
 1760 George III.
 1784 Mansfield declares that fictions of law shall not prevent execution of justice.
 1794 Habeas Corpus act suspended.
 1798. " " "
 1801 Union of Great Britain and Ireland.
 1801 Habeas Corpus act suspended.
 1817 " " "
 1820 George IV.
 1827 Benefit of clergy wholly repealed.
 1830 William IV.
 1832 Reform act.
 1837 Victoria.
 1837 Wills act.
 1851 Many legal technicalities gotten rid of by act of parliament.
 1867 New Reform act.
 1869 Arrest for debt abolished in England.
 1873 Judicature act.
 1879 Civil Procedure act abolishes outlawry in civil proceedings.

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- 1783 London, 8vo., 4 vols., 9th edition.
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(Notes by James Stewart.)
- 1844 London, 4 vols., 8vo., 21st edition. Edited by four members of the English bar. Messrs. Hargrove, Sweet, Couch and Welsby. Reprinted in New York with notes by Wendell. This is said to be the last carefully edited English edition. In 1841 appeared Serjeant Stephens' New Commentaries, and in 1869 Brown and Hadley's Commentaries on the laws of England.
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- 1771-2 First American edition of Robert Bee, of Philadelphia.
- 1799 Burton edition containing Christian's notes.
- 1803 Tucker's edition.
Translations.

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